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IN MEMORY OF

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FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS

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A digest of railway decisions, comprising



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A DIGEST OF RAILWAY DECISIONS

COMPRISING

ALL AMERICAN CASES REPORTED SINCE THE PUBLICATION OF THE
FIRST VOLUME OF THIS DIGEST IN WHICH A RAILWAY
COMPANY IS A PARTY, AND ALL OTHER CASES IN
WHICH RAILWAY LAW IS DETERMINED.

THIS VOLUME ALSO CONTAINS FULL SELECTIONS FROM
THE ENGLISH, SCOTCH, IRISH, CANADIAN AND AUSTRALIAN CASES, IN
CLUDING ALL CASES OF VALUE TO THE AMERICAN BAR.

BY
JOHN F. LACEY,
OF THE IOWA BAR.

VOL. II.

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PREFACE.

ABOUT TEN YEARS have elapsed since the first volume of this digest was completed. That volume included the American cases only.

It has long been my intention to supplement it with a volume which would embrace the foreign cases also.

The present volume includes all the American railway cases that have been reported since Volume I went to press, and also copious selections from the English, Scotch, Irish, Canadian and Australian cases.

It has been the intention to include such foreign cases only as will be of interest to the American bar. To make this choice required a careful examination of every reported case. The magnitude of this task will, I trust, be a sufficient excuse for any shortcomings in the execution of the plan. But with the aid of the experience acquired in the preparation of the former volume, it is hoped that the selections made will prove satisfactory.

With the American cases the work is executed upon the same plan as Volume I. ALL THE CASES have been digested.

Much time and labor have been spent in making references to many of the different collateral reports in which the cases have been published. In all instances the digest has been prepared from the original reports, but for the benefit of those who have no access to the original reports, these additional references have been made.

The two volumes will include all the American cases reported up to the time of going to press, and all foreign cases of any value to the bar of this country.

The American cases are about equal in number to those contained in the former volume, being a striking illustration of the growth of railway litigation.

I shall be content if this book shall be greeted with the same generous welcome accorded to the former volume.

I desire particularly to acknowledge the many courtesies received from F. W. Vaughan, the accomplished librarian of the Social Law Library of Boston.

J. F. L.

OSKALOOSA, IOWA, June 25, 1884.

TO
THE MEMORY OF MY SON,
RAYMOND F. LACEY,
THIS VOLUME IS AFFECTIONATELY INSCRIBED
BY THE AUTHOR.

DIGEST OF RAILWAY DECISIONS.

ABANDONMENT.

1. **Reversion to land owner.** A railway company may abandon land condemned as right of way under the statutes, and such abandonment causes the land to revert to its original owner, but gives the company no claim to the damages which may have been awarded and paid to the sheriff. *Hastings v. Burlington and Mo. River R. R. Co.*, 38 Ia., 316. 1874.

2. — Where a railroad company abandons land condemned to its use for right of way, all its interest in the land disappears; and the abandonment is a good defense to any claim for additional damages upon appeal from the award under *ad quod damnum*. *Ib.*

3. **Lease.** Where there was an abandonment of a railway grade, under and in pursuance of a lease, made to another company, and the lands were again reoccupied by the adjoining owners, *held*, that a court of equity would not interfere to put the complainant in possession of the abandoned grade, there having been a covenant in the lease not to use it. *Troy and Boston R. R. Co. v. Boston, Hoosac Tunnel and Western R'y Co.*, 86 N. Y., 107, 1881; 7 Amer. & Eng. R. R. Cases, 49.

ABATEMENT.

I. GROUNDS OF ABATEMENT.

II. PLEAS.

I. GROUNDS OF ABATEMENT.

1. **Death of party.** The death of the plaintiff in an action for personal injury abates with his death. *Thompson v. Central R. R. Co.*, 60 Ga., 120, 1878; *Sawyer v. Concord R. R. Co.*, 58 N. H., 517, 1879. An action for damages for an injury to the person of the plaintiff abates by his death, and

the pendency thereof cannot be pleaded in bar of a suit brought by his personal representative for his death resulting from such injury and caused by the wrongful act or omission of the defendant. *Indianapolis and St. Louis R. R. Co. v. Stout*, 53 Ind., 143. 1876.

2. — **agreement.** In an action against a railroad company for negligence, the defendant by its attorney, as a condition of obtaining a postponement, stipulated that in case of the death of the plaintiff at any time before verdict, neither the cause of action nor the action should abate. *Held*, that the stipulation was one that could lawfully be made by the defendant. *McGuire v. New York Central and Hudson River R. R. Co.*, 6 Daly (N. Y.), 70. 1875.

3. — In an action against a railroad company to recover damages for injuries sustained by a passenger in consequence of being unlawfully ejected from its cars, defendant's counsel, as a condition for putting the cause over a circuit, stipulated that, in case of the death of plaintiff before final judgment and determination of the action, the alleged cause of action should survive, and any verdict and judgment be regarded as if rendered in plaintiff's life-time; and also, that in case of such death, plaintiff's representatives might be substituted as plaintiff. *Held*, that the stipulation continued in force until final judgment, although meanwhile a verdict and judgment in plaintiff's favor had been set aside. *Cox v. N. Y. Central and Hudson River R. R. Co.*, 63 N. Y., 414, 1875; reversing 4 Hun (N. Y.), 176, and 6 Thompson & Cook, N. Y. Supreme Ct., 405, 1875; *Same v. Same*, 11 Hun (N. Y.), 621. 1877.

4. — Where a right of action for damages which can survive involves, mingled with, but separable from, such damages, other damages of a character that die with the

Somnambulism of Traveler.

party, the revival of the action does not draw the latter with it and permit a recovery therefor. (See *HUSBAND AND WIFE*, post.) *Cregin v. Brooklyn Crosstown R. R. Co.*, 83 N. Y., 595, 1881; reversing *Same v. Same*, 19 Hun (N. Y.), 341, 1879.

5. — An action of tort for the forcible expulsion of a passenger from a train does not survive. *Honnoh v. R. and D. R. R. Co.*, 10 Amer. & Eng. R. R. Cases, 737 (N. C.), 1882.

6. — The original plaintiff having died since the trial, and the judgment being reversed, so much of the action as is founded upon injury to his person will abate; while so much thereof as is for injury to property, and probably so much as is for expenses of medical attendance, etc., survives. *R. S.*, § 4253. *Randall v. Northwestern Telegraph Co.*, 54 Wis., 140. 1882.

7. — An action for damages for an assault does not survive to a personal representative. *Bat. Rev.*, ch. 45, §§ 113, 114. *Hannah v. Richmond and Danville R. R. Co.*, 87 N. C., 351. 1882.

8. — The pendency of a suit in another state will not bar a proceeding in New York. *Hadden v. St. Louis, Iron Mountain and Southern R. R. Co.*, 57 Howard's Practice (N. Y.), 390. 1879.

9. — *appeal.* In a suit for damages for injuries to the person, where judgment is for plaintiff below, but is reversed in the district court — or court in general term, — and pending the appeal in the supreme court plaintiff dies, his death will not abate the suit. By the recovery in the life-time of the injured party, his claim for damages becomes merged in the judgment, and the action of reversal by the intermediate tribunal does not destroy, but merely suspends, the judgment of the trial court, until final action of the court of last resort. *Lewis v. St. Louis and Iron Mountain R. R. Co.*, 59 Mo., 495, 1875; 8 Amer. R'y Rep., 450.

10. — *easement.* Where a plaintiff dies during the pendency of a suit brought by him to restrain an unlawful interference with an easement reserved by him in a conveyance to the defendant, and to recover the damages occasioned thereby, his personal representatives may revive and continue the action for the purpose of recovering

such damages, though they take no interest in the real estate, and are not entitled to the injunction sought by the deceased. *Matthews v. Delaware and Hudson Canal Co.*, 20 Hun (N. Y.), 427. 1880.

11. *Contract for right of way; law and equitable proceedings.* The pendency of an action at law by the owner of land through which a railway passes, for damages for the appropriation of right of way, cannot be pleaded in abatement of an equitable action by the railroad company against the land owner to compel specific performance of an agreement to convey the right of way in controversy. *Chicago and Southwestern R. R. Co. v. Heard*, 44 Ia., 358. 1876.

II. PLEAS.

12. *Dissolution of corporation.* Where the representative of a railway company is served with process he may plead in abatement in his own name that the corporation is extinct; or he may make the same defense by motion to dismiss the suit, or by suggestion of his attorney on record, supported by affidavits showing the facts. *Kelly v. Mississippi Central R. R. Co.*, 2 Flippin (U. S. C. C.), 531. 1880.

13. *Misnomer.* Where the misnomer is corrected by amendment there is no ground for a plea in abatement. *Nashville and Chattanooga R. R. Co. v. Wade*, 2 Baxter (Tenn.), 444. 1873.

ACCIDENT INSURANCE.

1. *Somnambulism of traveler.* A complaint that alleges substantially that the plaintiff fell asleep from weariness and the motion of the cars, and when it was quite dark "and while he was in a dazed and unconscious condition of mind, and not knowing or realizing what he was doing, involuntarily arose from his seat and walked unconsciously to the platform of said car, and, without fault on his part, fell therefrom to the ground," and was thereby injured, sufficiently negatives the self-infliction, design, or voluntary exposure to unnecessary danger which are made the conditions on which the Travelers' Insurance Company, that had insured plaintiff, was to be ex-

Miscellaneous.

empted from liability in case of injury. *Scheiderer v. Travelers' Insurance Co.*, 12 Amer. & Eng. R. R. Cases (Wis.), 160. 1883.

ACCORD AND SATISFACTION.

1. **Settlement with injured passenger; insanity.** Insane persons have no complete power of contract, but their contracts are not in general absolute nullities. *George v. St. Louis, Iron Mt. and Southern R'y Co.*, 34 Ark., 613, 1879; 1 Amer. & Eng. R. R. Cases, 294.

ACCOUNT STATED.

1. **What amounts to.** A mere transcript of an account by a bookkeeper of a railway company is not an "account stated." *Harvey v. West Side Elevated R'y Co.*, 13 Hun (N. Y.), 392. 1878.

2. — An account for boarding hands being rendered to the debtor and not objected to within a reasonable time, the acquiescence of the debtor is to be taken as an admission that the account is truly stated. *Powell v. Pacific R. R. Co.*, 65 Mo., 658. 1877.

ACT OF GOD.

1. **Concurring negligence.** The concurring negligence which, when coupled with the act of God, produces an injury, must, in order to render a defendant responsible, be such as is in itself a real producing cause of the injury, and not a merely fanciful or speculative negligence, which may not have been in the least degree the cause of the injury. *Baltimore and Ohio R. R. Co. v. Sulphur Spring School District*, 96 Pa. St., 65, 1880; 2 Amer. & Eng. R. R. Cases, 166.

2. — The latest decisions of the supreme court of Missouri incline to the opinion that, where the negligence of the defendant concurs in, and contributes to, the injury, he is not exempt from liability on the ground that the immediate damage is occasioned by the act of God or inevitable accident. *Pruitt v.*

Hannibal and St. Joseph R. R. Co., 62 Mo., 527. 1876.

ADMINISTRATION.

1. **Authority of administrator.** The appointment of an administrator of an estate may be collaterally assailed for want of jurisdiction. So held in an action against a railway company by such administrator. *Jacobs v. Louisville and Nashville R. R. Co.*, 10 Bush (Ky.), 263. 1874.

2. **Injury causing death; objection to appointment of administrator.** Apprehension of a suit by an administrator, when appointed, will not authorize a person to appear as a party in the court of ordinary to resist the grant of letters; especially if the administrator, when appointed, from the facts admitted will have no cause of action against such party. Before one can be heard as a party to the proceeding before the ordinary, he must show that he has an interest in the choice of administrator, either as heir or creditor; some interest on the part of the objector in the assets and their distribution must appear. *Augusta and Somerville R. R. Co. v. Peacock*, 56 Ga., 146. 1876.

3. **Right to sue railway company in sister state.** The South Carolina R. R. Co. having been allowed to extend its line into Georgia, with the condition attached that suit might be brought against it in Georgia on all claims upon it, the right to sue it in Georgia was not confined to the citizens of Georgia, but extended to the citizens of other states. Therefore, a foreign administrator, upon complying with the conditions for the bringing of suits by such persons, might sue the corporation in Georgia, although the administration was in South Carolina and the right of action accrued under a statute of that state. *South Carolina R. R. Co. v. Nix*, 68 Ga., 572. 1882.

ADMIRALTY.

1. **Collision.** The facts in relation to a collision of vessels examined. *Loud v. Philadelphia and Reading R. R. Co.*, 8 Benedict (U. S. D. C.), 338. 1876.

Appointment and Powers; Contracts.

AGENCY.

See ARBITRATION; BAGGAGE; CONTRACT; CONVEYANCE;
EMBEZZLEMENT; ESTOPPEL; EVIDENCE.

I. APPOINTMENT AND POWERS; CONTRACTS.

II. RIGHTS, DUTIES AND LIABILITIES OF AGENTS.

III. RIGHTS, DUTIES AND LIABILITIES OF PRINCIPALS.

IV. WRONGFUL ACTS OF AGENTS.

V. RATIFICATION.

VI. AGENT'S BOND.

I. APPOINTMENT AND POWERS; CONTRACTS.

1. **Authority; telegram.** The grant of authority by letters and telegrams to make sales, in the usual course of commerce, will be construed liberally in favor of authority of the agent. *Holman v. Georgia R. R. Co.*, 67 Ga., 595. 1881.

2. — Authority to an agent to do a thing generally includes authority to do everything usual and necessary for the accomplishment of the main object. Hence authority to sell personal property includes authority to deliver it. *Id.*

3. — Facts discussed which fail to constitute an agency to purchase real estate. *Larimer v. Chicago, Rock Island and Pacific R. R. Co.*, 38 Ia., 679. 1874.

4. — A single act of an assumed agent and a single recognition of his authority by the principal, if sufficiently unequivocal, positive and comprehensive in its character, may be sufficient to prove agency to do other similar acts. *Wilcox v. Chicago, Milwaukee and St. Paul R. R. Co.*, 24 Minn., 269. 1877.

5. **Powers; engineer.** A railway company's engineer promised to pay for material furnished for the use of a contractor engaged in building a bridge upon the company's railway. *Held*, that evidence of the making of like contracts was competent to show the authority of the engineer. *Beattie v. Delaware, Lackawanna and Western R. R. Co.*, 90 N. Y., 643. 1882.

6. — The engineer of a railway has no authority, by virtue of his position, to bind the corporation by his contracts. Special

authority therefor must be shown. *Gardner v. Boston and Maine R. R. Co.*, 70 Me., 181. 1879.

7. — **agreement to pay debts of contractor.** An engineer of a railway company, as such, has no authority to pledge the company to pay indebtedness due from a contractor, who is engaged in building the road, to one of his employes. *Powrie v. Kansas Pacific R'y Co.*, 1 Colo., 529. 1872.

8. **Powers of station agents.** Station agents are to be presumed to have power to make contracts for their railroads for the transportation of freight. The limitations on their powers the public cannot take notice of, unless they are conveyed to the public in such a manner as to authorize the inference that shippers are apprised of them. *Pruitt v. Hannibal and St. Joseph R. R. Co.*, 62 Mo., 527. 1876.

9. — The question whether or not a railway station agent has, as such agent, authority to bind the company by a contract to furnish cars to a shipper at his station at a particular time, is one of fact and not of law, and it was error, first, to reject testimony offered by defendant to prove that its agent had not such authority, and, second, to instruct the jury on the theory that such agents have such authority as matter of law. *Wood v. Chicago, Milwaukee and St. Paul R'y Co.*, 59 Ia., 196, 1882; 6 Amer. & Eng. R. R. Cases, 314.

10. **Authority to employ assistant; detective.** Appellant employed P. as detective to recover a lot of stolen goods and capture the thieves. P. engaged appellee to assist him, telling him that if the company did not pay him he (P.) would. The evidence failing to show any authority in P. to employ appellee for the company, the verdict cannot be supported. *Indianapolis and St. Louis R. R. Co. v. Dawson*, 3 Bradwell (Ill.), 292. 1878.

11. **Authority; services of witness.** An agent of a street car company was directed to investigate the facts in a personal injury case. He called upon L., who was a physician and witness to the accident, and who declined to make a statement without going and looking again at the scene of the accident. The agent consented, and afterwards the statement was made. In a suit

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against the company for services in going to the place of the accident and making the statement, *held*, that the question of the authority of the agent was for the jury. *Lovejoy v. Middlesex R. R. Co.*, 123 Mass., 480. 1880.

12. Contract for rebate. Where a local agent of a railroad company was authorized to make a special contract for transporting a lot of corn from Illinois to Boston, even if the agent transcended his authority and made a contract to return a part of the freight charged, yet if the company availed itself of the benefit of such contract, it was held that it should not be allowed afterwards to repudiate the agreement on the ground that its agent had no authority to make it. *Toledo, Wabash and Western R'y Co. v. Elliott*, 76 Ill., 67. 1875.

13. Sale of railway iron; contract; commissions. C., a manufacturer of railway and bar iron, wrote to W. & L.: "In reply to your application to be appointed selling agent for the G. Iron Works, I will agree to appoint you my selling agent for the sale of my railroad iron, merchant bar and muck bar, for New York and eastern markets, provided you will agree to exert yourselves to keep the mill employed, and give me the preference and refusal of all orders that may come to you. In compensation for such service I will agree to allow you a commission, on all sales of railroad iron and muck bar in your district, of one and one-half per cent., out of this percentage you to pay all extra commissions to other brokers." On the same day W. & L. wrote on the face of this letter, "Terms and conditions of this agreement accepted." W. & L. negotiated a sale of four thousand five hundred tons of rails to a railway company, but only six hundred and forty-six tons were delivered, as the company through its embarrassments was unable to pay for more. W. & L. claimed to recover commissions on the whole four thousand five hundred tons, and in an action therefor the court below instructed the jury that the right of the plaintiffs to compensation did not depend upon the quantity of iron delivered, but upon the amount which was sold through the agency of the plaintiffs; that if the latter brought the defendant and the purchaser together, and

"there was an act of sale or purchase passing from one to the other, the one agreeing to do and the other accepting, this constitutes a sale so far as the agent employed is concerned." . . . *Held*, that this was error; that plaintiffs were not acting in the capacity of brokers of the defendant, but as agents to sell under a special contract, and that the sales contemplated in said agreement were actual sales in a commercial sense and not mere contracts to sell. *Creveling v. Wood*, 95 Pa. St., 152. 1880.

14. Contract; railway ties. Where there was evidence tending to show that a party, bargaining for railroad ties, was acting as the agent of a railroad company, and it appeared that the company, when it accepted the road from its contractors, used the remaining ties left by the seller, upon the road, it was held that it might be inferred that the agent's contract was approved by the company. *Toledo, Wabash and Western R'y Co. v. Chew*, 67 Ill., 378. 1873.

15. Contract; evidence. Where one party to an alleged contract made by its agent denies the contract, and then introduces the agent to prove what the contract really was, such party will not be heard to deny the agent's authority to make any contract whatever. *Silver v. St. Louis, Iron Mountain and Southern R'y Co.*, 72 Mo., 194. 1880.

16. Sub-agent. The defendant was station master of the complainant at Nashville, having under him a collector and cashier, whose duties were to collect all moneys due the complainant, keep regular accounts, and make statements of the business at fixed times to the principal office at Louisville, and such accounts were kept and statements made, and balances were permitted to run up against the Nashville station without notice to the defendant. *Held*, that he, and the sureties on his official bond, were not liable for such balances, there being nothing to connect him with the defalcation or neglect. *Louisville and Nashville R. R. Co. v. Blair*, 1 Tenn. Ch., 351, 1873; *Same v. Same*, 4 Baxter (Tenn.), 407, 1874.

17. Notice to agent of purchase of claim. In an action brought by K. against the M., K. and C. Railway Co. for labor performed by M. for the company, it was shown that

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M. had a valid claim against the company for labor performed by him; that he sold the claim to K.; and that K. gave notice to H., who was agent for the company, of his, K.'s, purchase of the claim, and demanded that H. should pay the debt to him, K. The evidence introduced on the trial also tended to show that H. was in charge of the depot and business of the company at Parsons; that he was the only agent of the company stationed in Labette county, and that the company had no general office in Kansas, except at Parsons; and also that H. paid the employes of the company. The evidence also tended to show that afterward H. paid the claim to M., instead of to K. *Held*, that the evidence was sufficient to authorize the trial court to find that H. was such an agent of the company that notice to him by K. of the purchase of the claim by K. from M. was sufficient notice of such purchase to the company. *Memphis, Kans. and Colo. R'y Co. v. Koch*, 28 Kans., 565, 1882; 9 Amer. & Eng. R. R. Cases, 429.

18. Notice to; not in line of employment. A common carrier is not bound by its agent's knowledge or notice of facts outside of his duties and employment in his capacity as agent. *Wells v. American Express Co.*, 44 Wis., 342. 1878.

19. Hiring; term. In the absence of proof of custom or usage to the contrary, a general hiring cannot be regarded as a contract for a year's service. The English rule in this regard is not recognized by American decisions. *Kansas Pacific R'y Co. v. Roberson*, 3 Colo., 142. 1876.

20. Power to make contracts; passenger solicitor. The agent of a railway company, who is employed for the sole purpose of soliciting passengers to patronize the road, and who is not held out by the company as its agent for any other purpose, has no power to bind it by a contract to receive freight from another road, and transport it to the depot of, and ship it on, the road for which he is such agent. *Taylor v. Chicago and Northwestern R'y Co.*, 74 Ill., 86. 1874.

21. Power to borrow money; giving collateral security. A general power conferred upon the agent of a railroad company to borrow money on its behalf, in such sums, for such length of time, and at such a rate

of interest as he may think proper, and to purchase iron rails, locomotives, machinery, etc., on such terms as he may deem advisable, and, in order so to do, make, execute, and deliver obligations, bills of exchange, contracts and agreements of the company, includes authority to give to the lender of the money borrowed, or to the seller of the things purchased, the ordinary securities. *Hatch v. Coddington*, 95 U. S., 48. 1877.

22. Power to apply principal's money on debt. An agent cannot take the money of his principal in his hands, and apply the same upon the payment of a debt due him from his principal without the consent of the principal. *Detroit, Hillsdale and Southwestern R. R. Co. v. Smith*, 50 Mich., 112. 1883.

23. Agreement to locate depot. The agent of a railway company, acting under a general power to procure a right of way for the railroad, does not have, as connected with or incidental to such a power, the right to designate and locate for his principal the depots along the line of road; and his agreement to locate a depot at a particular place, as a consideration for a deed to the company of the right of way, would not be binding on the company. *Houston and Texas Central R. R. Co. v. McKinney*, 55 Tex., 176. 1881.

24. Contract for commissions. An agreement to pay an agent commissions upon stock subscriptions solicited by him, "to be paid as the capital stock should be paid in," does not entitle him to commissions upon stock forfeited for non-payment. *Maryland Agricultural College v. Baltimore and Potomac R. R. Co.*, 48 Md., 434; 14 Amer. R'y Rep., 266. 1875.

25. Corporate seal. Where an appeal bond purporting to have been executed in the name of a railway company, by its general attorney, has the company's seal attached, the presumption will arise that the person using the seal had authority to do so. *Indianapolis and St. Louis R. R. Co. v. Morganstern*, 103 Ill., 149, 1882; 9 Amer. & Eng. R. R. Cases, 469.

26. — An objection to a bill by an incorporated railway company for the specific performance of a contract for the purchase of land, entered into by its agent, that it did

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not appear that the agent was authorized under the corporate seal, and therefore that there was no mutuality, overruled on the ground that the company had, before the filing of the bill, actually entered on and constructed a railway over the land. *London and Birmingham R. R. Co. v. Winter*, 1 Craig & Phillips (Eng. Ch.), 57. 1840.

27. Evidence; admissions. Declarations of an agent in relation to a matter within the scope of his agency are admissible against the principal only when made at the time of the occurrence to which they relate; and the rule goes no further though the agent occupy the position of vice-principal. *McDermott v. Hannibal and St. Joseph R. R. Co.*, 73 Mo., 516, 1881; 2 Amer. & Eng. R. R. Cases, 85.

28. Declarations. On cross-examination one of the plaintiff's witnesses testified that he, with another man, at the request of the defendant's wood agent, went to see the plaintiff, to ascertain what he would settle his claim for, and reported his terms to said agent. The agent was then called and denied the conversation, and also said that he had no authority to request any one to see the plaintiff; and, on cross-examination, that he did not assume such authority. The plaintiff was then allowed to show that at such interview the wood agent gave them to understand that he represented the defendant. *Held*, no error. *Brownell v. Troy and Boston R. R. Co.*, 55 Vt., 218. 1882.

II. RIGHTS, DUTIES AND LIABILITIES OF AGENTS.

29. President of company. In an action to recover for materials alleged to have been sold to a railway company, it appeared that, immediately before the alleged sale, the president of the company made a large purchase of railway iron of the plaintiff, and that the company approved the purchase, received and used the iron, and paid for it as agreed upon by the president; that, upon the application to the plaintiff by the contractor for the building of the defendant's road, for material to be used, and afterwards actually used in the construction of the road, the plaintiff told the president that he would sell to the company the material in question

upon its order, but would not sell to the contractor, and that thereupon the president told him to send the material to the company; that the plaintiff's bill was sent to the president, who replied that he would present it to the directors of the company. Evidence was also introduced that the president always acted for the company on its part, and that the directors, when spoken to upon this subject, always referred to the president, and took no part themselves. *Held*, that upon this evidence it was a question of fact for the jury whether the president was the authorized agent of the company in making the purchase. *Reed v. Ashburnham R. R. Co.*, 120 Mass., 43. 1876.

30. Station agent acting for both parties. In an action for damages against a railroad company, where it appeared that the plaintiff had employed one C., who was a depot agent of the defendant, to purchase cotton for him, and to hold and ship it under his directions, it was *held* that C., in so dealing in cotton for the plaintiff, acted solely as the plaintiff's agent, and there was no liability on the defendant from any loss resulting from the failure of C. to perform his duty as such agent. The law does not favor double agencies. *Sumner v. Charlotte, Columbia and Augusta R. R. Co.*, 78 N. C., 289, 1878; 16 Amer. R'y Rep., 201.

31. Repudiation of act. A corporation as well as an individual may repudiate a contract executed by an agent without authority. *Pittsburgh and Steubenville R. R. Co. v. Allegheny County*, 79 Pa. St., 210. 1875.

32. Liability for delivery of goods to wrong person. Defendant was captain of one of plaintiff's barges, and, by mistake, delivered a load of coal to the wrong person. The general agent of plaintiff discovered the error, and undertook to collect the price from the person who received the coal, but failed, and sued defendant. *Held*, that if the defendant was thrown off his guard, or suffered by acts of the general agent, or by his delay in informing him of the error, the plaintiffs could not recover. *Philadelphia and Reading R. R. Co. v. O'Donnell*, 12 Philadelphia, 213. 1877.

33. Control by courts of equity. Where a principal has executed and deposited negotiable bonds with his agent to be issued by

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the latter in certain contingencies, which do not arise, and the agent refuses to return them on demand, a suit in equity may be maintained by the principal against the agent to compel their surrender, and for damages arising from the detention, or, in case a surrender cannot be made, for the value of the instruments as valid obligations. *Western R. R. Co. v. Bayne*, 75 N. Y., 1, 1878; affirming *Same v. Same*, 11 Hun (N. Y.), 166, 1877.

34. Action against agent; pleading. In an action by a principal against his agent, charging violations of a parol contract; the plaintiff, without objection from defendant, introduced in evidence a bond executed by such agent prior to the alleged breaches, conditioned for the faithful performance of his duties as such agent. *Held*, that the defendant had waived the right to make afterwards the objection that there was a variance between the pleadings and the facts proven. *South Carolina R. R. Co. v. Barrett*, 12 So. Car., 173. 1879.

III. RIGHTS, DUTIES AND LIABILITIES OF PRINCIPALS.

35. Adoption of acts of agent. Where a person has recognized another as his agent, by adopting and ratifying his acts done in that capacity, he will not be permitted to deny the relation to the injury of third persons, who have dealt with him as such. *Summerville v. Hannibal and St. Joseph R. R. Co.*, 62 Mo., 391. 1876.

36. Negligence of agent; negligence of principal. An agent charged with the disbursement of funds is not liable for a loss occurring through his negligence, provided the exercise of reasonable care on the part of his principal would have prevented the loss. *Sioux City and Pacific R. R. Co. v. Walker*, 49 Ia., 273. 1878.

37. Repudiation of agent's acts. Where a contract made by an agent is voidable at the election of his principal, such election must be made within a reasonable time after full knowledge is acquired by the principal of the circumstances under which the contract was made, otherwise it will be binding upon him. *United States Rolling Stock Co.*

v. Atlantic and Great Western R. R. Co., 34 Ohio St., 450, 1878; 21 Amer. R'y Rep., 3.

38. Estoppel. A railway company receiving property under a contract made by its agent is estopped to deny his authority to make the contract. *Conley v. Columbus Tap R'y Co.*, 44 Tex., 579. 1876.

IV. WRONGFUL ACTS OF AGENTS.

39. Malicious acts. The principal is not liable in exemplary damages for the unauthorized malicious act of its agent, unless such act is ratified or accepted by the principal. *Galveston, Harrisburg and San Antonio R. R. Co. v. Donahoe*, 56 Tex., 162, 1882; 9 Amer. & Eng. R. R. Cases, 287.

40. Fraud; purchase of ties. If the supervisor of a railroad, who has authority to purchase cross-ties for his principal, contracts with a party for their purchase, stating to the seller that his principal wants them to lend to another company to which it had promised them, and the cross-ties are furnished and put on the cars of the road whose agent has thus contracted for them, such company is liable for their payment, notwithstanding the statement as to the purpose for which they were purchased be not true, and the real fact was that the supervisor was the agent of another party in making the purchase. The seller is not affected by the truth or falsehood of the statement. *Southwestern R. R. Co. v. Knott*, 48 Ga., 516. 1873.

41. — A railway company held responsible for the fraud or bad faith of its agents in refusing to accept certain ice delivered under a contract with the company. *Lynn v. Baltimore and Ohio R. R. Co.*, 60 Md., 404. 1883.

42. Fraud; proceedings against. In a suit to compel an agent who has fraudulently conspired with others to obtain title to the lands of his principal to account therefor, and to have the sales of said lands set aside, the only necessary parties are the persons who have some present interest in the controversy, and against whom the complainant has a right to a decree for relief. *Northern Pacific R. R. Co. v. Kindred*, 14 Federal Reporter, 77; 3 McCrary (U. S. C. C.), 627. 1881.

Ratification.

43. Fraud; changing gold to silver; premium converted. An affidavit showed that defendant, who was agent for plaintiff in New Grenada to receive and pay out money, received money in gold coin, and paid it out in silver; that gold was at a premium over silver; that defendant, on plaintiff's books kept by him, had not accounted for the premium; that he had written a threatening letter to prevent one knowing the facts from informing plaintiff, and that he had received upward of \$5,000 for premium on gold of a firm of brokers. *Held*, sufficient to justify the conclusion that he converted the premium to his own use, and to warrant an order of arrest in an action for the amount so converted. *Panama R. R. Co. v. Robinson*, 4 Thompson & Cook (N. Y.), Supreme Ct., 672. 1874.

44. Misapplication of funds. A cashier or clerk of a railway company, who has charge of its moneys, is under a legal liability to the company to take care of and preserve its funds so intrusted to him; and if he loans the company's money to a fellow servant without the order or direction of any one having the right to give such order, he will be liable personally to the company for the same, and if he pays the same he cannot recover it back. *St. Louis, Alton and Terre Haute R. R. Co. v. Thomas*, 85 Ill., 464. 1877.

45. — When an agent has misapplied or misused the property of his principal, the latter may pursue and recover it. But this principle cannot be applied to money which has no "ear marks," and cannot be identified. When it passes to the possession of another who acquires it for a valuable consideration, and without notice, it cannot be reclaimed. *Mobile and Montgomery R'y Co. v. Felrath*, 67 Ala., 189. 1880.

46. Defalcation; action on account; evidence. A railway company brought an action against A., formerly its agent, on an account stated. A. filed an answer containing a general denial. On the trial the plaintiff read in evidence a letter of A. to the auditor of the company, dated February 12, 1874, proposing to pay every dollar of the defalcation of one B., to the amount of \$7,582.11, if he had time, and stating therein that his January report was short \$5,042.07,

and that the balance of \$2,540.04 would have to be reported in his February account, and then produced as a witness the auditor, who testified that the account sued on was furnished by him to A. on March 21, 1874; that A. went out of office on February 14, 1874; that he met A. in regard to the account three or four times; that the account included the whole of February, 1874; that he saw the account in his possession, and that he made no objection to it; that several other statements of account were sent A. before and after March 21, 1874; that they were not all like the one sued on; that those after March 21st were different, and that these statements were given A. as matters of information. *Held*, that the stated account was not conclusively established by the testimony, and therefore not error for the district court to submit the question in the case to the jury. A verdict in A.'s favor was permitted to stand. *Kansas Pacific R'y Co. v. Anderson*, 23 Kans., 44. 1879.

V. RATIFICATION.

47. Contract. Where the plaintiff did certain work for a railroad company, and the company afterwards made a beneficial use of it, and one acting as agent of the company made the contract for the work, and where the company's engineer promised to make out a voucher for it, and the chief engineer laid out the work, and an assistant engineer signed a voucher therefor with the plaintiff's name therein as contractor: *held*, that a promise to pay what the work was reasonably worth might be inferred from such facts. *Rockford, Rock Island and St. Louis R. R. Co. v. Wilcox*, 66 Ill., 417. 1872.

48. — part performance. Contract for purchase of stone held divisible, and that an acceptance by the principal of a part did not bind the principal as ratifying the whole of the contract. *Gano v. Chicago and Northwestern R'y Co.*, 49 Wis., 57. 1880.

49. — The acts of an agent in settling a claim held to have been ratified. *Dunn v. Hartford and Wethersfield R. R. Co.*, 48 Conn., 434. 1876.

50. Evidence. Where the principal has previous knowledge of all the material facts,

Agent's Bond.

an agency may be proved by subsequent ratification and adoption. *Middleton v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 62 Mo., 579. 1876.

51. Acquiescence in assumption of agency. Where it was in evidence that S., the regular agent of the defendant at a certain depot, lived three miles from the depot, and that T. lived at the depot for two years prior to the bringing of the action, and discharged the duties of agent in receiving and forwarding freight, selling tickets, etc., all of which was done in the name of S. and with the knowledge and acquiescence of defendant, it was held that T. was the agent of defendant, and that defendant was bound by any act of his within the scope of the authority impliedly given. *Katzenstein v. Raleigh and Gaston R. R. Co.*, 84 N. C., 688, 1881; 6 Amer. & Eng. R. R. Cases, 464.

VI. AGENT'S BOND.

52. Conditions. The rules and regulations of a corporation made for the government of the conduct of its officers do not become terms and conditions of the bond of its officers, unless such an intention is expressed on the face of the bond. *Richmond and Petersburg R. R. Co. v. Kasey*, 30 Grattan (Va.), 218. 1878.

53. — An agent's bond conditioned for the payment of — dollars is invalid. The contract is incomplete, and his sureties are not liable. *Canal and Claiborne St. R. R. Co. v. Armstrong*, 27 La. An., 433. 1875.

54. Notice to surety of agent's default. There having been no fraudulent concealment of the fact that K. did not settle promptly, the failure to inform his sureties of the fact did not relieve them from their liability for his default. *Richmond and Petersburg R. R. Co. v. Kasey*, 30 Grattan (Va.), 218. 1878.

55. Form of bond. Where the bond of an agent was couched in general terms, it was held that the promotion of the agent did not affect the liability upon the bond. *Collier v. Southern Express Co.*, 33 Grattan (Va.), 718. 1880.

56. — latent ambiguity. B. was appointed ticket agent of the M. and C. R. R. Co. at Memphis, and gave bond to cover his duties

as such. There were two ticket offices kept by said company there — the one at the depot, and the other on Court street — but B.'s bond did not show to which he was appointed. *Held*, that these facts presented a case of latent ambiguity, which might be removed by introducing parol evidence to show to which B.'s appointment related. *Mumford v. Memphis and Charleston R. R. Co.*, 2 Lea (Tenn.), 393. 1879.

57. Change in agent's duties. Where an agent was appointed to sell tickets at the office in M., and afterwards the duties and responsibilities of another ticket office in the same place were added to his charge, *held*, that this was such a change in his duties as would discharge the sureties upon his bond. *Ib.*

58. — The surety upon an agent's bond is discharged by the transfer of the agent to another parish, where he is put to entirely different work by the company. *Green v. Locke*, 31 La. An., 656. 1879.

59. — default. In an action by a railroad company against the sureties on a bond given by one of its depot agents, to recover for an alleged default of their principal for money received and not accounted for, the instructions given by the company to such agents, requiring them to make monthly reports, are not relevant or competent evidence for the plaintiff, when it does not appear that the alleged default is shown by the monthly reports of the agent, nor that he violated his duty in failing to make such reports. *Memphis and Charleston R. R. Co. v. Maples*, 63 Ala., 601. 1879.

60. — consolidation of railways. The defendant, as surety, executed a bond, conditioned for the faithful service of a clerk to a railway company. Whilst the service continued, that company and another railway company were dissolved, and united into one company, by a statute which provided that all bonds, etc., made or entered into with, in favor of, or by the dissolved companies should "be and remain as good, valid and effectual in favor of, and against, and with reference to the new company, and might be proceeded on and enforced in the same manner, to all intents and purposes, as if the last mentioned company had been a party to and executed the same, or had been named

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or referred to therein instead of the persons, company, or party actually named therein respectively." *Held*, that the defendant was liable for breaches of the bond committed by the clerk after the union of the two companies. *Eastern Union Railway Co. v. Cochrane*, 9 Welsby, Hurlstone & Gordon (Exchequer), 197, 1853; 24 Eng. Law & Equity, 495; 17 Jurist, 1108; 23 Law Jour. Rep., N. S., Exch., 61.

61. — duration of sureties' liability. M. gave a bond in the sum of \$200,000 for the faithful performance of the duties of secretary and treasurer of a railway company, for one year, from September 25, 1867. M. continued to be elected, and filled the office without other bond until 1870. A defalcation is alleged to have occurred after the expiration of the first year from the date of the bond. The sureties are not responsible upon their bond. A secretary and treasurer of a railway company is the mere agent of the company, and is not a public officer in the eye of the law. Although § 148 of the Code provides that the officers of a private company shall hold until the election and qualification of their successors, yet this law is prospective, and there is nothing to show that it has been adopted by this railway company as an amendment of its charter, granted previously to the enactment of the Code. *Railroad Co. v. Murrell*, 11 Heiskell (Tenn.), 715. 1872. The sureties of M. were also held not to be responsible upon his bond as financial agent of the contractors, except during the one year that they agreed to be bound. *Ib.*

62. Dishonesty; knowledge of principal. The agent of a corporation, being under bond to account and pay over daily, cannot be trusted with more money at his surety's risk after dishonesty of the agent is discovered by the corporation. But he may be so trusted so long as the circumstances, fairly interpreted, point not to moral turpitude, but to a want of diligence or punctuality, rather than to a want of integrity. *Charlotte, Columbia, etc., R. R. Co. v. Gow*, 59 Ga., 685. 1877.

63. Fraud of company. In an action by a railway company against the sureties on the bond of a station agent, who was in arrears when the bond was executed, and con-

tinued to make additional defaults in several subsequent monthly settlements, the presiding judge committed no error in charging the jury "that if the plaintiff knew when the bond was given that its agent was in default and indebted to it on his pre-existing agency, and yet concealed this fact and held him out to the sureties as trustworthy, either expressly or impliedly, such conduct would be a fraud upon the sureties, and would make void the bond as to them." *Wilming-ton, Columbia and Augusta R. R. Co. v. Ling*, 18 So. Car., 116. 1882.

64. — But in charging further "that each default of the agent, after the bond was given, in failing to pay over to the company the money collected by him, was a breach of his duty and obligation, and gave the plaintiffs the right to dismiss him; that if, knowing of these defaults, the plaintiffs condoned his fault and continued him in his agency without notice to his sureties of his misconduct, such conduct would be prejudicial to the interest of the sureties, and would discharge them," he erred in failing to limit the discharge to defaults occurring after the first. *Ib.*

65. Evidence. The admission of an agent, not made at the time of doing an act in the exercise of his authority, nor explanatory of any contemporaneous act in the execution of his agency, is not competent evidence against his principal, nor against his principal's sureties: *Memphis and Charleston R. R. Co. v. Maples*, 63 Ala., 601. 1879.

66. Set-off. Where an agent, in a suit upon his bond, was prevented from presenting a valid set-off, by inducements of the company's attorney, and a bill in equity was filed to enjoin the collection of the judgment, the company being solvent and responsible at law, the injunction was denied. *Harris v. Western and Atlantic R. R. Co.*, 59 Ga., 830. 1877.

67. — In an action upon an agent's bond for money due from such agent, he may plead as a set-off the services rendered by him as agent. *Baltimore and Ohio R. R. Co. v. Jameson*, 13 W. Va., 833. 1878.

68. — But such offset cannot be pleaded when the action is against the surety alone. *Baltimore and Ohio R. R. Co. v. Bitner*, 15 ib., 455. 1879.

Appeals to Courts of Last Resort.

69. Pleading. The pleadings in an action upon the bond of an agent, considered. *Baltimore and Ohio R. R. Co. v. Bitner*, 15 West Va., 467. 1879.

70. Bankruptcy. The surety upon a railway agent's bond is not released by the discharge of the agent in bankruptcy. *Greenville and Columbia R. R. Co. v. Maffett*, 8 So. Car., 307. 1876.

71. Surety. A clerk's bond conditioned for the accounting of moneys received in his employment recited that he had been employed at an annual salary of 100l. Subsequently his salary was changed to a commission. *Held*, that the surety in the bond was thereby released. *Northwestern Railway Co. v. Whinray*, 10 Hurlstone & Gordon (Exchequer), 77. 1854.

72. — Debt on bond, conditioned for the due payment by the chief clerk of a railway company of all moneys received by him on account of the company. It appeared that he had allowed the other clerks to be in arrear, and made up the deficiency on one day by appropriating to it a portion of the moneys received on the following day, but had, in fact, paid over a sum equal to the amount received on each day up to the time of his dismissal. *Held*, a breach of the condition, and that the plaintiff was entitled to recover as damages the full amount of the deficiency. *London, Brighton and South Coast Railway Co. v. Goodwin*, 3 Welsby, Hurlstone & Gordon (Exchequer), 736. 1849.

73. — amalgamation of companies, sureties not released. Debt on bond given by the defendant and another to the L. & C. Railway Co., as sureties for the due performance by E. G. of his duties as clerk. The condition of the bond was, that if E. G. should render to the L. & C. Railway Co., or to the committee for managing the London terminus of the L. & C., L. & B. and S. E. Railways, a true account of all the receipts and payments to him as such clerk, and also should pay to the L. & C. Railway Co., or to the said committee, all such sums as he should receive on account of the company or committee, then the obligation to be void. The defendant pleaded, thirdly, that the bond was made before the passing of the 9 and 10 Vict., c. 283, to consolidate the L. & B. and L. & C. Railway Companies, and that

the action was commenced afterwards, and that the L. & C. Railway Co. thereby became dissolved. Fourthly, that, from the time of the making of the bond, up to the time of the passing of the said act, E. G. rendered to the L. & C. Railway Co. an account of all receipts and payments, and paid all sums received by him as such clerk. *Held*, that the third plea was bad, and was no defense to the action, inasmuch as the new company was the same as the two old ones, with additional powers, and that the amalgamation of the companies did not affect the responsibilities of the defendant or E. G. That the fourth plea was also bad, for not alleging a payment to the committee of the moneys received by E. G. on account of the three companies. *London, Brighton and South Coast Railway Co. v. Goodwin*, 6 Eng. R. R. and Canal Cases, 177. 1849.

74. — A bond by an agent was given to the L. & C. Co. Afterwards the company was consolidated with another corporation. *Held*, that the bond was not released thereby. *London, Brighton and South Coast Railway Co. v. Goodwin*, 3 Welsby, Hurlstone & Gordon (Exchequer), 320. 1849.

APPEAL.

See BILL OF EXCEPTIONS; EMINENT DOMAIN.

I. APPEALS TO COURTS OF LAST RESORT.

II. APPEALS FROM COURTS OF LIMITED JURISDICTION.

III. MISCELLANEOUS MATTERS.

I. APPEALS TO COURTS OF LAST RESORT.

1. Assignment of errors. The court is of opinion that the errors assigned are not sufficient to warrant a reversal of the judgment. *St. Louis and South Eastern R'y Co. v. Gould*, 6 Bradwell (Ill.), 155. 1880.

2. — There being no errors assigned an appeal will be disregarded. *Bankhead v. Union Pacific R. R. Co.*, 2 Utah, 507. 1877-1880.

3. Practice. Failing to file the record in time, the appeal is dismissed. *Chicago, Burlington and Quincy R. R. Co. v. City of Aurora*, 5 Bradwell (Ill.), 395. 1879.

Appeals to Courts of Last Resort.

4. — Order of hearing on appeal determined. *Hines v. Brunswick and Albany R. R. Co.*, 51 Ga., 218. 1874.

5. — Practice on the death of a party to the suit considered. *Thompson v. Central R. R. and Banking Co.*, 58 Ga., 600. 1877.

6. — Questions of practice on appeal determined. *Ballou v. Chicago and Northwestern R'y Co.*, 53 Wis., 150, 1881; *Thornton v. St. Paul and Chicago R. R. Co.*, 6 Daly (N. Y.), 511, 1876; *Wilcox v. Toledo and Ann Arbor R. R. Co.*, 45 Mich., 280, 1881; *Smith v. New York Central and Hudson River R. R. Co.*, 30 Hun (N. Y.), 144, 1883; *Johnson v. New York, Ontario and Western R. R. Co.*, 30 Hun (N. Y.), 166, 1883.

7. — Appeal to the supreme court cannot be taken from an order that does not affect a substantial right. *Chester and Lenoir R. R. Co. v. Richardson*, 82 N. C., 343. 1880.

8. Demurrer. No appeal will lie from an order sustaining a demurrer, where no judgment is entered. *Thomas v. Union Pacific R. R. Co.*, 1 Utah, 184. 1875.

9. — A judgment on demurrer, with leave to amend, is not a final judgment from which an appeal will lie. *Cowan v. East Tenn., Va. and Ga. R. R. Co.*, 6 Baxter (Tenn.), 69. 1873.

10. Evidence. A judgment will not be reversed because of the admission of improper evidence upon the trial, where it was introduced and read without objection; nor where, if reversed, the evidence would be competent upon a subsequent trial. *Wayne County v. St. Louis and Iron Mountain R. R. Co.*, 66 Mo., 77. 1877.

11. — An order of the court below refusing to allow appellant to show certain facts on cross-examination of a witness of the opposite party, will not be disturbed when none of the testimony in chief of such witness is set out in the record. *Cook v. Sioux City and Pacific R. R. Co.*, 37 Ia., 426. 1873.

12. — Verdict held supported by the evidence, and judgment affirmed. *Thompson v. Ga. R. R. and Banking Co.*, 55 Ga., 458. 1875.

13. Dismissal. The court will not, on motion of the appellant, at a subsequent term, set aside the order of dismissal, where an appeal has been dismissed for non-payment or failure to secure costs. *Selma and*

Meridian R. R. Co. v. Louisiana National Bank, 94 U. S., 253. 1876.

14. Damages; appeal for delay. Under the twenty-third rule, in relation to damages, where a writ of error was sued out merely for delay, more than ten per cent. upon the amount of the judgment cannot be awarded, but the court may give less. *West Wisconsin R'y Co. v. Foley*, 94 U. S., 100. 1876.

15. Costs. An order setting aside the taxation and allowance, by the clerk, of costs and disbursements is not an appealable order. *Felber v. Southern Minnesota R'y Co.*, 28 Minn., 156. 1881.

16. Certificate of law question. Where a case is certified to the supreme court as involving a question of law desirable to be determined, the certificate should set out the particular question to be passed upon. *Minich v. Chicago, Rock Island and Pacific R. R. Co.*, 51 Ia., 363. 1879.

17. Amount in controversy. In fixing the amount in controversy in a writ of error the costs will not be included. *New Orleans, Jackson, etc., R. R. Co. v. Evans*, 49 Miss., 785. 1874.

18. Argument. Where the appellee fails to file a brief in accordance with the rules of this court, the judgment or decree will be reversed *pro forma*, unless the court on examination of the record should deem it proper to decide the case on its merits. *Terre Haute, Vandalia and Indiana R. R. Co. v. Goodwin*, 4 Bradwell (Ill.), 165. 1879.

19. — In giving the ten days' notice of argument required by rule 8 of the supreme court, the day of service and the first day of the term must both be excluded. *Greve v. St. Paul, Stillwater and Taylor's Falls R. R. Co.*, 25 Minn., 327. 1878.

20. Chancery cases. Prior to the taking effect of ch. 145, Laws of 1873, a compliance with the provision of § 2742 of the Code was necessary to secure a trial *de novo* in the supreme court. *Joliet Iron and Steel Co. v. C. C. and W. R. R. Co.*, 50 Ia., 455. 1879.

21. — Upon the appeal of an equity cause, tried below by the first method and triable *de novo* in the supreme court, the court must be satisfied that it has an abstract of all the evidence. *Britton v. Central R. R. Co.*, 39 Ia., 390. 1874.

Appeals from Courts of Limited Jurisdiction.

22. Reversal; judgment. When a case has been remanded by this court with directions to the trial court to enter judgment against the plaintiff, his right to dismiss upon payment of costs is at an end; and if he obtains a dismissal in vacation, it will be the duty of the trial court to reinstate the case upon the docket, and enter the judgment as ordered. *State ex rel. v. Givan*, 75 Mo., 516. 1882.

23. New trial. An order granting a new trial is not a final order from which an appeal may be taken. *McCormick v. Walla Walla, etc.*, R. R. Co., 1 Washington Ter., 512. 1876.

24. Res adjudicata. All questions covered by a decision of the supreme court in any case become *res adjudicata*, and will not be reconsidered or reviewed in a subsequent appeal in the same action. *Adams County v. Burlington and Missouri River R. R. Co.*, 55 Ia., 94. 1880.

25. Rehearing. A petition for a rehearing cannot be filed after the term at which the judgment was rendered. *Brooks v. Railroad Co.*, 102 U. S., 107. 1880.

26. Record. What should be contained in the record on appeal determined. *Houston and Texas Central R'y Co. v. Greenwood*, 40 Tex., 361. 1874.

27. — The record in this case not containing any statement of plaintiff's cause of action, the judgment of the court below in his favor is reversed. *Thomason v. St. Louis, Iron Mountain and Southern R'y Co.*, 74 Mo., 560, 1881; 7 Amer. & Eng. R. R. Cases, 421.

28. — The appellee, the successful party on appeal, caused the printing of the record to be done at his own expense, but at a cost no greater than if the work had been done at the government printing office. *Held*, that such cost be taxed against the appellant. *Railroad Co. v. Collector*, 96 U. S., 594. 1877.

29. — Where the record of a case is not transmitted to the court of appeals within the time prescribed, the burden is upon the appellant to show that the failure to transmit was not through any fault of his, and to do this he must furnish sufficient proof. *Northern Central R'y Co. v. Rutledge*, 48 Md., 262. 1877.

30. Exceptions. Instructions not reviewed, there being no exceptions in the

record. *Sampson v. Atlantic and N. C. R. R. Co.*, 70 N. C., 404, 1874; *People v. Wabash, St. Louis and Pacific R'y Co.*, 11 Bradwell (Ill.), 512, 1882.

31. Limitations. The pendency of an appeal with stay of proceedings prevents the bringing of a new action. The plaintiff has one year after the termination of the appeal, on reversal, to bring a new action. Code, § 104. *Wooster v. Forty-second St., etc.*, R. R. Co., 6 Daly (N. Y.), 528. 1876.

32. Settlement. The supreme court has no general original jurisdiction, and cannot order that an appellee shall proceed no further with a cause. So held where appellant filed receipts of plaintiff in settlement, and moved for an order to suspend further proceedings by plaintiff, after plaintiff had assigned one-half the judgment. *Simonson v. Chicago, Rock Island and Pacific R. R. Co.*, 48 Ia., 19. 1878.

33. Amount in controversy; United States supreme court. An appeal will not be entertained where the amount in controversy does not exceed \$5,000. *Whitsitt v. Railroad Co.*, 103 U. S., 770. 1880.

34. — The same provision as to amount involved applies to a suit where the United States is the plaintiff, unless it be brought for the enforcement of a revenue law. *United States v. Railroad Co.*, 105 U. S., 263. 1881.

35. — An appeal will not lie from a decree of the circuit court, which adjudged to none of the libelants in a collision suit, who had distinct causes of action against a vessel at fault, a sum exceeding \$5,000. *Baltimore and Ohio R. R. Co., Ex parte*, 106 U. S., 5, 1882; *Farmers' Loan and Trust Co. v. Waterman*, ib., 265, 1882.

II. APPEALS FROM COURTS OF LIMITED JURISDICTION.

36. From justice of the peace. Where the appeal is not taken on day of entry of judgment the appellee is entitled to notice thereof. *Thurston v. Kansas Pacific R'y Co.*, 1 Mo. App., 400. 1876.

37. — In taking an appeal from a justice's court, filing with the justice the original notice of appeal with proof of service thereof, within the time prescribed by statute, is a

Miscellaneous Matters.

jurisdictional prerequisite to the allowance of the appeal that cannot be dispensed with. *Marsile v. Milwaukee and St. Paul R'y Co.* 23 Minn., 4. 1876.

38. — When a party has demanded an appeal from a justice of the peace within twenty days after judgment, but was prevented from obtaining it until the time had expired by the severe illness of the magistrate, this appeal is good. *Woodside v. Pa. R. R. Co.*, 1 Pearson (Pa.), 301. 1867.

39. — In an appeal by a defendant to the superior court, from a judgment of a justice of the peace, it lies within the discretion of the presiding judge to require the plaintiff to give security for the further prosecution of the suit or not. *Smith v. Richmond and Danville R. R. Co.*, 72 N. C., 62. 1875.

40. Dismissal. Where an appeal from a justice of the peace is dismissed, the court has no authority to affirm the judgment of the justice and render judgment against the parties to the appeal bond. *Hooker v. Atlantic and Pacific R. R. Co.*, 63 Mo., 449. 1876.

41. Default. It is immaterial upon what ground a motion to set aside a default before a justice of the peace is made or overruled. *Beers v. Atlantic and Pacific R. R. Co.*, 55 Mo., 292, 1874; *Palmer v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 57 Mo., 249, 1874.

42. Appearance. The effect of an appeal to the circuit court, without anything further, amounts to a full appearance to the action in the circuit court. *Blunt v. A. and P. R. R. Co.*, 55 Mo., 157. 1874.

43. — A general appearance will waive notice of appeal. *Page v. Atlantic and Pacific R. R. Co.*, 61 Mo., 78. 1875.

44. Affirmance. In an action of tort, where a defendant in default before a justice appeals and makes no appearance in the circuit court, a judgment of affirmance may properly be entered on motion of the plaintiff, without trial. *Harty v. D. M. and M. R. R. Co.*, 54 Ia., 327. 1880.

III. MISCELLANEOUS MATTERS.

45. Bond and supersedeas. Amount of appeal bond considered. *Ennor v. Galena and Southern Wis. R. R. Co.*, 104 Ill., 103. 1882.

46. — Where an appeal, taken under the statute before the code, was dismissed for want of a bond, a new appeal may be taken under the code at any time within two years after the entry of the judgment. *Gensler v. Florida R. R. Co.*, 14 Fla., 41. 1871.

47. — A *supersedeas* will be vacated when the approval of the bond therefor was obtained by fraud and perjury. If it appears that the appellant had knowledge of such fraud and perjury, a new bond will not be accepted. *Railroad Co. v. Schutte*, 100 U. S., 644. 1879.

48. — Appeal dismissed for want of cost bond. *Halloran v. Texas and New Orleans R. R. Co.*, 40 Tex., 465. 1874.

49. — *Supersedeas* dismissed, as improvidently awarded. *Baltimore and Ohio R. R. Co. v. Annon*, 18 West Va., 493. 1881.

50. — An appearance by counsel to an appeal is not a waiver of a *supersedeas* bond. *Otterback v. Alexandria and Fredericksburg R'y Co.*, 26 Grattan (Va.), 940. 1875.

51. — attorney as surety. On an appeal by a railway company, the appeal bond was executed by the company's attorneys only, notwithstanding a rule of the court prohibiting attorneys "from being received as security in such cases." Held, on motion to dismiss the appeal, that the attorneys, though probably liable for contempt of the rule, are liable on the bond, and that the bond is sufficient. *Ohio and Mississippi R'y Co. v. Hardy*, 64 Ind., 454, 1878; *Same v. Hay*, 64 Ind., 597, 1878.

52. — waiver of bond. Effect of waiver of appeal bond considered. *Chicago, Pekin and South Western R. R. Co. v. Marseilles*, 104 Ill., 91. 1882.

53. Stockholder; appeal. An appeal from a judgment against a corporation cannot be prosecuted by an individual stockholder. *State v. Florida Central R. R. Co.*, 15 Fla., 690. 1876.

54. Mandamus. The appealable or unappealable character of a controversy is announced by the pleadings, but is fixed by the judgment. Hence a *mandamus* lies to compel the granting of a suspensive appeal, when at the time the judgment was rendered the case was appealable. *State ex rel. v. Lazarus*, 34 La. An., 864. 1882.

Contract — Award — Agreement.

55. Joint defendants. One of two defendants sued jointly for negligence has no right to appeal from a decision discharging his co-defendant. *Popham v. Twenty-Third St. R. R. Co.*, 48 N. Y. Superior Ct., 229, 1882; affirmed, 99 N. Y., 632, 1882.

56. Effect of remittitur. A remittitur entered after verdict and judgment does not affect the right of a party to appeal from such judgment. *State ex rel. v. Lazarus*, 34 La. An., 1117, 1882; see, also, *Smith v. New Orleans R. R. Co.*, 34 La. An., 1160, 1882.

57. Agreement; extension of time. Appeal held to have been taken within the time stipulated for by the agreement of the parties. *State ex rel. Pontchartrain R. R. Co. v. Judge Superior Court*, 27 La. An., 697, 1875.

APPRENTICESHIP.

1. Contract. A parol agreement of apprenticeship is not binding upon the parties thereto. In Pennsylvania, a contract of apprenticeship, in order to be binding on the parties, must comply with all the requisites of the act of September 29, 1770, 1 Sm. L. 309. It must, therefore, be in writing, signed and sealed by the parties thereto. *Phelps v. Pittsburgh, Cincinnati and St. Louis R'y Co.*, 99 Pa. St., 108, 1881.

ARBITRATION.

See CONSTRUCTION OF RAILWAYS; CONTRACT; EMINENT DOMAIN.

1. Award. Where two arbitrators, to whom a verbal submission had been made as to the injury to certain goods shipped over a line of railroad, but who were not sworn and did not examine any witnesses, reported in writing that, at the request of the parties, they had examined the flour in controversy and found it damaged \$1.25 per barrel, and that it was in such condition previous to shipment, held, that it was not error in the court to charge that such a report could do "no more than show the damage to the flour, if that." *Central R. R. and Banking Co. v. Rogers*, 57 Ga., 336, 1876.

2. — A submission of all differences between parties respecting certain right of way matters is sufficient basis for an award, and such award is binding at common law, although the arbitrators were not sworn, the submission not requiring them to be sworn. *Kankakee and Southwestern R. R. Co. v. Alfred*, 3 Bradwell (Ill.), 511, 1878.

3. — It is highly improper — though not *per se* a ground for setting aside his award — for an arbitrator to employ the attorney of one of the parties to the reference (though his own attorney also) to assist him in framing the award. *Underwood and Bedford and Cambridge Railway Co., In re*, 11 Common Bench, N. S., 442; 103 E. C. L., 442, 1861.

4. — It is no ground for setting aside an award of a majority of arbitrators, which is otherwise unobjectionable upon its face, that, after the hearing, while the arbitrators were consulting, the chairman expressed in a decided manner his views of the law of the case; that one of the arbitrators stated that he should rely upon the chairman's knowledge of the law; that the other arbitrator dissented from the chairman's view; that there was a heated and unfriendly discussion between the chairman and the dissenting arbitrator; and that afterwards the other two arbitrators refused to discuss the question further with the dissenting arbitrator. *Roberts v. Old Colony R. R. Co.*, 123 Mass., 552, 1878.

5. — Where it was said by plaintiff that the submission was procured by fraud; that the arbitrators were stockholders of the defendant, and therefore not proper persons to act as arbitrators, and that the submission had been revoked, held, that, if these allegations were true, the orderly course for the plaintiff to pursue would be to make a motion or bring a suit to set aside the submission. *Ensign v. St. Louis and San Francisco R'y Co.*, 62 Howard's Practice (N. Y.), 123, 1881.

6. — The statute of Michigan in relation to arbitration construed. *Chicago and Michigan Lake Shore R. R. Co. v. Hughes*, 28 Mich., 186, 1873.

7. Agreement. Two railway companies entered into an agreement for making a line, by which they agreed that "in every case in which any difference should arise touching

By Employees.

anything done or omitted in pursuance of the agreement, or touching its incidents or consequences, or touching any breach or non-fulfilment of the agreement, it should be referred to arbitration according to the provisions of the *Railway Companies Arbitration Act, 1859*." Differences subsequently arose between the companies, and one of them filed a bill against the other for an account, when the defendant company insisted on the agreement to refer. *Held*, that, though the account was of such a complicated nature as to render it a proper subject of a suit in equity, yet that the court was bound to give effect to the agreement to refer under sec. 26 of the *Railway Companies Arbitration Act, 1859*, and could not entertain the suit. *Watford and Rickmansworth R'y Co. v. London and North Western R'y Co.*, Law Reports, 8 Equity Cases, 231. 1869.

8. Eminent domain. Where plaintiff asks damages for the alleged appropriation of a right of way, and defendant moves to dismiss on the ground that the controversy has been submitted to arbitration and an award made, *held*, that the plaintiff had a right to disprove the agreement to arbitrate or to show that it was procured by fraud, and the motion was accordingly overruled. *Hynes v. S. A. and D. R'y Co.*, 38 Ia., 258. 1874.

9. Appeal. An appeal cannot be taken from an award until after judgment. *Coltins v. Louisville and Nashville R. R. Co.*, 70 Ala., 533. 1881.

10. — The submission of the controversy in this case to arbitrators was made with the understanding that they should have power to act as amicable compounders. Under the law (art. 460, C. P.), the judgment itself is not appealable. *Hopkins v. La. Western R. R. Co.*, 33 La. An., 1138. 1881.

11. — The act of 1817, requiring corporations to give bail absolute for the debt in cases of appeal from the awards of arbitrators, was superseded by the non-imprisonment act of 1842. *Erie and Allegheny R. R. Co. v. Atlantic and Great Western R'y Co.*, 3 Pittsburgh, 232. 1870.

12. Engineer as sole arbiter. There was a stipulation in the contract that if any dispute or misunderstanding should arise be-

tween the parties it should be referred to the company's engineer, whose decision should be final. *Held*, that if this stipulation was intended to make the engineer sole umpire and to preclude resort to the courts, it was against public policy and void. *Kistner v. Indianapolis and St. Louis R. R. Co.*, 12 Amer. & Eng. R. R. Cases (Ind.), 314. 1883.

13. Power of president of corporation. A resolution of the board of directors was as follows: "It was resolved that the president is hereby authorized to receive the hotel at valuation as provided for by said contract." The company, being a corporation aggregate, could act only through the instrumentality of an agent or attorney. The resolution conferred power upon the president of the railroad to "agree with the proprietor," and this has been held to authorize an agreement to pay such sum as arbitrators should award. *Memphis and Charleston R. R. Co. v. Scruggs*, 50 Miss., 284. 1874.

14. Waiver. The repudiation by a railway company of a contract for the completion of its line, followed by seizure of the works under an order of a colonial court, *held*, a waiver on its part of the right to proceed by arbitration under the same contract, with reference to the question of the legality of the seizure, and all matters involved in and dependent upon such question. *Pickering v. Cape Town Railway Co.*, Law Reports, 1 Equity Cases, 84. 1865.

ASSAULT AND BATTERY.

See INJURIES TO PASSENGERS.

1. By employees. If the employees of a railway company, engaged in the operation of the road or the running of trains, commit an assault upon a citizen who is not a passenger upon the train or in any manner connected with the company, it is not liable for such assault. *Porter v. Chicago, Rock Island and Pacific R. R. Co.*, 41 Ia., 353. 1875.

2. — not in line of duty. Where it appears that plaintiff was authorized to receive freight for certain parties, and in pursuance thereof went to the depot of defendant and there demanded the same of the agent who was in charge of the depot and authorized

Bond of Corporation — Against Corporation.

to receive and deliver freight, and while so demanding it the said agent made an assault upon him, and it does not appear that said assault was made in ejecting or attempting to eject plaintiff from the depot, or in preventing or attempting to prevent him from committing any injury to the property of defendant, or from transgressing any rules for the regulation of its depot and the transaction of its business, *held*, that it did not appear that the company was liable for the assault, and that only the agent who actually made it was liable. *Hudson v. Missouri, Kansas and Texas R. R. Co.*, 16 Kans., 470. 1876.

3. — verdict. In an action against a railway company and a conductor for an assault and battery by the conductor, the jury found a verdict against the company but not against the conductor. *Held*, that such a conflicting result would necessitate a new trial. *Hyatt v. N. Y. Central and Hudson River R. R. Co.*, 6 Hun (N. Y.), 306. 1875.

4. Pleading. In an action against a railway company, to recover damages for an assault and battery by one of its servants, it is not necessary to state the name of such servant, and, if stated, the name may be regarded as surplusage, and need not be proved as alleged. *Toledo, Wabash and Western R'y Co. v. Williams*, 77 Ill., 354. 1875.

ASSIGNMENT.

See CARRIAGE OF MERCHANDISE.

1. Bond of corporation. A bond of a corporation, payable to an obligee named or his assigns, may be assigned under the act of May 28, 1715, so as to enable the assignee to sue in his own name. Such bond is assignable in equity by parol delivery, but an action on it cannot be maintained in the assignee's name; the suit must be in the name of the obligee. *Bunting's Adm'rs v. Camden and Atlantic R. R. Co.*, 81 Pa. St., 254, 1876; 15 Amer. R'y Rep., 570.

2. Of cause of action; death of assignor. Where a plaintiff, during the pendency of an action, assigned his interest therein to a third party, and then died, *held* (the cause of action surviving), that the court below did not err in permitting the record to be

amended, so as to make the assignee a party plaintiff. *Moore v. North Carolina R. R. Co.*, 74 N. C., 528. 1876.

3. — of wages; notice of transfer. Upon an issue whether a railway company had notice of a transfer of his wages by one of its workmen, it appeared that the assignee presented the assignment to the general agent of the transportation and freight department at one end of the railway, under whose orders the employee was, and who hired and discharged men, but did not pay them; that the agent told the assignee that if the assignment was sent on to the general office the employee would lose his place, and that the assignee took the assignment away. *Held*, that a ruling by the judge that these facts, as matter of law, proved actual notice to the company, was improper. *Corbett v. Fitchburg R. R. Co.*, 110 Mass., 204. 1872.

4. — tort. A cause of action on a verbal contract, or for an injury to the person or property of another, is not assignable so as to pass the right of action to the assignee. *Chicago and Alton R. R. Co. v. Maher*, 91 Ill., 312. 1878.

ATTACHMENT.

See CONTRACT; GARNISHMENT; STOCK AND STOCKHOLDERS.

1. Against corporation. In an affidavit for attachment against a private corporation of Wisconsin, the title of the act incorporating it need not be stated; and if such statement be necessary in a pleading, its omission is not a jurisdictional defect, but may be supplied by amendment before or after judgment. *Ruthe v. Green Bay and Minnesota R. R. Co.*, 37 Wis., 344. 1875.

2. — foreign corporation. That a foreign railway company was allowed by special act of the legislature to contract with a municipal corporation on the Georgia line, and extend its road into a city, and by the same act was made liable to suits in the proper courts in Georgia, did not change its character as a foreign corporation so as to prevent an attachment against it. The remedy provided by the act was merely cumulative. *South Carolina R. R. Co. v. People's Saving Institution*, 12 Amer. & Eng. R. R. Cases, 432; 64 Ga., 18, 1881.

Miscellaneous.

3. Levy on goods in transit. A common carrier, who surrenders the possession of goods, intrusted to him for carriage, to an officer, who attaches them upon legal process against the consignee, is not liable to an action by the consignor, after notice by him to hold the goods, for not notifying the officer or taking steps to stop the goods *in transitu*. *French v. Star Union Transportation Co.*, 134 Mass., 288. 1883.

4. — A common carrier is not liable in trover to the consignor, for surrendering the possession of goods, intrusted to him for carriage, to an officer, who attaches them upon legal process against the consignee. *Ib.*

5. — It is no defense by a common carrier for loss of goods, that they were taken from it under an attachment, if the goods were not subject to the attachment. *Kiff v. Old Colony and Newport R'y Co.*, 117 Mass., 591. 1875.

6. Obstruction of levy by employees. That the agent of a railroad company obstructed an officer in levying an attachment upon goods loaded upon one of the trains of the company, and that he removed the goods out of the state by running out the trains, will not furnish a cause of action against the company at the instance of the plaintiff in attachment. *Western R. R. Co. v. Thomas*, 60 Ga., 313. 1878.

7. Contract to deliver bonds. In an action for damages for a breach of contract to deliver bonds, held that an attachment under Code, § 229, could issue. *Glews v. Rockford, Rock Island and St. Louis R. R. Co.*, 4 Thompson & Cook (N. Y.), Supreme Ct., 669; 2 Hun (N. Y.), 379; 49 Howard's Practice (N. Y.), 117, 1874.

8. Liens; priority. Attached property will be distributed in the order of priority of the attachments, notwithstanding a general judgment is entered in favor of a creditor who has attached. *Atlantic and Gulf R. R. Co. v. Florida Construction Co.*, 51 Ga., 241. 1874.

9. Examination of debtor. Whether the funds are held under a trust by the debtor, and whether the trust is valid or not, may be the subject of investigation in another mode, but such facts cannot be inquired into under proceedings for the examination of a

debtor. Code, § 236. *Baxter v. Missouri, Kansas and Texas R'y Co.*, 67 Barbour (N. Y.), 283. 1875.

10. Arrest. An attachment and order of arrest may both issue in the same case against an officer of a corporation who fraudulently withholds the moneys of the company. *Rockford, Rock Island and St. Louis R. R. Co. v. Boody*, 56 N. Y., 456. 1874.

11. Married women. An attachment cannot issue in Missouri against the property of a married woman. *Williams v. St. Louis, Iron Mountain and Southern R'y Co.*, 8 Mo. App., 135. 1879.

12. Land of railway company. Where a strip of land, with a railroad track thereon, in a proceeding against a foreign corporation and with no charter privilege from the state in which the road is situated, is attached at the suit of a creditor, and it does not appear in the record that any railroad chartered in the state has any interests therein, the court will regard the strip of land, so attached, as ordinary real estate; but no decree with reference thereto, or sale of the land thereunder, can affect the rights of any railroad chartered in this state, or any interest of such railroad in the land, of whatever character that interest may be, such company not being a party to the suit. *Chapman v. Pittsburgh and Steubenville R. R. Co.*, 18 West Va., 184, 1881; 9 Amer. & Eng. R. R. Cases, 484.

13. Intervention. In the absence of some statutory authority an intervention cannot be permitted in an attachment proceeding. *Pennsylvania Steel Co. v. New Jersey Southern R. R. Co.*, 4 Houston (Del.), 572. 1874.

14. Affidavit. The affidavit for attachment against a non-resident company need not allege that it is a corporation. *Miss. Central R. R. Co. v. Plant*, 58 Ga., 167. 1877.

15. Effect of appeal. Where a case in a justice's court, in which an attachment has been issued and levied upon property of the defendant, is taken by the defendant on appeal to the district court, the attachment is thereby discharged. *St. Joseph and Denver R. R. Co. v. Casey*, 14 Kans., 504. 1875.

16. Estoppel. An attaching creditor who permits the debtor to sell and dispose of the attached property is estopped from question-

Powers and Duties.

ing the legality of such sale. *Montpelier and Wells River R. R. Co. v. Coffrin*, 52 Vt., 17. 1879.

ATTORNEYS.

I. POWERS AND DUTIES.

II. COMPENSATION AND LIEN.

I. POWERS AND DUTIES.

1. Authority. An attorney employed by a party to defend a suit is vested with the authority ordinarily appertaining to that relation. He is authorized to take such steps as are necessary to a proper defense of the suit, among which may fairly be included the suing out of a commission to take depositions, and the employment of a competent person to execute such commission. *Fairchild v. Michigan Central R. R. Co.*, 8 Bradwell (Ill.), 591. 1881.

2. — compromise by. A court of equity has jurisdiction to vacate a compromise and satisfaction of a judgment made by the plaintiff's attorney without his authority. *Moore v. Cairo and Fulton R. R. Co.*, 36 Ark., 262. 1880.

3. — continuance. The attorney of a party has the exclusive control of the conduct and management of a suit, and neither the party nor his agent have authority to sign an agreement for continuance. *Nightingale v. Oregon Central R'y Co.*, 2 Sawyer (U. S. C. C.), 338. 1873.

4. — general solicitor of a railway. The general solicitor of the plaintiff corporation, being an officer unknown to the articles of incorporation and the by-laws, has no authority to institute and prosecute suits without the sanction of the board of directors, and such sanction not appearing in this case, the suit was dismissed on motion. *Des Moines and Minneapolis R. R. Co. v. Chicago and Northwestern R. R. Co.*, 7 Federal Reporter, 748; 2 McCrary (U. S. C. C.), 531. 1881.

5. Employment. Managing officers of corporations have power to employ attorneys and counselors without express delegation of power, or formal resolutions to that effect. *Southgate v. Atlantic and Pacific R. R. Co.*, 61 Mo., 89. 1875.

6. — Not only the appointment but the authority of an agent of a corporation, to employ counsel on its behalf, may be implied from the adoption or recognition of his acts by the company. *Id.*

8. — A director of a railway company employed an attorney and authorized him to employ local counsel to attend to a suit in which the company was interested. The report of the original attorney of his employment of the local counsel, to the director, was legal notice to the corporation, and the continued silence of the director amounted in law to the ratification of the action of the original attorney. *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Woolley*, 12 Bush (Ky.), 451. 1876.

9. Employment by county as a stockholder in a railway company. The power given to the county court of Livingston county by the charter of the Chillicothe and Brunswick R. R. Co., to "take proper steps to protect the interests of the county," and to "appoint an agent to represent its interests," did not authorize that court to employ a special attorney for the purpose of prosecuting an action to protect the interests of the county as a stockholder in that company, while the circuit attorney of the circuit lived within the county. It was his duty to prosecute such action. *Dixon v. Livingston County*, 70 Mo., 239. 1879.

10. Release by client without consultation. After an action has been commenced and counsel employed, no release obtained from the plaintiff, in the absence and without the consent or knowledge of his counsel, should be held valid, unless the utmost good faith is shown on the part of the defendant in obtaining the same. *Russian v. Milwaukee, Lake Shore and Western R'y Co.*, 56 Wis., 325, 1882; 10 Amer. & Eng. R. R. Cases, 716.

11. Right to withdraw from a case. When an attorney accepts employment in a case, in the absence of a special contract to the contrary, the law implies an obligation on his part to attend to it until it is determined, and he cannot abandon it without just cause. He may demand payment of fees already earned, and, if not paid, may upon reasonable notice withdraw from the case; but a refusal to pay some other demand will

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not justify him in leaving the case. *Cairo and St. Louis R. R. Co. v. Koerner*, 3 Bradwell (Ill.), 248. 1878.

12. Settlement with defendant by client. Where, after the commencement of a suit against a railway company, the plaintiff executed a release of the cause of action and costs, and also signed, in person, a stipulation discontinuing the action, and consenting to a discontinuance on filing the stipulation, which order was entered, *ex parte* and without the special direction of the court, upon filing the release and stipulation, *held*, that, while the court had power to protect the plaintiff's attorney against a collusive settlement in fraud of his rights, the plaintiff was not entitled to have the order set aside on account of her attorney; that the order having been entered upon her stipulation, she could not question its regularity, and could not be heard to make the objection that, having appeared by attorney, he only was authorized to sign a stipulation for discontinuance; and that therefore an appeal by her from an order denying a motion to set aside an order of discontinuance was not sustainable. *McBratney v. Rome, Watertown and Ogdensburgh R. R. Co.*, 87 N. Y., 467. 1882.

II. COMPENSATION AND LIEN.

13. Amount of fees. Under the facts in the record, the decision of the judge to whom the whole matter was submitted, refusing the compensation asked for, was not contrary to law. So *held* where counsel representing a portion of the claims against a corporation claimed fees upon the entire fund realized by the proceedings. *Hines v. Brunswick and Albany R. R. Co.*, 50 Ga., 363. 1874.

13a. Compromise by client. Where one having a claim against a railroad company, for damages resulting from negligence, accepted the proposition of attorneys, that they would take the claim for collection, pay all expenses attending its prosecution and divide the recovery, and where, after service of summons, defendant, having notice that the attorneys had an interest in the cause of action, settled with plaintiff and obtained a release, that the release was a bar

to the action; and that the attorneys could not prosecute it, to give them the benefit of the agreement. *Coughlin v. New York Central and Hudson River R. R. Co.*, 71 N. Y., 443, 1877; reversing *Same v. Same*, 8 Hun (N. Y.), 186, 1876. See, also, *Atchison, Topeka and Santa Fe R. R. Co. v. Johnson*, 29 Kans., 218, 1883.

14. Constitutional law. A statute allowing attorneys' fees in actions against corporations, there being no like provision as to other defendants, is unconstitutional and void. *Chicago, St. Louis and New Orleans R. R. Co. v. Moss*, 60 Miss., 641. 1882.

15. Contingent fee. In this action, prosecuted under an agreement with plaintiff's attorney that he should receive one-half the recovery for his services, the defendant, having no notice of such agreement, settled with the plaintiff before trial; *held*, that the settlement was good as against the claim of the attorney, unless made by the defendant in bad faith, and that the defendant was entitled to an order discontinuing the action. *Walsh v. Flatbush, North Shore and Central R. R. Co.*, 11 Hun (N. Y.), 190. 1877.

16. — settlement of cause by client. Plaintiff brought an action of tort to recover damages for personal injuries received. Pending the suit, plaintiff and defendant, without the knowledge of plaintiff's attorneys, settled the case. Plaintiff then gave defendant an order on the clerk of the court to dismiss the suit, which being filed, plaintiff's attorneys moved the court to set the cause down for trial notwithstanding, on the ground that the settlement was collusive and was made with knowledge on the part of the defendant that the plaintiff's attorneys were interested in the case to the extent of their fees for services. An affidavit accompanied the motion showing that the plaintiff had agreed to pay his attorneys a contingent fee of thirty-three per cent. of the amount that should be recovered. The court thereupon passed an order that defendant should pay to plaintiff's attorneys one-third of the sum for which the case had been settled, and in default thereof the entry of dismissal should be struck out and the cause set down for trial. On appeal this court reversed the order, holding that the court will not interfere to enforce in a summary way

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through the original suit the collateral engagement of a client for the compensation of his attorney, but will leave the latter to his common law remedy. *Lamont v. Washington and Georgetown R. R. Co.*, 2 Mackey (Dist. Col.), 502. 1883.

17. Lien. Although the court will extend its aid to an attorney, to prevent his being defrauded by any collusive action between the parties to a suit, out of his reasonable compensation, yet he is called upon to invoke the aid of the court with due diligence; and great and unreasonable delays and laches on his part, in asserting his rights, will be as fatal to his claim as it would be to the claim of any ordinary suitor. *Richardson v. Brooklyn City and Newtown R. R. Co.*, 7 Hun (N. Y.), 69. 1876.

18. — notice. Service of notice of an attorney's lien upon a station agent of a railway company is not sufficient. *Kansas Pacific R'y Co. v. Thacher*, 17 Kans., 92. 1876.

19. — The service of notice of a claim for an attorney's lien upon the agent of a corporation upon whom the original notice in the same action is served, and at the same time, is a sufficient service to bind the corporation. *Smith v. Chicago, Rock Island and Pacific R. R. Co.*, 56 Ia., 720. 1881.

20. Prosecuting attorney. A prosecuting attorney who, at the request of a railway company, appears before a magistrate to prosecute a criminal charge, has no implied right to compensation for his services from the company. *Railroad Co. v. Lee*, 37 Ohio St., 479. 1882.

21. Stockholder as attorney. R., a lawyer, was employed to, and did, perform certain services for a railroad company in which he was a stockholder, in procuring the release of a mortgage upon its property, the surrender of certain of its bonds, the release of its liability on a contract, and the extension of a land grant, and in taking care of the surrendered bonds, etc., etc. *Held*, that the fact that R. was a stockholder did not preclude him from being retained and recovering for the services in question; and that the presumption was that the services were legal. *Barker v. Cairo and Fulton R. R. Co.*, 3 Thompson & Cook (N. Y.), Supreme Ct., 328. 1874.

BAGGAGE.

See JURY; SLEEPING CARS.

I. WHAT CONSTITUTES BAGGAGE.

II. LIABILITIES AND DUTIES OF CARRIERS.

I. WHAT CONSTITUTES BAGGAGE.

1. Articles included. The following articles packed in a box, viz.: a rifle, revolver, two gold chains, two gold rings and a silver pencil case, held to be ordinary personal baggage, for the loss of which a carrier of passengers was held liable. *Bruty v. Grand Trunk R'y Co.*, 32 Upper Canada, Queen's Bench, 66. 1871.

2. — goods wrapped and bound in a shawl strap. The plaintiff, a passenger upon the railway, required one of the company's porters to label and place in the luggage-van a package (within the stipulated weight and dimensions) consisting of articles of wearing apparel, and wrapped in a shawl fastened with a strap, and properly addressed. The porter refused to label the package, and insisted upon placing it in the carriage with the plaintiff. The plaintiff declined to allow this, unless it was to be at the company's risk. The package was left behind, and was afterwards taken to the lost property office, where it was detained, and *6d.* demanded for its restoration. *Held*, that the company was not justified in refusing to carry the package at its own risk, and was responsible for its detention. *Munster v. South Eastern Railway Co.*, 4 Common Bench, N. S., 676; 93 E. C. L., 675. 1858.

3. — household goods. The plaintiff, a passenger from Liverpool to London, took with him in a trunk, as his personal baggage, six pairs of sheets, six pairs of blankets, and six quilts. He had given up his residence in Canada, and these articles were intended for the use of his household when he should have provided himself with a home in London. The trunk having been lost, he sought to recover the value of the articles from the defendant. *Held*, that the articles, being intended for the use of the plaintiff's household when permanently settled, could not be considered as personal or "ordinary passenger's luggage." *Macrow v. Great Western*

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Railway Co., Law Reports, 6 Queen's Bench Cases, 612. 1871.

4. — **jewelry.** If a passenger on a railway brings a trunk to the depot, which in fact contains costly jewelry of the value of \$30,000, and gives no notice of its contents, and has the same checked as ordinary baggage, and there is nothing about the trunk indicating its contents, and the same is consumed by fire while being carried, the company not being guilty of gross negligence in respect to the origin of the fire or in attempting to extinguish the same and save the baggage, it cannot be held liable for the contents of the trunk. *Michigan Central R. R. Co. v. Carrow*, 73 Ill., 348. 1874.

5. — **laces.** What constitutes reasonable personal baggage is a question for the jury. Their finding, under the evidence, that laces of the value of \$10,000 were reasonable personal baggage, was held conclusive. *Fraloff v. N. Y. Central and Hudson River R. R. Co.*, 12 Blatchford (U. S. C. C.), 484. 1875.

6. — **spring horse not baggage.** Those articles only which travelers usually carry with them as part of their baggage come within the definition of "ordinary" or "personal" luggage, which a railway company is bound to carry with a passenger free of charge. A railway company refused to carry a "spring horse" for a child to ride on, weighing seventy-eight pounds, and measuring forty-four inches in length, tendered to it by a passenger who was entitled to take with him one hundred and twelve pounds weight of "ordinary" or personal luggage; *held*, that the spring horse was not ordinary or personal luggage, and that the company was justified in refusing to carry it free of charge. *Hudston v. Midland Railway Co.*, Law Reports, 4 Queen's Bench Cases, 366. 1869.

7. **Merchandise carried as baggage.** By its act of parliament and its published notices a railway company was bound to allow each passenger to take with him a certain weight of ordinary personal baggage, without any charge for the carriage. The plaintiff, a passenger by the railway, who was stated in a special case to have had no knowledge of the act of parliament or the notice, brought with him as luggage a box

containing only merchandise, but not exceeding in weight the limit prescribed for personal luggage. On the box was painted in large letters "Glass." No information was given by the plaintiff to the company's servants, nor was any inquiry made by them as to the contents of the box. *Held*,—affirming the judgment of the court of common pleas,—that, inasmuch as the box contained merchandise only, and not personal luggage, there was no contract on the part of the company to carry it, and that consequently it was not liable for the loss. *Cahill v. London and North Western Railway Co.*, 13 Common Bench, N. S., 818; 106 E. C. L., 817, 1863; *Same v. Same*, 10 Common Bench, N. S., 154; 100 E. C. L., 154, 1861.

8. — *Seemle*, that the acts of parliament in relation to gratuitous baggage must be presumed to have been known to the plaintiff. *Cahill v. London and Northwestern R'y Co.*, 10 Common Bench, N. S., 154; 100 E. C. L., 154. 1861.

9. — It is the duty of a passenger having valuable merchandise in his trunk or valise, and desiring its transportation, to disclose to the carrier the nature and value of the contents, and if the latter then chooses to treat it as baggage, without extra compensation, the liability of common carrier will attach, but not otherwise. *Michigan Central R. R. Co. v. Carrow*, 73 Ill., 348. 1874.

10. — A railway passenger, with knowledge that the railway company, though allowing each passenger to carry free of charge a certain amount of luggage, required all merchandise carried to be paid for, took with him, as if it were personal luggage, a case of merchandise and did not pay for it as such. *Held*, that no contract whatever touching the same arose between him and the company, and therefore on its being lost he was not entitled to recover the value of it from the company. *Belfast and Ballymena R'y Co. v. Keys*, 9 House of Lords Cases, 556. 1861.

11. — If a passenger delivers to a passenger carrier a trunk or valise containing merchandise, not his personal baggage, of which fact the carrier had no notice, the carrier would not, in the absence of negligence, be liable for its loss. The carrier is not bound in such a case to inquire as to the

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nature of the property, but has a right to assume that it consists only of the personal baggage of the passenger. *Haines v. Chicago, St. Paul, Minneapolis and Omaha R'y Co.*, 29 Minn., 160. 1882.

12. — Evidence that a passenger delivered to the baggage-master of a railway company a package of merchandise and received a check for it, on showing his passenger ticket; that the baggage-master knew it was merchandise, and that other passengers had similar packages, will not warrant a jury in finding that the company agreed to carry the merchandise, or become liable for it as a common carrier, in the absence of an agreement that it should be carried as freight, or that the baggage-master had authority to receive freight to be carried on a passenger train, or to bind the company to transport merchandise as personal baggage. *Blumantle v. Fitchburg R. R. Co.*, 127 Mass., 322. 1879.

13. — Where a passenger carried merchandise with him without payment and without any concealment, in a package manifestly not adapted to containing personal baggage, and the same was placed in charge of the company's servants and was lost, the company was held liable. On appeal, the court was equally divided. *Belfast and Ballymena R'y Co. v. Keys*, 2 Irish Common Law, 145. 1859.

14. — **carried in car with passenger.** A carrier of passengers for hire is at common law only bound to carry their *personal* luggage; therefore, if a passenger has merchandise among his personal luggage, or so packed that the carrier has no notice that it is merchandise, he is not responsible for its loss. But if the merchandise is carried openly, or so packed that its nature is obvious, and the carrier does not object to it, he will be liable. The luggage of a passenger by railway, though never delivered to any servant of the company, but kept by the passenger during the journey, is nevertheless, in point of law, in the custody of the company, so as to render it responsible for the loss. *Great Northern Railway Co. v. Shepherd*, 8 Welsby, Hurlstone & Gordon (Exchequer), 30, 1852; 9 Eng. Law and Equity, 477; 21 Law Jour. Rep., N. S., Exch., 114, 286; 14 Eng. Law and Equity, 367.

15. — **extra price paid.** Where a railway company receives the trunk of a passenger, after being advised that it contains articles of merchandise in addition to ordinary baggage, and receives for its transportation, because of extra weight, a sum in addition to the ordinary fare, in case of failure to deliver, it is liable for the merchandise as well as baggage. *Perley v. New York Central and Hudson River R. R. Co.*, 65 N. Y., 374. 1875.

16. — A railway company is liable as a common carrier to the owners of extra baggage, where it is shown that the baggage-master accepted it with the knowledge and with the understanding and arrangement between the passenger and himself, as the agent of the company, that extra charge should be made for the carriage thereof, and if he receives the extra baggage, gives his checks therefor, upon payment of the extra charge, the company will be liable as a common carrier, and is responsible for any injury occurring to the baggage in its transportation, and before its delivery at the place where it was to be delivered. *Strouss v. Wabash, St. Louis and Pacific R'y Co.*, 17 Federal Reporter, 209. 1883.

17. — **former adjudication.** A passenger upon applying for checks informed the defendant's agent that his trunk contained articles other than his baggage, and was required to pay extra compensation for its transportation. His valise and trunk having been burned, the plaintiff brought an action to recover for the loss of the contents thereof, describing the articles as baggage. Upon the trial, upon the demand of the defendant, the court refused to allow the plaintiff to recover for the loss of the articles of merchandise, on the ground that they were not included in the word "baggage" used in the complaint. The plaintiff having recovered in that action for the loss of his baggage, brought another action to recover for the articles of merchandise. *Held*, that his right to recover for the loss of his merchandise was not barred by the former action. The contract to carry the baggage was distinct from the contract for the carriage of the merchandise. *Millard v. Missouri, Kansas and Texas R. R. Co.*, 20 Hun (N. Y.), 191, 1880; affirmed, *Same v. Same*, 86 N. Y., 441, 1881.

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18. Sample cases. Plaintiff's son, a lad eighteen years of age, was employed by him as traveling agent to sell goods by sample. He had two large trunks, containing the samples, different from ordinary traveling trunks, and had a valise for his personal baggage. He delivered the trunks to a baggage-master at a railroad depot, and when asked where he wanted them checked to, replied that he did not then know, as he had sent a dispatch to a customer at F. to know if he wanted any goods; if not, he wanted them to go to R., where he expected to meet some customers. Soon after he had them checked to R., paying \$2 and receiving a receipt ticket for them, headed "receipt ticket for extra baggage," etc. They were not weighed, and no evidence was given as to any regulation of the company in reference to charging extra compensation for passengers' baggage. *Held*, that the evidence justified the submission to the jury of the question of notice as to the contents of the trunks. *Sloman v. Great Western R'y Co.*, 67 N. Y., 203, 1876; 15 Amer. R'y Rep., 113; reversing *Same v. Same*, 6 Hun (N. Y.), 546, 1876.

19. — Where a railway company receives the trunks of a passenger with notice that they contain property other than the passenger's baggage, and charges and receives an extra compensation for their transportation, an agreement to carry the property as freight may be inferred therefrom, and proof of these facts will sustain a recovery for loss of the property. *Ib.*

20. — A railway company is liable as a common carrier for the ordinary baggage of passengers upon its trains, but it is not liable for loss or injury to packages of merchandise, passed as baggage, unless its agent having control of the receipt of the baggage was informed or knew what was contained therein, and no misrepresentation was made by the owner to the agent having charge of the business of checking the baggage. *Strouss v. Wabash, St. Louis and Pacific R'y Co.*, 17 Federal Reporter, 209. 1883.

21. — The implied undertaking of a carrier to insure the safety of baggage does not extend to the contents of a trunk, consisting of samples of merchandise, which the passenger, a traveling salesman, carries to facilitate his business in making sales. But the

carrier, by taking it into his charge, and putting it in his warehouse for safe keeping, assumes the relation to it of an ordinary bailee, and he is bound to take such care of the property as a man of ordinary prudence would of his own, under like circumstances. *Pennsylvania Co. v. Miller*, 35 Ohio St., 541. 1880.

22. — If a passenger delivers to a railway company a trunk containing samples of merchandise belonging to a third person, whose agent he is, to be carried to a place to which he has a ticket, the only contract entered into is for the transportation of the personal baggage of the agent, and the company is not liable in contract to the owner of the trunk for its loss; nor in tort, except for gross negligence; and evidence that a large part of the defendant's business consists in carrying passengers known as commercial travelers, with trunks like the one lost, containing merchandise; that such trunks are known as sample trunks and are of special construction, and that such travelers purchase tickets for the ordinary passenger trains and receive checks for their trunks, and are transported for the price of the tickets, is immaterial. *Alling v. Boston and Albany R. R. Co.*, 126 Mass., 121. 1879.

23. Money; title deeds. "Ordinary luggage," for which a railway company is responsible, does not include title deeds belonging to a client which an attorney is carrying with him in his bag or portmanteau for the purpose of producing on a trial in a local court; or bank notes (to a considerable amount) carried by him for the purpose of meeting the contingencies of the suit. *Phelps v. London and North Western R'y Co.*, 19 Common Bench, N. S., 321; 115 E. C. L., 321. 1865.

24. — In a lost portmanteau were thirty-nine English sovereigns. The court charged the jury, if they found for plaintiff, that they should allow the value of the sovereigns, if they found they were a proper and reasonable amount for plaintiff to carry with him for his journey, and that, in deciding this question, they should take into consideration his circumstances, the length and character of his journey, and the fact that he was in a foreign country. To which

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charge defendant's counsel duly excepted. *Held*, that the charge was at least as favorable to defendant as the law required. *Fairfax v. New York Central and Hudson River R. R. Co.*, 73 N. Y., 167. 1878.

25. — Negligent delay in delivery of baggage in which is contained deeds, leases, etc., is a good ground of action against a carrier. Where the carrier relies upon a statutory release from liability it must be specially pleaded. *Hearn v. London and South Western Railway Co.*, 10 Hurlstone & Gordon (Exchequer), 793, 1855; 29 Eng. Law & Equity, 494. •

26. Master and servant. A declaration in case against a railway company for the loss of a passenger's luggage, stated that the defendant received the passenger to be safely carried, together with his luggage, "for reward to the defendant in that behalf;" it then alleged that it was the defendant's duty safely and securely to carry the plaintiff and his luggage, and averred a breach of that duty, whereby the luggage was lost. *Held*, that the action being founded on the breach of duty, and not on contract, it was not necessary to allege or to prove that the reward was to be paid by the plaintiff; but that the plaintiff was entitled to recover, although it appeared that the fare was paid by the plaintiff's master, with whom he was traveling at the time. *Marshall v. York Railway Co.*, 11 Common Bench, 655; 73 E. C. L., 655, 1851; 7 Eng. Law & Equity, 519; 21 Law Journal Rep., N. S., C. P., 34.

27. — The plaintiff gave his portmanteau to his servant to take with him by the defendant's railway from N. to L., he intending himself to travel by a later train. The servant took and paid the defendant for a ticket from N. to L. and delivered to the defendant the plaintiff's portmanteau and his own luggage as his (the servant's) ordinary luggage, each passenger being entitled to take with him his ordinary luggage, not exceeding a certain weight, free of charge; and the defendant received the portmanteau as such ordinary luggage. The plaintiff traveled as a passenger from N. to L. by a later train on the defendant's line, without any luggage. The portmanteau having been lost during the journey by the defendant's default, *held*, that the plaintiff could not

maintain an action against the defendant for the loss. *Becher v. Great Eastern Railway Co.*, Law Reports, 5 Queen's Bench Cases, 241. 1870.

28. Passenger not on train. A railway company is not obliged to carry as baggage the trunk of one who does not go by the same train. Upon receiving the trunk of such person to be forwarded it is received as freight, and the duties and liabilities of a common carrier attach, with the right to a reasonable compensation for transportation. *Graffam v. Boston and Maine R. R. Co.*, 67 Me., 234, 1877; 15 Amer. R'y Rep., 372.

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29. Act of God. A sudden and extraordinary flood in a stream is to be regarded as the act of God; and in an action by the owner of baggage for damage caused thereby, the jury are to determine, from all the circumstances of the case, whether, after the baggage-master of the company received and checked such baggage, the flood came so suddenly that under the circumstances the injury could not have reasonably been prevented by the company or its agents by the use of all possible means; and if they find that it could have been done with the exercise of reasonable and proper and all possible means that could be exercised and used by the agents, it was bound to place such baggage in a place of safety and prevent damage to the goods, and the owner is entitled to recover. *Strouss v. Wabash, St. Louis and Pacific R'y Co.*, 17 Federal Reporter, 209. 1883.

30. Charges unpaid; loss. A railway company is responsible for the loss of a passenger's luggage (within the weight allowed), which has been delivered to one of its servants, though not booked and paid for; notwithstanding a by-law which provides that "every first-class passenger will be allowed one hundred and twelve pounds, and every second-class passenger fifty-six pounds of luggage, free of charge; but the company will not be responsible for the care of the same, unless booked and paid for accordingly,"—in the absence of evidence that the company has provided means for the

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booking of luggage. *Great Western Railway Co. v. Goodman*, 12 Common Bench, 313; 74 E. C. L., 312. 1852.

31. Checks. B. bought a railroad passenger ticket at Bloomington, Ill., for Wichita, Kans., via Kansas City, and the A., T. and S. F. Railroad. At Kansas City his trunk was checked by the said railroad company over its road to Wichita, and he received a check therefor. He was carried over the road as a passenger, and after arriving at Wichita presented the check to the proper officers of the company, and inquired for his trunk. It could not be found. *Held*, the company was liable to B. for the baggage. *Atchison, Topeka and Santa Fe R. R. Co. v. Brewer*, 20 Kans., 669. 1878.

32. Evidence. Where, in an action brought against a railroad company for the alleged loss of a trunk, a certain nickel-plated check was put in evidence, and a witness, the baggage-master of the company at Cleveland, having testified that nickel-plated checks had never been used on through baggage to his knowledge, was asked whether his position was such that he would have known if they had been so used, *held*, that such question was unobjectionable. *Lake Shore and Michigan Southern R'y Co. v. Lassen*, 12 Bradwell (Ill.), 659. 1883.

33. — As railway companies have made their baggage checks evidence in regard to the delivery of baggage, the possession of such check is evidence against the company of the receipt of the baggage. *Denver, South Park and Pacific R. R. Co. v. Roberts*, 6 Colo., 333. 1882.

34. — burden of proof. The delivery of a baggage check by a carrier to a passenger is *prima facie* evidence that the carrier has received the baggage it represents. Such evidence may be overcome by proof to the contrary, but the burden of proof is upon the carrier to show a non-delivery. *Chicago, Rock Island and Pacific R. R. Co. v. Clayton*, 78 Ill., 616. 1875.

35. Connecting lines. Plaintiff purchased at the office of the B. and O. R. R. Co., at W., a coupon ticket from W. to R., over several connecting lines, the last of which was that of defendant. She received a check for her baggage, with the names of all the roads stamped upon it. On arriving at B.

she demanded her baggage, but it could not be found. In an action to recover for the loss, *held* that, in the absence of proof that the baggage came into defendant's possession, it was not liable; that the ticket and check furnished no evidence that the connecting roads were jointly engaged in the business of carrying passengers; but the facts were consistent with two theories, either that the B. and O. R. R. Co. made an entire through contract, it employing the other companies, or, what was more probable, that each company was the agent of the others to sell tickets and check baggage for the others; and, in either view, defendant would not be responsible without proof that the baggage came into its possession. *Kessler v. New York Central and Hudson River R. R. Co.*, 61 N. Y., 538, 1875; 12 Amer. R'y Rep., 134.

36. — The plaintiff took at the Newport Station of the South Wales Railway Company a ticket from Newport to Birmingham, for which he paid the entire fare. The South Wales Railway extends from Newport to within twelve miles of Gloucester, which latter distance is traversed on the Great Western Railway; and the Midland Railway Company has a line from Gloucester to Birmingham. By arrangement between the three companies tickets are issued for the entire distance, and the fares are divided between them according to the mileage traveled on each line. At Gloucester the plaintiff took his portmanteau from the South Wales Railway carriage and delivered it to a guard of the Midland Railway Company. On the arrival of the train at Birmingham the portmanteau was missing. The plaintiff having sued the Midland Railway Company for the loss, *held*, that the contract was an entire contract with the South Wales Railway Company to convey the whole distance from Newport to Birmingham, and consequently the Midland Railway Company was not liable. *Mytton v. Midland Railway Co.*, 4 Hurlstone & Norman (Exchequer), 615. 1859.

37. — Where it is necessary for a traveler to pass over the connecting lines of several railroad companies, it is competent for either company to contract with him for the transportation of himself and baggage the whole distance, or that its liability shall be confined

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to loss or damage occurring on its own road; but the collection, by such contracting carrier, of fare in advance for the entire journey, without agreement as to risks, renders it liable, on receipt of such traveler's baggage, to transport it safely to the end of the route, and then deliver it, on demand, to such owner. *Baltimore and Ohio R. R. Co. v. Campbell*, 36 Ohio St., 647, 1881; 3 Amer. & Eng. R. R. Cases, 246.

38. Where a railway company received a passenger's check for baggage which had not then arrived on another road, and gave its own check for the same, and it appeared that it surrendered the passenger's first check to the other railway company, it was held that this was sufficient, in the absence of proof to the contrary, to show that the baggage was received by the company so surrendering the first check. *Chicago, Rock Island and Pacific R. R. Co. v. Clayton*, 78 Ill., 616. 1875.

39. — checked over wrong route. The plaintiff, a resident of New Orleans, purchased tickets for himself and family to Niagara Falls and return over what was called the Mobile route. From Niagara Falls he purchased tickets to New York city and for his return to the Falls over the defendant's road. When about to leave New York, he went to the baggage room in the defendant's depot, showed his return ticket, and asked for checks for his baggage over the route indicated upon them to New Orleans. The baggage-master examined the tickets, and delivered to the plaintiff two checks, which the latter, upon returning to the hotel, gave to his wife for safe keeping. Neither the plaintiff nor his wife examined the checks until after they arrived in New Orleans, when it was found that the baggage-master had checked the trunks over a route from Niagara Falls to New Orleans different from that indicated on the plaintiff's tickets. The trunks and their contents were found, upon their arrival at New Orleans, to have been greatly damaged by reason of an accident which had occurred in Mississippi upon one of the roads forming the route over which they had been carried. In an action brought by the plaintiff against the defendant to recover the damages he had sustained, held, that he was not entitled to recover. *Isaacson v. New York Central and Hud-*

son River R. R. Co., 25 Hun (N. Y.), 350. 1881.

40. — The receipt by a train baggage-master of a carrier by railroad plying between two points, of the baggage of a traveler, who is a passenger by another carrier plying between the same points by different routes, and who has paid no fare to the first carrier, does not constitute a special agreement with the first carrier, and render him liable as carrier for the loss of the baggage. *Fairfax v. New York Central, etc., R. R. Co.*, 37 N. Y. Superior Ct., 516, 1874; *Same v. Same*, 40 ib., 128, 1875. Reversed, and the defendant held at least liable as a warehouseman under the facts of the case. *Same v. Same*, 67 N. Y., 11. 1876.

41. — check. A carrier contracting, without limitation of responsibility, to carry the baggage of a passenger, and giving a check therefor to a given point beyond the terminus of the carrier's line, becomes liable for the carriage of such baggage in the same way and to the same extent as the carrier of goods, although the passenger whose baggage is thus checked may purchase and travel upon a coupon ticket. *Louisville and Nashville R. R. Co. v. Weaver*, 9 Lea (Tenn.), 38. 1882.

42. — When, therefore, the defendant, a common carrier, sold to the plaintiff tickets for herself and family for transportation by railroad from Memphis, Tenn., to San Francisco, Cal., each ticket having separate coupons for each carrier over whose road the route lay, and gave plaintiff a check for the carriage of her baggage to Omaha, and a loss of baggage occurred before reaching Omaha but after leaving defendant's own road, the defendant was held liable for the loss. *Ib.*

43. — The plaintiff at San Francisco applied to the railroad companies whose roads lay beyond Omaha for compensation for the loss, and those companies, while denying all liability, made a deduction upon the plaintiff's return tickets over their roads, in consideration of her release of all claim against them for the alleged loss; it was held that neither the payment nor the release affected the liability of the defendant. *Ib.*

44. — Suit was instituted against the Texas and Pacific Ry Co., for baggage lost

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at some unknown point between Memphis and Dallas, through checks for said baggage being delivered to plaintiff at Memphis by an agent of the Memphis and Little Rock Railroad, over three uniting lines, including the Texas and Pacific Railway. *Held*, that the check delivered at Memphis was the check of appellant railroad, as well as of the other companies; that the contract was appellant's contract, and it was bound by it. *Texas and Pacific R. R. Co. v. Fort*, 9 Amer. & Eng. R. R. Cases (Tex.), 392. 1882.

45. — A passenger who purchased a through ticket from Savannah, Ga., to Jacksonville, Fla., of the agent of the Atlantic and Gulf Railroad, and had his trunk checked accordingly, could recover of such company for its loss, although there were three connecting roads between the two places mentioned, and that the company had safely delivered the trunk to the connecting road. *Hawley v. Screven*, 62 Ga., 347. 1879.

46. — When a through line for transportation of passengers and freight is established by the owners of different railroads, the first carrier who receives fare for the whole route, and gives a through check for baggage, becomes liable for any loss or injury, not only on its own line, but on any other road in the connecting line throughout the entire distance. *Croft v. Baltimore and Ohio R. R. Co.*, 1 MacArthur (Dist. of Columbia), 492. 1874.

47. — Where a passenger with a through ticket over a connecting line of railways checks his baggage at the starting point through to his destination, and upon arriving it is damaged or has been broken open and robbed, he may sue the company which issued the check, or he may sue the company delivering the baggage in bad order. *Wolff v. Central R. R. Co.*, 68 Ga., 653, 1882; 6 Amer. & Eng. R. R. Cases, 441.

48. — *contract limiting liability.* The plaintiff took a ticket of the South Eastern Railway Company to be conveyed as a passenger from London to Paris, on which was printed, "The South Eastern Railway Company is not responsible for loss or detention of or injury to luggage of the passenger traveling by this through ticket, except while the passenger is traveling by the South Eastern Railway Company's trains or

boats. . . ." The plaintiff did not sign this memorandum. The plaintiff's portmanteau was lost between Calais and Paris on a French railway; *held*, that the Railway and Canal Traffic Act only extends to the traffic on a company's own lines, and sec. 7 does not apply to a contract exempting a company from liability for a loss on a railway not belonging to or worked by the company; and that the company was therefore protected by the condition on the ticket. *Zunz v. South Eastern Railway Co.*, Law Reports, 4 Queen's Bench Cases, 539. 1869.

49. — *evidence.* Where baggage has been delivered to a company to be transferred over connecting lines, it is incumbent upon the company to show its delivery to one of the connecting lines. In case of loss the tracing of the property into the possession of one carrier is sufficient to render it liable, in the absence of proof on its part of delivery to the next carrier. *Kent v. Midland Railway Co.*, Law Reports, 10 Queen's Bench Cases, 1, 1877; 11 Eng. (Moak), 128.

50. — Evidence that, when the baggage was delivered by the last carrier, the package was broken and a part of its contents missing, is *prima facie* evidence that the loss occurred through the negligence or fraud of the last carrier; and casts upon such carrier the burden of proving that the loss happened before the goods reached him. *Lin v. Terre Haute and Indianapolis R. R. Co.*, 10 Mo. App., 125. 1881.

51. — To protect himself, the last carrier must show that he delivered the trunk to the passenger in the same condition in which he received it. *Ib.*

52. — Where one railroad company sells to a traveler a through ticket and check for his trunk over its own and connecting roads, and, in pursuance of the contract thus made, the passenger is transported to the destination called for by the ticket and the check, and his trunk is delivered to him by the last carrier, the lock broken and a portion of the contents stolen, these facts entitle the passenger to recover the damage from the last carrier. *Ib.*

53. — Such a contract is a contract with each several carrier, who, under it, undertakes the transportation of the passenger and his baggage. *Ib.*

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54. — sent by wrong line. Plaintiff bought a ticket of the G. T. R'y Co., at Montreal, from that city by railroad to Troy or Albany, thence by steamboat on the Hudson river to New York. His baggage was checked to go by the same route, but the railroad agent at Troy delivered it to defendant, who received and transported it over its road to New York. It was placed in its baggage room. Three days thereafter, and as soon as plaintiff had reason to believe that his baggage had been carried by defendant, he demanded it; a portmanteau could not be found. In an action to recover for the loss, *held*, that the delivery of the baggage to defendant was the wrongful act of the railroad agent at Troy, who was not plaintiff's agent in any sense that would enable him to bind plaintiff by his acts; that defendant at least incurred the liability of a warehouseman, and was bound to exercise ordinary care, to account for the baggage in some way when demand was made, and to show that it had disappeared without its fault. *Fairfax v. New York Central and Hudson River R. R. Co.*, 73 N. Y., 167. 1878.

55. — statute. Section 2084 of the Code, providing that the last of a connecting line of railways over which goods are shipped, which receives them as in good order, is liable to the consignee, does not apply to baggage of a passenger checked and accompanying him on his passage. *Wolff v. Central R. R. Co.*, 68 Ga., 653, 1882; 6 Amer. & Eng. R. R. Cases, 441.

56. Continuous passage; tickets. Where a passenger forfeits his right to passage by stopping over in violation of the conditions of his ticket, but the company, instead of insisting upon the forfeiture, carries him without objection, and his baggage is lost, the company is bound for reasonable care. *Smith v. Grand Trunk R'y Co.*, 35 Upper Canada, Queen's Bench, 547. 1874.

57. Contract limiting liability. Words on a ticket or baggage check limiting the liability of the carrier to a specific amount for loss of baggage are not binding on a passenger, unless, with knowledge of such limitation, he agrees to it. *Baltimore and Ohio R. R. Co. v. Campbell*, 36 Ohio St., 647, 1881; 3 Amer. & Eng. R. R. Cases, 246.

58. — Defendant's agent came into a car in which plaintiff was traveling, and called for baggage; he received the check for plaintiff's trunk with directions as to the delivery, and marked on a blank receipt the date, number of check, and place of delivery, which he handed to plaintiff without anything being said as to its contents. The car was dimly lighted, so that plaintiff, where he was seated, could not have read the receipt; without reading it he put it into his pocket. The receipt was marked upon the margin "domestic bill of lading," and purported to be a contract relieving defendant from, or limiting its liability in certain specified cases, and among others limiting its liability, save in case of a special contract, to \$100. The court refused to charge, as matter of law, that the delivery of the receipt created a contract for the carriage of the trunk under its terms, and limited defendant's liability to the amount specified, but submitted the question to the jury. *Held*, proper; that defendant, in order to relieve itself of full liability, was bound to establish a contract upon the special terms contained in the receipt; that no such contract arose, as matter of law, from the acceptance of the receipt under the circumstances. *Madan v. Sherard*, 73 N. Y., 329. 1878.

59. — The defendants, carriers in India, received the plaintiff's goods under a contract, by which the baggage of certain troops (including the plaintiff's goods) was to remain in charge of a guard provided by the troops, "the company accepting no responsibility." *Held*, that the stipulation did not exempt the defendants from liability for a loss arising wholly from their own negligence. *Martin v. Great Indian Peninsular Railway Co.*, Law Reports, 3 Exchequer Cases, 9. 1867.

60. — by-law limiting liability. By s. 169, 5 and 6 Will. IV., c. 107, every passenger traveling upon the Great Western Railway may take with him without extra charge his articles of clothing, not exceeding certain weight and dimensions; and the company is not to be liable for the safe carriage of any article carried with a passenger, except his articles of clothing, not exceeding the given weight and dimensions.

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By s. 144, the company is authorized to make by-laws for the government of its affairs, for regulating the proceedings of and remunerating the directors, and for the management of the undertaking and of its officers; provided that the by-laws are not repugnant to the laws of England or the directions in the act. *Held*, that a by-law made under s. 144, and declaring that the company would not be responsible for the care of a passenger's luggage, unless booked and the carriage paid for, was bad. *Williams v. Great Western Railway Co.*, 28 Eng. Law & Equity, 439. 1854.

61. — The plaintiff, a passenger on the defendant's railway to a certain station thereon, having taken and paid for a second-class ticket, delivered her luggage to a porter of the defendant, telling him to what station she was going, and, after seeing him label it, took her seat in the train. On her arrival at her destination one of her boxes was missing. By the defendant's act, 5 and 6 Will. 4, c. 107, s. 144, it was empowered to make by-laws which were to be painted on a board and hung up at the stations, and were to be binding on all parties. One of the by-laws was as follows: "Every first-class passenger will be allowed one hundred and twelve pounds, and every second-class passenger fifty-six pounds of luggage, free of charge, but the company will not be responsible for the care of the same unless booked and paid for accordingly." It did not appear that the plaintiff knew of the by-law, or that it had been affixed at the stations, as required by the act. It was admitted by the defendant that the box had been stolen. The plaintiff having sued the defendant in a county court for the loss, the judge, on the above facts, held the defendant liable, and gave the plaintiff a verdict for the full value of the box. *Held*, on appeal, that the judgment must be affirmed, as the *prima facie* liability of the defendant was not conclusively rebutted, and there was, therefore, evidence to support the finding. *Great Western Railway Co. v. Goodman*, 11 Eng. Law & Equity, 546; 16 Jurist, 862; 21 Law Jur. Rep., N. S., C. P., 197. 1852.

62. — **notice limiting liability; deposit.** On the deposit of articles at the cloak-room at a railway station, a charge is made of 2d.

for each, and the depositor receives a ticket, on the face of which is printed the times of opening and closing the cloak-room, and the words "See back;" and on the back there is a notice that "the company will not be responsible for any package exceeding the value of 10l." A placard, upon which is printed in legible characters the same condition, is also hung up in a conspicuous place in the cloak-room. The plaintiff deposited his bag (of the value of 24l. 12s.) in the defendant's cloak-room, paid 2d. and received a ticket. The bag was lost or stolen. In an action to recover its value, the plaintiff swore that, on receiving the ticket, he placed it in his pocket without reading it, imagining it to be only a receipt for the money paid for the deposit of the article; that he did not see the condition at the back of the ticket; nor did he see the notice hung up in the cloak-room. The judge left two questions to the jury: 1. Did the plaintiff read or was he aware of the special condition upon which the article was deposited? 2. Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or make himself aware of the condition? The jury answered both questions in the negative, and a verdict was entered for the plaintiff. *Held*, that, upon these facts and findings, the company was responsible for the loss of the bag. Mere notice, not brought home to and assented to by the depositor, is not enough in such a case to relieve the company from liability. *Parker v. South Eastern R'y Co.*, Law Reports, 1 Common Pleas Division, 618. 1876.

63. — The plaintiff having been a passenger by the defendant's railway, her luggage (consisting of two packages) was deposited with a clerk of the defendant at its cloak-room; and the person depositing it received a ticket which was headed "Luggage and cloak office," and on the face of which was printed in type easily legible, "left, subject to the conditions on the other side. This ticket to be given up when the luggage is taken away." And on the other side, after a statement of the "sums to be paid for warehousing passengers' luggage," there was a notice that "the company will not be responsible for loss of, or injury to,

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any package beyond the value of 5*l.*, unless at the time of the delivery of such package the true value and nature thereof . . . shall have been declared, . . . and a sum at the rate of 1*d.* per pound sterling . . . be paid, . . . in addition to the before mentioned ordinary warehouse charges. The company will not be responsible for loss of, or injury to, articles except left in the cloak-room." The value of each package was more than 5*l.*, but no declaration of value or additional payment was made. The person who deposited the luggage knew that there were conditions on the back of the ticket, but did not know what those conditions were. The luggage was not put by the defendant's servants into the cloak-room, but was left in a vestibule, without any other protection, and was stolen owing to this negligence of the defendant's employees. On these facts, the court having power to draw inferences, *held*, that the luggage must be taken to have been deposited subject to the conditions on the back of the ticket. *Harris v. Great Western R'y Co.*, Law Reports, 1 Queen's Bench Division, 515; 17 Eng. (Moak), 156. 1876.

64. — statute. Luggage carried for a passenger without extra charge is within sec. 7 of the Railway and Canal Traffic Act, 1854, which enacts that a railway company "shall be liable for the loss of, or injury to, any horse, cattle or other animals, or to any articles, goods or things, in the receiving, forwarding or delivering thereof, occasioned by the neglect of such company, or its servants, notwithstanding any notice or condition made and given by such company in any wise limiting such liability;" and the provisions of that section are extended, by sec. 16 of the Regulation of Railways Act, 1868, to the traffic on board steamers belonging to, or used by, railway companies authorized to have and use them. Plaintiff was an English subject, and defendant was an English railway company subject to the English statutes as to railways, and authorized to have and work steamers between Boulogne and Folkestone. Plaintiff took a ticket at an office of the defendant in Boulogne for a through journey from Boulogne to London, by defendant's steamer to Folkestone, and thence by its railway to London.

On the ticket was: "Each passenger is allowed one hundred and twenty pounds of luggage free of charge." "The company is in no case responsible for luggage of the passenger traveling by this through ticket of greater value than 6*l.*" Plaintiff had a box with her, which was given in charge of defendant's servants, and in transferring it from the boat to the train it fell into the sea, owing to the negligence of defendant's servants, and the contents were damaged to the amount of 7*l.* *Held*, affirming the judgment of the exchequer division, that, assuming the contract to be governed by English law, the condition on the ticket was void by reason of the above sections, and defendant was liable for the loss. *Cohen v. South Eastern R'y Co.*, Law Reports, 2 Exchequer Division, 253, 1877; 20 Eng. (Moak), 525.

65. — A condition made by a railway company, limiting its liability in respect of passengers' luggage, is not binding, unless such condition is reasonable, and is contained in a contract signed by the passenger. *Cohen v. South Eastern R'y Co.*, Law Reports, 1 Exchequer Division, 217. 1876.

66. — statute; contract to be performed in several states. In a suit to recover for the loss of baggage delivered to defendant at Scranton, Pa., to be transported to and delivered in New York city, *held*, that the contract was not controlled by a statute of Pennsylvania limiting and defining the liability of railway companies for baggage. The rights of the parties are to be determined by the laws of New York, where the delivery was to be made. *Curtis v. Delaware, Lackawanna and Western R. R. Co.*, 74 N. Y., 116. 1878.

67. — value. It is competent for general carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable, and not inconsistent with a statute or their duties to the public, to protect themselves against liability as insurers of his baggage which exceeds a fixed amount in value, except upon additional compensation proportioned to the risk. *Railroad Co. v. Fraloff*, 100 U. S., 24, 1879; 21 Amer. R'y Rep., 428.

68. — They may be discharged from liability for its full value, if he, by any device

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or artifice, evades inquiry as to such value, whereby a responsibility is imposed upon them beyond what they are bound to assume in consideration of the ordinary fare charged for the transportation of the person. *Ib.*

69. Conversion. Plaintiff went to defendant's depot in Philadelphia with nine trunks, to take passage with his family to Chicago. He applied to the baggage-master for baggage checks, but was informed that he must first procure tickets; while he was absent for that purpose the baggage-master caused his baggage to be weighed, checked and put into the baggage car. Upon the return of plaintiff with his tickets, he was informed that, under the rules of the company, the tickets were not sufficient to transfer all his baggage, and for the excess a charge was made, which he refused to pay. He demanded his checks; these were refused unless the extra charge was paid; he then demanded his trunks, but the baggage-master refused to deliver them, for the reason that they were covered with other baggage and could not be reached before the time for starting the train. Plaintiff declined to go on the train, his baggage went through to Chicago, and the night after its arrival the depot was struck and set on fire by lightning, and it, with the baggage, except two trunks, and some loose articles, was destroyed. The trial court found that there was no reasonable excuse for the refusal to return the baggage, and that the facts authorized a finding of a conversion at Philadelphia. *McCormick v. Pennsylvania Central R. R. Co.*, 80 N. Y., 353. 1880.

70. — The plaintiff having taken the train the same evening under an arrangement with the president of the company by which he was to receive his baggage without checks, *held*, that this was a resumption of control of the baggage by him, which relieved the company from all claim except for nominal damages. *Ib.*

71. Damages. Hotel bills incurred in searching for lost baggage are not proper to be allowed as damages. *Morrison v. European and North American Railway Co.*, 2 Pugsley (New Brunswick), 295. 1874.

72. Delay in delivery. Plaintiff left his baggage in defendant's station, receiving a

deposit ticket therefor. On Sunday evening he came for his baggage and the office was shut, and he was thereby delayed from taking another train out of the city. The defendant was held liable for the damages. *Stallard v. Great Western Railway Co.*, 2 Best & Smith, 419; 110 E. C. L., 419. 1862.

73. Delivery to carrier; custom. G. advised defendant's agents that she intended to take the train the following morning. She sent her baggage, properly marked, to the station the evening before her departure, as was the custom with passengers intending to take the morning train, and it was locked up in defendant's baggage room. *Held*, that the facts constituted an acceptance of the baggage by the carrier. *Green v. Milwaukee and St. Paul R'y Co.*, 41 Ia., 410. 1875.

74. — Whether or not the custom had been established that the delivery of baggage at the station without notice to the carrier is regarded by the latter as a delivery to its servants, binding upon itself, is a question of fact to be submitted to the jury. *Ib.*

75. — To render a carrier liable for baggage, the owner need not have placed himself in such situation that he cannot withdraw the baggage. The question of liability is determined by the *intention* of the owner at the time he places his baggage in the hands of the carrier's servants. *Ib.*

76. — *left without notice to carrier.* With the assent of a common carrier, the baggage of travelers may be left at a railway station without notice to it or its agent; and such assent may be implied from the course of business or custom of the carrier. *Green v. Milwaukee and St. Paul R. R. Co.*, 38 Ia., 100. 1874.

77. Delivery to wrong person. The delivery by a carrier of personal baggage to the wrong person, although by mistake, through imposition or upon a forged order, will not excuse it; the carrier will remain responsible for the goods lost. *Waldron v. Chicago and North Western R. R. Co.*, 1 Dakota, 351. 1876.

78. — Plaintiff was a passenger upon defendant's line from R. to P., having the usual check for her baggage. On arrival at P. she informed the station baggage-master that she desired to leave her trunk for a few

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days. The baggage-master replied that he was not allowed to keep baggage with the checks on; that if she gave up her check the baggage would be perfectly safe. This she did and the trunk was left. It was subsequently delivered to one falsely claiming it. In an action to recover its value, *held*, that the declaration of the agent was, in substance, a notification to plaintiff that he was without power to continue in force the obligation of the company in respect to the baggage indicated by the check, and the surrender of the check was, in effect, an admission of the performance of that obligation. That, in the absence of evidence tending to show that the agent had power thereafter to bind it by a new agreement, or that the company had acquiesced in the exercise by him of such power, and it appearing that it was in violation of the regulations of the company, defendant could not be held liable. *Mattison v. New York Central R. R. Co.*, 57 N. Y., 552, 1874; 7 Amer. R'y Rep., 98.

79. Deposit of baggage. Baggage arrived at ten o'clock A. M. and was not called for until next morning, when it was destroyed by fire. *Held*, that the company was not liable as a common carrier. *Hogan v. Grand Trunk R'y Co.*, 2 Quebec Law Reports, 142. 1876.

80. — If the passenger does not call for his baggage on arrival, the carrier cannot abandon it; but his responsibility as carrier ceases after a reasonable time has elapsed to enable the owner to claim it, and a modified liability, like that of a warehouseman, supervenes. *Matteson v. New York Central and Hudson River R. R. Co.*, 76 N. Y., 381. 1879.

81. — The non-delivery of property on demand raises a presumption of negligence, which the warehouseman is bound to remove by proof showing that sufficient ordinary care has been bestowed by him upon the property, and to establish such care the proof should show affirmatively that the loss, however it may have occurred, was not caused by want of proper care and diligence on his part. If the proof comes fully up to the requirement, the question of negligence becomes a question of law, and may be determined as such. *Fairfax v. New York Central and Hudson River R. R. Co.*, 43 N. Y. Superior Ct., 18. 1877.

82. — But if, in such case, the fair and legitimate inference from the evidence is favorable to plaintiff's cause of action, or they present a case where reasonable minds might differ as to the inference to be drawn from the evidence, the question is one of fact, and must be determined by the jury. *Ib.*

83. — **delivery to wrong person.** In an action to recover for loss of baggage, plaintiff's evidence was to the effect that she, with her sister, were passengers on defendant's railway. Upon arrival at her destination the checks for their baggage were delivered to the baggage-master for the purpose of getting a valise. They informed him that they desired to leave their trunks there for a week or two; this he advised them they could do, "by giving him the checks," and he assured them that the trunks would be "just as safe without the checks as with them." The checks were left with him, and when plaintiff called for her trunk it could not be found, it having been delivered by the baggage-master to a stranger. The baggage-master was prohibited by defendant from thus keeping baggage. *Held*, that it was a question for the jury whether there was a delivery of the trunk by the defendant to the plaintiff, and a termination of its responsibility. *Matteson v. New York Central and Hudson River R. R. Co.*, 76 N. Y., 381. 1879.

84. — **left in store with freight agent for subsequent shipment.** The plaintiff left his trunks with defendant's freight agent for storage over night, intending the next day to take them to the passenger depot and have them checked for transportation; in an action to recover damages for their loss before the owner returned to take them from the possession of the freight agent, it was *held* that the defendant never assumed the responsibility of a common carrier, and, therefore, was not chargeable with negligence in the transportation of the property. That as a warehouseman, it was not liable under the facts given, because, being a gratuitous bailee, nothing less than gross negligence would subject it to liability. *Van Gilder v. Chicago and Northwestern R'y Co.*, 44 Ia., 548. 1876.

85. — **limitation of liability.** On the deposit of articles at the cloak-room at a rail-

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way station a charge is made of 2*d.* for each, and the depositor receives a ticket, on the face of which are printed the times of opening and closing the cloak-room and the words "See back," and on the back there is a notice that the company will not be responsible for any packages exceeding 10*l.* A placard, in which is printed in legible characters the same condition, is also hung up in the cloak-room. The plaintiff deposited his bag, of value exceeding 10*l.*, in the defendant's cloak-room, paid 2*d.*, and received a ticket. The bag was lost or stolen. In an action to recover its value the plaintiff swore that he took the ticket without reading it, imagining it to be only a receipt for the money paid for the deposit of the article, or as evidence that the company had received the article; that he did not read the condition at the back of the ticket, nor did he see the notice hung up in the cloak-room. The judge left two questions to the jury: 1. Did the plaintiff read or was he aware of the special condition upon which the article was deposited? 2. Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read and make himself aware of the condition? The jury answered both the questions in the negative, and judgment was directed for the plaintiff. *Held*, by Mellish and Baggalay, L. JJ., that there ought to be a new trial, on the ground that there had been a misdirection by the judge, inasmuch as the plaintiff could be under no obligation to read the condition, and that the second question left to the jury ought to have been whether the company did that which was reasonably sufficient to give the plaintiff notice of the condition. *Parker v. South Eastern Railway Co.*, Law Reports, 2 Common Pleas Division, 416, 1877; 21 Eng. (Moak), 349.

86. — The plaintiff, a passenger by the S. E. Railway, on arriving at the terminus at London Bridge, deposited in the cloak-room a bag containing wearing apparel and jewelry to a value considerably exceeding 10*l.*, receiving as a voucher a ticket, on the back of which was printed the following notice: "The company will not be responsible for articles left by passengers at the station, unless the same be duly registered, for which a

charge of 2*d.* per article will be made, and a ticket given in exchange; and no article will be given up without the production of the ticket, or satisfactory evidence of the ownership being adduced. A charge of 1*d.*, per diem, in addition, will be made on all articles left in the cloak-room for a longer period than twenty-four hours. The company will not be responsible for any package exceeding the value of 10*l.*" A similar notice printed in large characters was posted up in the office, but the plaintiff swore that she did not see it. She was not asked whether or not she had seen the notice on the back of the ticket; but she produced it when she applied for the bag. Through the negligence of the company's servants part of the contents of the bag were abstracted whilst it was in their custody. *Held*, that the company, having received the deposit, not as a carrier, but as ordinary bailees, upon the terms contained in the printed notice,—which the plaintiff, having the means of ascertaining them, must be taken to have consented to be bound by,—was not responsible for the loss; and that the case was neither within the Carriers' Act (11 G. 4 and 1 W. 4, c. 68), nor the Railway Traffic Act, 17 and 18 Vict., c. 31. *Van Toll v. South Eastern Railway Co.*, 12 Common Bench, N. S., 75; 104 E. C. L., 75. 1862.

87. — Where baggage was left by a passenger to be deposited in the cloak-room, but by neglect was left outside on the platform, *held*, that a limitation in valuation contained in the deposit ticket was no defense. To make the limitation available the baggage should have been "deposited in the cloak-room." *Hendon v. Caledonian R'y Co.*, 7 Scotch Session Cases, 4th series, 966. 1880.

88. — loss by fire. The duty of a railroad company is to carry freight to the place directed, and to deliver it to the party entitled, if there ready to receive it, and if not, to store it for him. The liability of the company as a common carrier ceases when the freight is deposited in a warehouse; and is not extended by the act of 1870, ch. 17 (Code, § 1993), requiring the company to give a prescribed notice to the consignee. *Butler v. East Tenn. and Va. R. R. Co.*, 8 Lea (Tenn.), 32, 1881; 9 Amer. & Eng. R. R. Cases, 249.

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89. — lost while carrier is holding baggage under lien. Where a railroad company retains the trunk of a passenger under its lien for her fare, it is liable for any articles that may be taken therefrom whilst in its possession. *Southwestern R. R. Co. v. Bentley*, 51 Ga., 311, 1874; 6 Amer. R'y Rep., 354.

90. Evidence; declarations of agent. A passenger, on arrival at the place of destination, presented to the agent in charge of the baggage-room a check for his baggage and demanded the same, which baggage he had delivered to the carrier when he took passage on the train. The agent, being unable to find the baggage, took the number of the check and requested the passenger to call again. On the same evening the passenger returned, but the agent informed him that he had made further search and the baggage could not be found. *Held*, that such acts and declarations of the agent were competent evidence for the passenger in his action against the carrier for loss of such baggage. *Baltimore and Ohio R. R. Co. v. Campbell*, 36 Ohio St., 647, 1881; 3 Amer. & Eng. R. R. Cases, 246.

91. Excursion trains. The thirty-ninth section of the North Eastern Railway Company's Act, 17 and 18 Vict., c. CCXI, enacts that "every passenger traveling upon the said railways may take with him his ordinary luggage, not exceeding one hundred and fifty pounds in weight for first-class passengers, and one hundred pounds in weight for second and third-class passengers, without any extra charge being made for the carriage thereof." *Held*, this does not preclude the company from making special arrangements for the exclusion of luggage by cheap excursion trains. *Rumsey v. North Eastern R'y Co.*, 14 Common Bench, N. S., 641; 108 E. C. L., 640. 1863.

92. — contract limiting liability. A railway company issued excursion tickets at reduced prices, "subject to the condition contained in the company's time and excursion bills." The bills contained this condition: "Luggage under sixty pounds free, at passenger's own risk." *Held*, that a purchaser of one of these tickets, who had the means of knowing, but did not in fact know, of the condition, could not recover for the

loss during the transit of his personal luggage (under sixty pounds), though properly addressed, and although he was not allowed to retain it under his personal control. *Stewart v. London and North Western R'y Co.*, 3 Hurlstone & Coltman (Exchequer), 135. 1864.

93. Form of action for loss of baggage. An action against a common carrier for loss of baggage is not founded upon contract, but upon the carrier's breach of a legal duty. *Catlin v. Adirondack Co.*, 20 Hun (N. Y.), 19. 1880.

94. Free baggage. An action for the loss of baggage cannot be maintained in *assumpsit* against the carrier, if the baggage was carried free. But an action of tort will lie for negligent loss. A railway company transporting baggage free is held to no greater diligence than any other gratuitous bailee. *Flint and Pere Marquette R'y Co. v. Weir*, 37 Mich., 111. 1877.

95. Husband and wife. Baggage consisted of articles which had been in use by plaintiff, his wife and child. Plaintiff was not a passenger by the train which took the baggage, having taken another train. His wife and child, however, were on the train. *Held*, that it was not necessary to a recovery that plaintiff should have been upon the train; that he was sufficiently represented by his wife. *Curtis v. Delaware, Lackawanna and Western R. R. Co.*, 74 N. Y., 116. 1878.

96. — The title to the personal effects of a wife, which have been paid for and furnished by the husband, is, in the absence of evidence of a gift thereof to the wife, in him, and for an injury to it he is the proper party to bring an action. *Ib.*

97. — When a married woman brings an action for the loss of her property in transit, and it does not appear upon the face of the declaration that she is a married woman, the question of her right to maintain the action can only be raised by plea, and not by motion to exclude the evidence. *Quarrier v. Baltimore and Ohio R. R. Co.*, 20 W. Va., 424. 1882.

98. — Wearing apparel furnished by a husband to his wife, or purchased by the wife, with the consent of her husband, with money given her by him from a fund

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formed by their joint earnings, remains the property of the husband, and the wife cannot recover against a carrier for the loss thereof. *Hawkins v. Providence and Worcester R. R. Co.*, 119 Mass., 596. 1876.

99. Law of place of performance of contract. B. bought a ticket from Philadelphia to Atlantic City, N. J., from the C. & A. R. R. Co., a New Jersey corporation operating a railway between those two points, and delivered his trunk to the company at Philadelphia to be carried to Atlantic City; the trunk was lost by the company, but it did not appear where the loss occurred. *Held*, in an action by B. to recover the value of the trunk and its contents, that as the contract was to be performed in New Jersey by a New Jersey company, the act of April 11, 1867, did not apply. *Held*, that the negligence of which the defendant was guilty was in the exercise of its franchise as a New Jersey company, and that its liability was to be determined by the law of that state. *Held*, also, that it made no difference that the undertaking was, in part, to carry the baggage across the Delaware river, as the inhabitants of both states have equal rights of navigation and passage on that stream. *Brown v. Camden and Atlantic R. R. Co.*, 83 Pa. St., 316, 1877; 15 Am. R'y Rep., 421.

100. Neglect of passenger. A party about to travel by a railway having obtained a ticket, his luggage was taken possession of by a railway porter, who was informed of the destination, in order to be placed on the train. There was no address upon the luggage, and, on a change of carriages which took place in the course of the journey, the passenger did not inquire for his luggage. The luggage having been lost, *held*, that by receiving it, the railway company undertook to convey it to its destination; that having failed to do so, it was liable for its value; and that its liability was not affected by the passenger's carelessness in not having an address on the luggage, and not inquiring for it at the change of carriages. *Campbell v. Caledonian R'y Co.*, 14 Scotch Session Cases, 2d series, 806. 1852.

101. Passenger stopping off. The fact that a passenger is taken sick, and is given a lay-over ticket, so that he does not reach his destination as soon as his baggage, will not

have the effect of extending the liability of the carrier as insurer beyond what it would otherwise be, and prevent the liability of warehouseman from attaching. Where a passenger for Chicago, with baggage, being unwell, obtained a lay-over ticket for his own accommodation, and his baggage arrived on the 6th or 7th of October, 1871, and was stored in the company's warehouse, and the passenger did not arrive in Chicago until the 11th of October, and the baggage, in the mean time, was destroyed by fire, without fault on the part of the carrier, it was *held* that the carrier was not liable for the loss. *Chicago, Rock Island and Pacific R. R. Co. v. Boyce*, 73 Ill., 510. 1874.

102. — A passenger by the M. Railway from Gloucester to Bristol, told a porter there that he wished to proceed by the B. and E. Railway (whose station closely adjoined that of the M. Railway) to Torquay. The porter thereupon placed A.'s portmanteau on a truck with other luggage, entered the B. and E. station with the truck, passed down an incline from the arrival platform, crossed the line of the railway, and ascended an incline to the departure platform of the B. and E. Railway. There was no evidence that the portmanteau was ever afterwards seen, and it never reached Torquay. In an action against the M. Railway Company for the loss, *held*, that there was no evidence of a breach of contract to deliver either to A., or at the departure platform of the B. and E. Railway. *Midland Railway Co. v. Bromley*, 17 Common Bench, 372; 84 E. C. L., 370; 33 Eng. Law & Equity, 235. 1856.

103. — The plaintiff brought with him into the carriage a carpet-bag containing a large sum of money, and kept it in his own possession until the arrival of the train at the London terminus. On alighting from the carriage with the bag in his hand, the plaintiff permitted a porter of the company to take it from him for the purpose of securing for him a cab. The porter, having found a cab (within the station), placed the carpet-bag on the footboard thereof, and then returned to the platform to get some other luggage belonging to the plaintiff, when the cab disappeared, and the carpet-bag and its contents were lost. *Held*, that this was a loss by the negligence of the com-

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pany, for which it was responsible in damages. *Butcher v. London and South Western Railway Co.*, 16 Common Bench, 13; 81 E. C. L., 12; 29 Eng. Law & Equity, 347. 1855.

104. — Where a railway company employs porters at its stations to convey passengers' luggage from the railway carriages to the carriages or hired vehicles of the passengers, the liability of the company as carriers continues until the porters have discharged their duty. *Richards v. London, Brighton and South Coast Railway Co.*, 7 Manning, Granger & Scott, 839; 62 E. C. L., 837. 1849.

105. Retained in passenger's custody. A railway company is not responsible for baggage not delivered to it, but retained by the passenger in his own custody. *Weeks v. New York, New Haven and Hartford R. R. Co.*, 9 Hun (N. Y.), 659. 1877.

106. — Under the ordinary contract of carriage a carrier of passengers enters into no duty as to articles of property of great value, forming no part of a passenger's ordinary baggage or personal equipment. *Weeks v. New York, New Haven and Hartford R. R. Co.*, 72 N. Y., 50. 1878.

107. — Where a passenger carries such articles upon his person, without notice to, or knowledge of, the carrier, and they are violently taken from him by robbers, in the absence of gross negligence or fraud, the carrier is not liable although negligent in the exercise of his duty of protecting his passengers from violence. *Id.*

108. — When a passenger's luggage is, at his request, placed by a railway company's servants in the carriage in which he is traveling, the company's contract to carry it safely is subject to an implied condition that the passenger takes ordinary care of it, and if his negligence causes its loss the company is not responsible. A passenger whose portmanteau had been placed at his request in the carriage with him, got out at an intermediate station on his journey, and having negligently failed to find the same carriage again, finished his journey in a different one; the portmanteau having been robbed during the latter part of the journey by persons in the carriage without any negligence of the railway company, *held*, that the railway company was not responsible for the loss. *Talley v. Great Western Rail-*

way Co., Law Reports, 6 Common Pleas Cases, 44. 1870.

109. — A railway company is not an insurer in respect of luggage placed at a passenger's request in the same compartment in which he intends to travel; and it will not be liable to compensate him if luggage so placed is lost or stolen, without any negligence on their part. *Bergheim v. Great Eastern Railway Co.*, Law Reports, 3 Common Pleas Division, 221; 30 Eng. (Moak), 117. 1878.

110. — A railway company is responsible for an article of personal baggage, kept by a passenger exclusively within his own control, which is lost through the negligence of the company or its servants, and without fault of the passenger. *Kinsley v. Lake Shore and Michigan Southern R. R. Co.*, 125 Mass., 54. 1878.

111. — A common carrier who enters into a contract with a passenger to convey him from A. to B., part of the journey to be performed by land in England, and the rest by sea, is entitled to the protection of the Carriers' Act, 11 G. 4 and 1 W. 4, c. 68. Where a person traveling with luggage by railway directs a porter of the railway company to place it on the seat of the carriage in which he is going to travel, and it is so placed accordingly, this fact alone is not a sufficient taking the luggage from under the control of the company to render it irresponsible for its loss. *Le Couteur v. London and South Western Railway Co.*, 6 Best & Smith, 961; 118 E. C. L., 959. 1865.

112. — A carrier who undertakes to carry a passenger with his luggage is bound to deliver it to him at the end of the journey, though it may be in the same carriage with him, and under his personal care; and if the usual course of delivery is at a particular spot, that is the place of delivery. The declaration stated that the defendant was a common carrier for hire on a railway from W. to the S. terminus; that the wife of the plaintiff became a passenger to be conveyed from W. to the S. terminus with her luggage; that the defendant did not use due or proper care about the carriage of her dressing case; that, through its carelessness, the same became lost to the plaintiff. It appeared that the plaintiff's wife became a

Liabilities and Duties of Carriers.

passenger from W. to the S. terminus; and, on taking her seat, her dressing case was placed in the carriage with her; and, on her arrival at the S. station, she was placed in a hackney-coach with her luggage by the company's servants. The dressing case was lost, but where it did not appear, though it was not seen in the hackney-coach, nor missed until the arrival of the lady at her destination. *Held*, that the allegation of negligence being unnecessary, the plaintiff was not bound to prove it; and that, on proof of the receipt and non-delivery, the plaintiff was entitled to a verdict; consequently, that the evidence supported the declaration. *Richards v. London and South Coast Railway Co.*, 6 Eng. R. R. & Canal Cases, 49. 1849.

113. — *Held*, affirming the judgment of the court below, that the mere fact of a passenger traveling in a railway carriage retaining possession of a bag or other small article of luggage did not, without some evidence of contract, express or implied, to that effect, relieve the company from its liability as a common carrier in case of loss. *Gamble v. Great Western R'y Co.*, 3 Grant, Error & Appeal, Upper Canada, 163. 1866.

114. — *left in car*. A passenger on leaving the car at a station for the purpose of getting his dinner, inquired of an employee in the car whether his baggage would be safe if left in the car, and was told to leave it there; that it would be safe. He left it in the car, and on his return found that the car had been detached from the train and his baggage removed to another car, where he could have a seat. On going to this car he found only part of his baggage. No notice of the change had previously been given to him. *Held*, that this evidence would warrant a finding that the missing baggage was lost through the negligence of the company. *Kinsley v. Lake Shore and Michigan Southern R. R. Co.*, 125 Mass., 54. 1878.

115. — A railway company is liable for the loss of baggage left in the train by a passenger who has temporarily left the train for refreshments. The fact that the company has adopted the system of checking baggage does not relieve it of this responsibility. *Gamble v. Great Western R'y Co.*, 24 Upper Canada, Queen's Bench, 407. 1865.

116. *Sale for freight charges*. Several trunks were carried by an express company, and after remaining in its office for a considerable time an order of court, under the act of December 14, 1863, was obtained to sell them for freight charges, etc. *Held*, that this order did not protect the company for selling the trunks unopened and locked and without exposing the contents. *Adams Express Co. v. Schlessinger*, 75 Pa. St., 246. 1874.

117. *Sleeping cars*. If a person who has made a contract with a railway company for his personal transportation, takes a seat in a sleeping car, and there loses an article of personal baggage, through the negligence of a person in charge of the car, and without fault on his part, it is no defense to an action against the company that the car was not owned by it, but by a third person, who, by an agreement with the defendant, provided conductors and servants, in the absence of evidence that the plaintiff had knowledge of these facts. (See SLEEPING CARS.) *Kinsley v. Lake Shore and Michigan Southern R. R. Co.*, 125 Mass., 54. 1878.

118. *Value*. A passenger is not bound to declare the value of his baggage unless required to do so; and in the absence of proof to the contrary this will be presumed, in an action in the courts of Pennsylvania, to be the rule of law in New Jersey. *Brown v. Camden and Atlantic R. R. Co.*, 83 Pa. St., 316; 15 Amer. R'y Rep., 421. 1877.

119. — *value not disclosed; statute*. To a count charging the defendant, a common carrier by railway from London to Southampton and thence to Jersey by steam-vessels, with the loss of a passenger's portmanteau, the defendant pleaded that the goods contained in the portmanteau were writings, silks, furs and lace, within the meaning of the Carriers' Act, 11 G. 4 and 1 W. 4, c. 68, and exceeded the value of 10*l.*, and were delivered by the plaintiff to the defendant, "then being a common carrier by land for hire, to be carried by it as a carrier by land, over its said railway;" that such delivery was made to the servants of the defendant; that, at the time of such delivery, the value and nature of the said goods were not disclosed by the plaintiff; and that the non-delivery of the said goods to the plaintiff in the count complained of was by reason of

Rerolling Old Iron — Assignee — Stock and Stockholders.

the same being lost by the defendant out of its possession while the same were upon the railway of the defendant, and in its possession and under its care as such carrier by land as aforesaid. *Held*, a good plea. *Piancini v. London and South Western R'y Co.*, 18 Common Bench, 226; 86 E. C. L., 225; 36 Eng. Law & Equity, 418. 1856.

120. When carrier's liability ceases. It is the duty of a railway company, with regard to the luggage of a passenger, which travels by the same train with him, but not under his control, when it has reached its destination to have it ready for delivery upon the platform at the usual place of delivery, until the owner, in the exercise of due diligence, can receive it; and the liability of the company does not cease until a reasonable time has been allowed to the owner to do so. *Patscheider v. Great Western Railway Co.*, Law Reports, 3 Exchequer Division, 153, 1878; 31 Eng. (Moak), 195.

BAILMENT.

1. Rerolling old iron. Where a rolling mill company contracted to reroll a lot of old iron, adding a small amount of new iron, the title to the new rails remains in the railway company as against the creditors of the rolling mill company. *Arnott v. Kansas Pacific R'y Co.*, 19 Kans., 95, 1877; 14 Amer. R'y Rep., 246.

BANKRUPTCY.

1. Assignee. Where the assets of a railway company are sold in bankruptcy, and the purchaser of its assets transfers them to another, who organizes a new corporation, and in the papers expressly recognizes the new company as assignee from him of the assets, this is a sufficient assignment to enable the new company to bring suits upon obligations given to the old company. *Wilcox v. Toledo and Ann Arbor R. R. Co.*, 48 Mich., 584, 1880; 21 Amer. R'y Rep., 161; 9 Amer. & Eng. R. R. Cases (Mich.), 518, 1880.

2. Attachment. An action commenced in a state court by attachment of the property of a corporation against which, pending the action, but not within four months after the

attachment was made, proceedings in bankruptcy have been instituted, will not be dismissed on motion of the assignees in bankruptcy of the corporation, for want of jurisdiction. *Munson v. Boston, Hartford and Erie R. R. Co.*, 120 Mass., 81. 1876.

3. Railways. The bankrupt law applies to railway companies. *California Pacific R. R. Co., In re*, 3 Sawyer (U. S. C. C.), 240, 1874; *Sucatt v. Boston, Hartford and Erie R. R. Co.*, 3 Clifford (U. S. C. C.), 339, 1871; *Adams v. Same*, 1 Holmes (U. S. D. C.), 80, 1870.

4. — A railway company is "a joint-stock company" within the meaning of the Irish Bankrupt and Insolvent Act, 1857, and as such is liable to be made a bankrupt. *Baginastown and Westford R'y Co., In re*, 15 Irish Ch., 491. 1864.

5. — An answer in an action against a railway company for damages, alleging that, subsequent to the commencement of the action, the plaintiff had been adjudged a bankrupt, and an assignee of his estate appointed, is insufficient on demurrer. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Nuzum*, 60 Ind., 533. 1878.

6. Stock and stockholders. Where a company has come to an end before the bankruptcy of a shareholder, the certificate discharges him from all liability to contribute to debts, and also from all liability to contribute to the expenses of winding up, and he ought not to be put on the list of contributories. *Parbury's Case*, 3 De Gex, Fisher & Jones, 80; 64 Eng. Ch., 79. 1861.

7. — pledge of shares of stock. A holder of shares in a railway company, which was subject to the provisions of the Companies Clauses Consolidation Act, 1845, was one of the secretaries of the company and a solicitor. He borrowed money of a client on a deposit of the certificates of the shares, but no further notice of the deposit was given to the company. On the solicitor becoming bankrupt, *held*, that the shares were in his order and disposition with the consent of the client. *Boulton, Ex parte, In re Sketchly*, 1 De Gex & Jones, 168; 58 Eng. Ch., 162. 1857.

8. — transfer; stock in possession of debtor. A person at the time of his being adjudged bankrupt was the owner of a share

Officer of Corporation — Bills of Exchange — Indorsement.

of stock in a corporation. Subsequently he fled from the jurisdiction, taking the certificate with him, and the assignee in bankruptcy had good reason to believe that it was at all times thereafter beyond the jurisdiction. He demanded a transfer of the same on the books of the corporation, and the issuance of a new certificate, tendering a sufficient bond of indemnity. The company refused to comply. *Held*, that the refusal was without justification, and the assignee had an appropriate remedy by bill in equity against the corporation. *Wilson v. Atlantic and St. Lawrence R. R. Co.*, 2 Federal Reporter, 459. 1880.

BILL OF DISCOVERY.

1. Officer of corporation. An officer of a corporation cannot be joined in an action against the corporation merely by way of discovery of matters not learned by him as an officer, though it appears that he has knowledge through other sources. *McComb v. Chicago, St. Louis and New Orleans R. R. Co.*, 19 Blatchford (U. S. C. C.), 69. 1881.

BILLS AND NOTES.

1. Bills of exchange. The knowledge of a director that bills indorsed for value to his company were bills which had been accepted for the accommodation of the drawer, the director not having been concerned on behalf of his company in the transaction in which the bills were indorsed to them, *held*, not to affect the company with notice of the fact of their being accommodation bills. *Peruvian Railways Co. v. Thames and Mersey Marine Insurance Co.*, Law Reports, 2 Chancery Appeal Cases, 617. 1887.

2. — acceptance by corporation. A bill of exchange, drawn upon a completely registered joint-stock company by its corporate name, was accepted as follows: "Accepted, J. B. and E. N., directors of the C. Company, appointed to accept this bill." J. B. and C. N. were, in fact, directors of the company. The corporate seal, having the name of the company inscribed, was also affixed

to the bill, and it was countersigned by the secretary. *Held*, that the bill of exchange was sufficiently expressed to be accepted by J. B. and E. N. on behalf of the company within 7 and 8 Vict., c. 110, s. 45. *Halford v. Cameron's Coalbrook Steam Coal Railway Co.*, 3 Eng. Law & Equity, 309; 20 Law Jour. Rep., N. S. (Q. B.), 160; 15 Jurist, 335. 1851.

3. — A bill of exchange drawn upon a general fund, and not accepted by the drawee, does not operate as an assignment of the fund, but is merely evidence to be considered with other circumstances in determining the intention of the parties. *First National Bank of Canton v. Dubuque Southwestern R'y Co.*, 52 Ia., 378. 1879.

4. — A railway company incorporated to make a railway under a special act of parliament, with which the general railway acts are incorporated, is not empowered, in absence of express authority, to accept bills of exchange. *Bateman v. Mid-Wales R'y Co.*, 1 Harrison & Rutherford, Eng. Com. Pl., 508. 1866.

5. Check of company; fraud. A., B. and C., three directors of a railway company, in fraud of the company, drew a check upon the company's banker in favor of one of their body. This check, though bearing the stamp usually impressed upon documents issued by the company, and countersigned by the secretary, did not upon the face of it purport to be drawn on behalf of the company, nor did the drawers describe themselves therein as directors. *Held*, that the company was not liable for the amount to a bona fide holder for value. *Serrell v. Derbyshire Railway Co.*, 9 Manning, Granger & Scott, 811; 67 E. C. L., 811. 1850.

6. Corporation; consideration. Where the execution of the note of a corporation is admitted, evidence in defense to show that it was given to satisfy a claim against another is not admissible to show want of consideration; it would only show that the consideration was another's liability, and defendant's right to assume the liability cannot be questioned if the execution has been admitted. *Chicago and Northeastern R. R. Co. v. Edson*, 41 Mich., 673. 1879.

7. Indorsement. Parties whose names are written on the back of a note before

Agreement — Insufficiency.

delivery are *prima facie* liable as makers. *Chaffe v. Memphis, Carthage and Northwestern R. R. Co.*, 64 Mo., 193. 1876.

8. Payment. The maker, if he acts in good faith, may make payment upon a note payable to bearer to the person in possession of the note. *Merritt v. N. Y. Central and Hudson River R. R. Co.*, 14 Hun (N. Y.), 324. 1878.

9. Guaranty. A guaranty of the notes of another railway company in the following form, "For value received, the Vermont and Canada Railroad Company hereby guaranty the payment of the within note, principal and interest, according to its tenor, and order the contents thereof to be paid to the bearer," held valid and binding. *Codman v. Vermont and Canada R. R. Co.*, 16 Blatchford (U. S. C. C.), 165. 1879; 17 ib., 1, 1879.

10. Sealed instruments. An instrument in writing, having in every respect the form of a promissory note, except that the corporate seal was impressed, whereby a railroad corporation promised to pay to the order of A. a certain sum of money, held to be a negotiable promissory note. *Bank v. Railroad Co.*, 5 So. Car., 156. 1873.

11. — The seal of a corporation is equally appropriate as a means of evidencing its assent to be bound by a simple contract as by a specialty. *Ib.*

12. — The attaching of a corporate seal to a promissory note destroys its negotiability. *Coe v. Cayuga Lake R. R. Co.*, 19 Blatchford (U. S. C. C.), 522. 1881.

13. Usage. A corporation may be bound by promissory notes issued by its treasurer in accordance with a usage, as well as by express authority. *Great Western Telegraph Co., In re*, 5 Bissell (U. S. C. C.), 363. 1873.

BILLS OF EXCEPTIONS.

1. Agreement. The statute imperatively requires the signature and seal of the judge to the bill of exceptions, before it shall become a part of the record, and the stipulation of parties that a certain document shall stand for a bill of exceptions cannot obviate this positive requirement. *Illinois Cen-*

tral R. R. Co. v. Gilchrist, 9 Bradwell (Ill.), 185. 1881.

2. Amendment. A bill of exceptions may be amended. *Bothe v. Dayton and Michigan R. R. Co.*, 10 Amer. & Eng. R. R. Cases, 396; 37 Ohio St., 147. 1882.

3. Insufficiency. Bill of exceptions held insufficient. *Ledoux v. Grand Trunk R'y Co.*, 61 N. Y., 613, 1874; *Kenyon v. New York Central and Hudson River R. R. Co.*, 76 N. Y., 607, 1879; *Dougherty v. North Wisconsin R'y Co.*, 86 Wis., 402, 1874; *Columbus and Indianapolis Central R'y Co. v. Griffin*, 45 Ind., 369, 1873; *Terre Haute and Indianapolis R. R. Co. v. Graham*, 46 Ind., 239, 1874; *Toledo, Wabash and Western R'y Co., v. Rogers*, 48 Ind., 427, 1874; *State ex rel. v. Peru and Indianapolis R. R. Co.*, 44 Ind., 350, 1873; *Baltimore, Ohio and Chicago R. R. Co. v. Barnum*, 79 Ind., 261, 1881; *Willich v. Indianapolis and St. Louis R. R. Co.*, 10 Bradwell (Ill.), 402, 1882; *Chicago, Pekin and Southwestern R. R. Co. v. Town of Marseilles*, 107 Ill., 313, 1883; *Indianapolis and St. Louis R. R. Co. v. Miller*, 61 Ill., 468, 1872; *St. Louis, Alton and Terre Haute R. R. Co. v. Dorsey*, 63 Ill., 326, 1873; *Burk v. Pittsburgh, Cincinnati and St. Louis R'y Co.*, 26 Ohio St., 643, 1875; *Oakland R'y Co. v. Thomas*, 1 Pennypacker (Pa.), 485, 1881; *Fox v. Railroad Co.*, 4 So. Car., 543, 1873; *Spencer v. Ga. R. R. and Banking Co.*, 55 Ga., 584, 1876; *Corley v. Central R. R. and Banking Co.*, 53 Ga., 553, 1874; *Atlanta and Charlotte Air Line R'y Co. v. Smith*, 66 Ga., 205, 1880; *Omaha and Northern Nebraska R. R. Co. v. Redick*, 14 Neb., 55, 1883; *St. Louis, Iron Mountain and Southern R'y Co. v. Murphy*, 38 Ark., 456, 1882; *Pittsburgh, Ft. Wayne and Chicago R'y Co. v. Probst*, 30 Ohio St., 104, 1876; 16 Amer. R'y Rep., 271; *Nye v. Old Colony R. R. Co.*, 124 Mass., 241, 1878; *Pennsylvania R. R. Co. v. Page*, 41 N. J. Law, 183, 1879.

4. — A bill of exceptions signed neither by the judge, nor in case of his refusal by the bystanders (Wagn. Stat., p. 1044, § 80), is a nullity, and will be disregarded by the supreme court. *Smith v. Hannibal and St. Joseph R. R. Co.*, 55 Mo., 601. 1874.

5. — Before an action in the district court to set aside a bill of exceptions or case made can be sustained, it must appear that the bill

Acceptance.

or case is untrue in fact, as well as that the signature of the judge was fraudulently obtained. *Kans. Pacific R. R. Co. v. Simpson*, 11 Kans., 494. 1873.

6. — A railway company, not being a party to a suit, cannot take exceptions in a suit in which another company is defendant. *Central R. R. and Banking Co. v. Craig*, 59 Ga., 185, 1877; *Southwestern R. R. Co. v. Craig*, 62 Ga., 361, 1879.

7. — Affidavits, depositions, and matters of parol evidence, though appearing in the transcript of the proceedings of a common law court, do not form part of the record unless they are made so by an agreed statement of facts, a bill of exceptions, a special verdict, or a demurrer to the evidence. *Baltimore and Potomac R. R. Co. v. Presbyterian Church*, 91 U. S., 127. 1875.

8. — Neither the charge of the court below, if no exception was taken thereto before the final submission of the case to the jury, nor the granting or the refusing of a new trial, is subject to a review in the supreme court. *Railway Co. v. Heck*, 102 U. S., 120. 1880.

9. Time. In the absence of an agreement of parties a judge has no authority to sign a bill of exceptions tendered after the expiration of the time limited by the order of the court. *Cranmer v. Kansas Pacific R'y Co.*, 4 Colo., 96. 1878.

10. — A bill of exceptions signed after the time allowed by the court is of no validity. *St. Louis, Iron Mountain and Southern R'y Co. v. Rapp*, 39 Ark., 558. 1882.

11. — A bill of exceptions may be settled at any time within thirty days after the judgment is rendered. *Berry v. San Francisco and North Pacific R. R. Co.*, 47 Cal., 643. 1874.

12. Settling bill. It is the duty of the judge, whether he certifies the bill in term time or vacation, to give opposing counsel full opportunity to examine the draft proposed by excepting counsel, and to suggest amendments, and then to decide between the parties according to the truth. *Vicksburg and Meridian R. R. Co. v. Ragsdale*, 51 Miss., 447. 1875.

13. Skeleton bill. A bill of exceptions that does not clearly identify the instruments to be incorporated therein is insuffi-

cient. *Atchison and Nebraska R. R. Co. v. Wagner*, 19 Kan., 335, 1877; 19 Amer. R'y Rep., 46.

14. — The sufficiency of bills of exceptions determined. *Wickes v. Baltimore and Ohio R. R. Co.*, 14 West Va., 157. 1878.

15. Sufficiency. Bill of exceptions held sufficient. *Boswell v. St. Louis, Iron Mountain and Southern R'y Co.*, 73 Mo., 470; 7 Amer. & Eng. R. R. Cases, 561. 1881.

BILL OF LADING.

See CARRIAGE OF MERCHANDISE; CONTRACT LIMITING LIABILITY.

1. Acceptance; condition. By the shipper accepting and acting upon a bill of lading, his knowledge of its stipulations will, in the absence of fraud or mistake, be conclusively presumed, and he will be bound thereby. He will not be permitted to show that he was ignorant of its contents. *Mulligan v. Illinois Central R'y Co.*, 36 Ia., 181. 1873.

2. — The acceptance of a bill of lading binds the shipper and precludes him from alleging ignorance of its terms. *Wertheimer v. Pennsylvania R. R. Co.*, 1 Federal Reporter, 232. 1880.

3. — The signature of the shipper is not necessary to establish his assent to the terms of a bill of lading. *Piedmont Manufacturing Co. v. Columbia and Greenville R. R. Co.*, 19 So. Car., 353. 1882.

4. — A carrier having agreed with a shipper as to the price of transportation, on the following day delivered bills of lading in ordinary form, specifying the rates agreed upon, and containing certain conditions. On the next day the goods were shipped. Held, that the bills of lading, in the absence of fraud, must be taken as the evidence, and the sole evidence, of the final agreement of the parties, and, by it their rights and liabilities must be regulated. *Germania Fire Ins. Co. v. Memphis and Charleston R. R. Co.*, 7 Hun (N. Y.), 233. 1876.

5. — To take a case out of this general rule, it must appear that, before the delivery of the bill of lading, the goods have been shipped, so that the shipper could not have reclaimed them had he objected to the contents of the bill of lading. *Germania Fire*

Action Upon — Assignment.

Ins. Co. v. Memphis and Charleston R. R. Co., 72 N. Y., 90. 1878.

6. Action upon; pleading. In a complaint upon a bill of lading given to the consignor, which contains a clause providing that the goods shall be delivered on "presentation of duplicate hereof," it is unnecessary to allege the reasons that influenced, and purposes that controlled, the shippers or the carrier in inserting the clause, and such averments do not add anything to the legal effect of the bill of lading. *Jeffersonville, etc., R. R. Co. v. Irvin*, 46 Ind., 180. 1874.

7. Assignment. The indorsee of a bill of lading for value may not only sue for the goods, but he may, in his own name, sue the carrier for non-delivery. Bills of lading are quasi negotiable to that extent, and particularly so under the Tennessee Code, § 1967. *Robinson v. Memphis and Charleston R. R. Co.*, 9 Federal Reporter, 129. 1881.

8. — collateral security. Railroad receipts for property in transit, when indorsed as security for drafts attached thereto, create a special property in the goods in the indorsee, to the extent at least of the advances made by him. *Newcomb v. Boston and Lowell R. R. Co.*, 115 Mass., 230, 1874; *Alderman v. Eastern R. R. Co.*, ib., 233, 1874.

9. — The transfer of a warehouse receipt or bill of lading, accompanied by a sale or pledge of the property specified in the receipt or bill, will have the same effect as the delivery of the property itself to the transferee. *Western Union R. R. Co. v. Wagner*, 65 Ill., 197. 1872.

10. — delivery. A delivery of an inland bill of lading, for a valuable consideration, is in law the delivery of the property itself; and it is not necessary for the person to whom it is delivered to take possession of the property upon its arrival, or to give notice to the carrier or warehouseman who has the actual possession of the goods. *Forbes v. Boston and Lowell R. R. Co.*, 133 Mass., 154, 1882; 9 Amer. & Eng. R. R. Cases, 76; *Jeffersonville, etc., R. R. Co. v. Irvin*, 46 Ind., 180. 1874.

11. — The delivery of a bill of lading for value, accompanied by drafts of the consignor upon the factor for the proceeds, vests title to the property in the person to whom the delivery is made, and he may

maintain a suit against the factor who has sold the goods and credited the proceeds to the debt of the consignor to him. *Trayer v. Mullally*, 12 Mo. App., 588. 1883.

12. — Goods shipped under bill of lading drawn to order of the shipper may be transferred by delivery of the bill of lading without indorsement. *Merchants' Bank of Canada v. Union R. R. and Transportation Co.*, 69 N. Y., 373, 1877, affirming *Same v. Same*, 8 Hun (N. Y.), 249, 1876; *Forbes v. Fitchburg R. R. Co.*, 9 Amer. & Eng. R. R. Cases (Mass.), 80, 1881.

13. — delivery of goods to wrong person; usage. If a usage exists for railway companies in a certain city to deliver to a consignee goods consigned to him by a bill of lading, not containing the words "or order," without requiring the production of the bill of lading, such a delivery is good as against a person to whom the consignee has previously delivered the bill of lading as security for an advance made by him to the consignee. *Forbes v. Boston and Lowell R. R. Co.*, 133 Mass., 154, 1882; 9 Amer. & Eng. R. R. Cases, 76.

14. — draft upon; liability of carrier. Defendant having received from a person representing himself to be a member of the firm of E. W. P. & Co. thirty barrels for carriage over its line, delivered to him a bill of lading, certifying that it had received of said firm, consigned to their order, "the following described packages in apparent good order, contents and value unknown;" this part was printed; following it, and before the signature of defendant's agent, was written "articles, thirty barrels eggs." The person receiving the bill indorsed it in blank in the name of E. W. P. & Co., and annexed it to a draft drawn upon plaintiffs, who, upon the faith and security thereof, accepted and paid the draft. The barrels, in fact, were filled with sawdust, and contained no eggs. In an action against defendant for damages, held, that the description of the articles was not a representation that the barrels contained eggs; but, taking the whole instrument together, it imported only that defendant had received thirty packages described as containing or purporting to contain eggs, but the actual contents of which were unknown to defendant. *Miller v. Hannibal*

Change of Direction while in Transit — Connecting Lines.

and *St. Joseph R. R. Co.*, 12 Amer. & Eng. R. R. Cases, 30; 90 N. Y., 430. 1882.

15. — **evidence.** The assignment of a bill of lading is not conclusive proof of the change of title to the property, like a bill of sale; it is a question of evidence as to whether such effect should be given it. *Kyle v. Buffalo and Lake Huron R'y Co.*, 16 Upper Canada, Common Pleas, 76. 1865.

16. — **negotiability.** Common carriers must recognize transfers of bills of lading and consignments of goods, and, unless protected by proper vouchers, cannot always assume to deal with consignments as actually and beneficially belonging to the consignee. *Walker v. Detroit, Grand Haven and Milwaukee R. R. Co.*, 49 Mich., 446, 1882; 9 Amer. & Eng. R. R. Cases, 251.

17. — Bills of lading are not negotiable in the sense in which bills of exchange are understood to be negotiable. *Baltimore and Ohio R. R. Co. v. Wilkens*, 44 Md., 11. 1875.

18. — While a bill of lading is not a negotiable instrument in the sense in which a bill of exchange or promissory note is negotiable, yet as the representative of a valuable commodity it is assignable to the party entitled to control the possession of such commodity, to the same extent and for the same purposes as the property itself would be, and innocent holders thereof for value ought to receive the same protection as if they held possession of the property itself. *Stone v. Wabash, St. Louis and Pacific R'y Co.*, 9 Bradwell (Ill.), 48. 1881.

19. — **lost or stolen bill.** Although a statute makes bills of lading negotiable by indorsement and delivery, it does not follow that all the consequences incident to the indorsement of bills and notes before maturity ensue or are intended to result from such negotiation. *Shaw v. Railroad Co.*, 101 U. S., 557. 1879.

20. — The rule that a *bona fide* purchaser of a lost or stolen bill or note indorsed in blank or payable to bearer is not bound to look beyond the instrument, has no application to the case of a lost or stolen bill of lading. *Ib.*

21. — **purpose and effect.** By the usual course of business in forwarding grain from C. to B., it was sent by water from C. to an intermediate point, and thence taken by rail-

way to B. A bill of lading was given at C. making the grain deliverable to the shipper at the intermediate point, and there a railway receipt was given, with a memorandum upon it showing that the grain was received from a vessel and that a bill of lading was outstanding. The bill of lading was regarded as transferring the property, and was alone used in procuring the goods from the carrier at B. *Held*, that the bill of lading was the representative of the grain during the whole of the transit from C. to B. *Forbes v. Boston and Lowell R. R. Co.*, 133 Mass., 154, 1882. 9 Amer. & Eng. R. R. Cases, 76.

22. — **rights of assignee.** The transfer and delivery of an inland bill of lading of goods by the consignee to a person who advances money upon them is not in form or effect a mortgage, but vests in such person a property in the goods which entitles him to maintain an action against one who wrongfully converts them. *Ib.*

23. **Change of direction while in transit.** A consignor of goods, after they have passed from the hands of the company with which the contract of affreightment was made, into the hands of another company, has the same right to change their destination while *in transitu*, by taking a new bill of lading, as if the first company had a continuous line to the place of destination. *Sutherland v. Second National Bank of Peoria*, 6 Amer. & Eng. R. R. Cases (Ky.), 368. 1881.

24. **Claim for damages.** A stipulation in a bill of lading given by a common carrier, that all claims for damages shall be made by the consignee at the delivery station *before* the article is taken away, is reasonable. Therefore, in an action against a railroad company for damages to certain cotton, when the plaintiff had not complied with such stipulation contained in his bill of lading, *held*, that he was not entitled to recover. *Capehart v. Seaboard and Roanoke R. R. Co.*, 77 N. C., 355. 1877.

25. **Connecting lines.** The bill of lading is the contract between the shipper and the carrier by which the latter agrees to transport and deliver beyond its own line, and the terms and conditions of the contract regulate and determine the duties and obligations of the contracting parties. *Piedmont Manufacturing Co. v. Columbia and*

Conditions — Limitation of Liability.

Greenville R. R. Co., 19 So. Car., 358. 1882.

26. — A bill of lading construed, and the company giving the same held liable for damages accruing beyond its own line. *Lindly v. Richmond and Danville R. R. Co.*, 9 Amer. & Eng. R. R. Cases (N. C.), 31. 1882.

27. — right of possession. A railroad company completing the transportation of freight, begun by other common carriers whose lines are connected with the railroad by an intermediate line or lines, may, for its own security, exact the production of the bill of lading before making delivery of the goods to the consignee. At all events, where, in such case, the consignee has never had actual possession of the goods, he cannot obtain possession of them by possessory warrant against such railroad company, without producing the bill of lading or showing that its non-production would leave no liability on the part of the company to a *bona fide* assignee of the same. *Bass v. Glover*, 68 Ga., 745, 1879; 1 Amer. & Eng. R. R. Cases, 277.

28. Conditions. In an action against a common carrier upon a special contract to collect the price before delivering the goods, the consignor need not prove a compliance with the conditions contained in the bill of lading. *McNichol v. Pacific Express Co.*, 12 Mo. App., 401. 1882.

29. Construction. A freight bill ending "acc't Henry Dixon," and signed "W. T. Noell & Co., Agents," may be construed as made to Henry Dixon, he being in fact the consignee. *Dixon v. Columbus and Indianapolis R. R. Co.*, 4 Bissell (U. S. C. C.), 187. 1868.

30. A bill of lading is a contract which must be construed by the court like any other written contract, according to its true meaning. *Lucesco Oil Co. v. Pa. R. R. Co.*, 2 Pittsburgh, 477. 1863.

31. — printed form. The parts written in the printed bill of lading express the true contract, and \$20 per barrel was to be regarded as the value fixed by the parties in advance. *Elkins v. Empire Transportation Co.*, 81½ Pa. St., 315. 1876.

32. The printed part of a bill of lading is controlled by the written part. *Miller v.*

Hannibal and St. Joseph R. R. Co., 24 Hun (N. Y.), 607. 1881.

33. Limitation of liability; assent of shipper. The assent of a shipper to the conditions in a receipt or bill of lading limiting the carrier's liability will not be inferred from the mere fact of acceptance of the bill or receipt without objection. Nor will it be conclusively inferred from the fact of the previous acceptance of a large number of similar bills of lading, not filled up by the shipper or held in his possession to be filled up. *Erie and Western Transportation Co. v. Dater*, 91 Ill., 195. 1878.

34. — burden of proof. Where loss arose through one of the excepted causes contained in the bill of lading, the *onus probandi* rests upon the shipper to show that such loss occurred through the negligence of the carrier. *Wertheimer v. Pennsylvania R. R. Co.*, 1 Federal Reporter, 232. 1880.

35. — claim of damages; time of presenting. A stipulation in a bill of lading, that in case any claim for damage should arise for the loss of articles mentioned in the receipt while *in transitu* or before delivery, the extent of such damage or loss shall be adjusted before removal from the station, and claim therefor made in thirty days to a "trace agent" of the carrier, is an unreasonable provision which the courts will not uphold. *Capehart v. Seaboard and Roanoke R. R. Co.*, 81 N. C., 438. 1879.

36. — connecting lines. When the contract for transportation is over the lines of several distinct and independent companies, it is perfectly competent for those companies to limit their liability by contract as expressed in the bill of lading. *Schiff v. New York Central and Hudson River R. R. Co.*, 52 Howard's Practice (N. Y.), 91. 1876.

37. — Where a carrier delivers goods to a forwarder, who is its agent and the agent of the company to whom the same are delivered, and he gives a bill of lading limiting the duty of the latter to deliver the goods to another company, this will make the bill of lading a contract, binding upon the first and second carriers, and the second carrier will not be responsible for the delivery of the goods to the consignee by the last carrier. *Chicago and Northwestern R. R. Co. v. Northern Line Packet Co.*, 70 Ill., 217. 1878.

Limitation of Liability.

38. — corn. A bill of lading exempting the carrier from deficiency "in packages," held not to apply to a shipment of corn in bulk. *McCoy v. Erie and Western Trans. Co.*, 42 Md., 498, 1875; 14 Amer. R'y Rep., 317.

39. — evidence. On the trial of a cause by the court alone, against a carrier, for loss of goods shipped, where the proof shows that the shipper had no knowledge of a clause in the receipt given exempting the carrier from liability for loss by fire, and that the shipper never assented to such clause, there is no error in receiving in evidence the part of the receipt acknowledging the receipt of the goods and agreeing to carry the same, and to reject the exemption clause. If the trial is before a jury, the whole instrument must be read, as they are to decide whether the clause of exemption was known and assented to by the shipper. *Merchants' Despatch Transportation Co. v. Theilbar*, 86 Ill., 71. 1877.

40. — fire. A condition in a bill of lading of an express company was that it was not to be liable for loss by fire in transit unless from gross negligence of the company or its servants. Held, that it was not responsible to owner of goods for loss by fire unless occasioned by negligence. *Adams Express Co. v. Sharpless*, 77 Pa. St., 516. 1875.

41. — A bill of lading for a carriage given to plaintiff provided that, except when the agents of the defendant were guilty of gross negligence, they were not to be responsible for any of the damages of railroad or of fire. The carriage reached its destination, much injured by fire. On inquiry by the plaintiff, as to the occasion of the fire and where it occurred, the defendant refused to give him any information in regard thereto. In an action for damages, held, that by the refusal of defendant to give any account of the cause of the injury, a presumption of negligence arises which it must rebut, and this presumption is not repelled by evidence that defendant exercised ordinary care, and the court properly left it to the jury to determine whether the defendant had been guilty of negligence or not. *Pennsylvania R. R. Co. v. Miller*, 87 Pa. St., 895. 1878.

42. — knowledge of shipper. A clause in a receipt or bill of lading exempting a

carrier from a common law liability is not binding on the shipper, unless it appears that he knew of and assented to the exemption, and this is a question of fact. *Merchants' Despatch Transportation Co. v. Theilbar*, 86 Ill., 71. 1877.

43. — When a carrier claims exemption from liability under a bill of lading not signed by the owner or consignor of the goods, he must allege and prove that such bill was assented to by the shipper. *Gaines v. Union Transportation and Insurance Co.*, 28 Ohio St., 418, 1876; 14 Amer. R'y Rep., 158.

44. — By accepting a bill of lading without reading it, or without objection or protest against a contract therein limiting the liability of the carrier, the shipper will be presumed to have assented thereto, but the shipper is not bound to accept such a bill of lading. *Louisville and Nashville R. R. Co. v. Brownlee*, 14 Bush (Ky.), 590, 1879; *Dillard v. Louisville and Nashville R. R. Co.*, 2 Lea (Tenn.), 288, 1879.

45. — The right of a carrier to limit its common law liability by contract, if made fairly and advisedly on behalf of the shipper, cannot be denied; but the mere fact that the bill of lading given contains a clause exempting the carrier from loss of the goods by fire, cannot be held conclusive of such a contract. *Merchants' Despatch Transportation Co. v. Leysor*, 89 Ill., 43. 1878.

46. — Where the shipper of goods has no knowledge that the bill of lading given contains a provision releasing the carrier from liability from loss by fire, and the goods are destroyed by fire before reaching their destination, and while in the custody of the carrier, the latter will be liable to the owner for their value. *Merchants' Despatch Transportation Co. v. Leysor*, 89 Ill., 43, 1878; *Merchants' Despatch Transportation Co. v. Joesting*, 89 Ill., 152, 1878; *Erie and Western Transportation Co. v. Dater*, 91 Ill., 195, 1878.

47. — Whether the shipper has knowledge of and assents to a clause in a bill of lading or receipt for goods delivered to a common carrier, whereby the common law liability is limited, is a question of fact to be determined by the evidence in each case. *Field v. Chicago and Rock Island R. R. Co.*, 71 Ill., 458. 1874.

Indorsements Thereon — Erroneous Delivery of Goods.

48. — By the law of Massachusetts, in order to limit the carrier's common law liability by a clause in the bill of lading or receipt, the bill of lading must be taken by the consignor, without objection, *at the time of the delivery* of the property for transportation. When given a few days after the delivery of the goods, and while they are in transit, such a clause therein, not assented to by the consignee and owner, will not be binding on the latter. The consignor cannot bind the consignee after the goods have passed beyond the control of the former, and his agency has ceased. *Michigan Central R. R. Co. v. Boyd*, 91 Ill., 268. 1878.

49. — If a shipper, with full knowledge of the terms and conditions of a bill of lading given for goods to be transported, assents to and accepts the same as the contract under which the goods are shipped, then the bill of lading will constitute a binding contract. Whether the shipper knows the term and conditions of a bill of lading, and assents to the same, is a question of fact for the jury. *Merchants' Despatch Transportation Co. v. Leysor*, 89 Ill., 43. 1878.

50. — navigation. Where a railway company received freight to be carried partly by rail and partly by water, and it was stipulated in the bill of lading that "it is especially agreed and understood that the company is not responsible . . . for loss or damage on the lakes or rivers, unless it can be shown that such damage or loss occurred through the negligence or default of the agents of the company;" and the freight, after being carried by the defendant, was placed upon a wharf-boat, awaiting the arrival of a packet wherein to ship it, and the wharf-boat sunk without the fault of the railway company, and the freight was lost, *held*, that the loss was not one occurring on the lakes and rivers within the meaning of the bill of lading. *Held*, also, that the bill of lading should be construed to mean that the carrier was not to be responsible, in the absence of negligence, for loss or damage occurring in the navigation of the lakes or rivers. *St. Louis and South Eastern R'y Co. v. Smuck*, 49 Ind., 302, 1874; 8 Amer. R'y Rep., 209.

51. — negligence. The terms of a bill of lading will not be construed to exempt a

carrier from liability for negligence, unless there be an express stipulation to that effect. *McKinney v. Jewett*, 9 Amer. & Eng. R. R. Cases (N. Y.), 209. 1882.

52. — valuation. Where it was orally agreed between A., a shipper, and B., a common carrier, that the latter should carry all goods which the former desired to ship from X. to Z., for a certain sum per hundred pounds, regardless of value, and A. shipped certain packages by B. under the agreement, but took a bill of lading therefor, which provided that unless the shipper had the value of his packages inserted in the bill of lading given for them the carrier would not be liable for an amount exceeding \$50 on each package, but the values of the packages were not asked for by B. or inserted in the bill of lading, and the goods were lost in transit through B.'s negligence, *held*, that B. was liable for their full value. *Scruggs v. Baltimore and Ohio R. R. Co.*, 18 Federal Reporter, 318. 1883.

53. Indorsements thereon; evidence. The declarations of the agents of a railroad company are admissible and will bind the company, only when made in the particular business intrusted to them, and while engaged in that business. Hence, to authorize the introduction as evidence of the written indorsement of the agents of a railroad company, upon a bill of lading referred from one agent to another, in respect to the condition of corn when received by the company sought to be charged with damage thereto, it must be shown that it is the business of such agents, intrusted to them by the company, to investigate the condition of the freight, and to indorse the result of their investigations upon such bill of lading. *Evans v. Atlanta and West Point R. R. Co.*, 56 Ga., 498. 1876.

54. Erroneous delivery of goods. A bill of lading providing that the goods are to be delivered on "presentation of duplicate hereof," establishes the fact that the consignor is the owner of the goods, and if the carrier deliver the goods to the consignee without the presentation of any bill of lading, the carrier becomes liable to the consignor. *Jeffersonville, etc., R. R. Co. v. Irvin*, 46 Ind., 180. 1874.

55. — If this condition had not been in the

Fraud.

bill of lading, the title to the goods would have vested in the consignee on their delivery to the carrier, but being there, the property remained in the consignor until the goods were paid for by the consignee. *Ib.*

56. — A carrier held liable for delivering corn without the authority of the person holding the bill of lading. *Joslyn v. Grand Trunk R'y Co.*, 51 Vt., 92. 1878.

57. **Fraud.** A railway company is not liable for damages resulting from advancements made upon a bill of lading fraudulently issued by one of its station agents. *Baltimore and Ohio R. R. Co. v. Wilkens*, 44 Md., 11. 1875.

58. — **estoppel.** An agent of a railway company, authorized to issue bills of lading, issued certain bills to a shipper for five cars of wheat. In fact less than one car load of wheat and about the same quantity of barley was shipped. Drafts were drawn by the shipper against the bills and attached thereto, and were delivered to a bank, which in good faith discounted the same and forwarded them for payment. The drafts being protested and the shipper having absconded, and leaving no property in the state, *held*, that as against the bank the railroad company was estopped from denying that it had received the wheat. *Sioux City and Pacific R. R. Co. v. First National Bank of Fremont*, 10 Neb., 556, 1880; 1 Amer. & Eng. R. R. Cases, 278.

59. — **forgery.** The shipper was allowed to fill in the blank bill of lading in his own handwriting. This gave him an opportunity to change the amount so as to deceive. *Held*, that the carrier was not liable for damage resulting from the forgery of the shipper in raising the amount of the bill of lading, and thus obtaining money on the same in excess of the value of the goods actually shipped. *Lehman v. Central R. R. and Banking Co.*, 12 Federal Reporter, 595. 1882.

60. — **misstatements.** Defendant having received thirty barrels for transportation from a person representing himself to be a member of the firm of E. W. P. & Co., delivered to him a bill of lading, certifying that it had received of said firm, consigned to their order, "the following described packages, in apparent good order, contents

and value unknown;" this part was *printed*; following it and before the signature of defendant's agent was written "articles, 30 bbls. eggs." The person receiving the bill indorsed it in blank in the name of E. W. P. & Co., and annexed it to a draft drawn upon plaintiffs, who, upon the faith and security thereof, accepted and paid the draft. The barrels, in fact, were filled with sawdust and contained no eggs. In an action to recover plaintiffs' damages, *held*, that the description of the articles was not a representation that the barrels contained eggs; but, taking the whole instrument together, it imported only that defendant had received thirty packages described as containing or purporting to contain eggs, but the actual contents of which were unknown to defendant. *Miller v. Hannibal and St. Joseph R. R. Co.*, 90 N. Y., 430. 1882.

61. — The freight agent of a railroad company, by the procurement of a cotton buyer, signed a bill of lading for thirty-two bales of cotton, which were not on hand, and were never delivered to the railroad company or any agent for it. The plaintiffs paid a draft for the price of the cotton on the faith of the bill of lading attached to it and indorsed to them, and, never having received the cotton, sued the railroad company for its non-delivery. *Held*, that the carrier was not estopped to show that no cotton was in fact delivered for transportation; that the agent had no authority, real or apparent, to sign a receipt or bill of lading until actual delivery of the cotton, and the company was not liable. *Robinson v. Memphis and Charleston R. R. Co.*, 9 Federal Reporter, 129. 1881.

62. — Where a freight agent signed false bills of lading, which were attached to drafts, and the proceeds of the drafts obtained by the party named in the bill of lading, *held*, that this act of the freight agent was not done within the scope of his authority, and that the railway company was not liable for the damages resulting from the payment of the drafts. *Erb v. Great Western R'y Co.*, 5 Canada Supreme Court Reports, 179, 1881. The Ontario court of appeals was divided upon the question. 3 Ontario Appeal Reports, 446, 1879. See, also, *McLean v. Buffalo, etc., R'y Co.*, 23

Insurance — Parol Evidence.

Upper Canada, Queen's Bench, 448, 1864; *Same v. Same*, 24 ib., 270, 1865; 42 ib., 90, 1877; *Oliver v. Great Western R'y Co.*, 28 Upper Canada, Common Pleas, 143, 1877.

63. — W., being the general owner of a quantity of wheat, subject to a lien in favor of the M. and T. Bank, and having the custody thereof (it being stored in his name at Buffalo), contracted verbally to sell the same to N., to be paid for on delivery. He gave to N. an order on the warehouseman to deliver the wheat to defendant, subject to order. Defendant thereupon, and without any evidence of any right or title of N. to the wheat, gave to N. a bill of lading, stating that the wheat was shipped by N. to New York, subject to plaintiff's order. On the faith of this bill of lading, N. obtained from plaintiff an advance upon the wheat. Defendant obtained the wheat on the order, transported it to New York, where it was sold by plaintiff to reimburse the advance. The M. and T. Bank brought an action against plaintiff for a conversion of the wheat, and obtained a verdict which plaintiff paid before entry of judgment thereon. *Held*, that plaintiff was entitled to recover of defendant the damage sustained by its wrongful or negligent act in issuing the bill of lading in the name of N. *Farmers' and Mechanics' Bank v. Erie R'y Co.*, 72 N. Y., 188. 1878.

64. **Insurance.** A contract in a bill of lading giving to the carrier the benefit of any insurance that may be effected upon the goods is valid. *Rintoul v. New York Central and Hudson River R. R. Co.*, 17 Federal Reporter, 905. 1883.

65. **Mistake.** The words "I. & C. Central R. R." cannot, without an allegation of misnomer or offer to prove the identity, be taken to mean the Columbus and Indianapolis Railway Co., in a contract not purporting to be made by such company. *Dixon v. Columbus and Indianapolis R. R. Co.*, 4 Bissell (U. S. C. C.), 187. 1868.

66. — A carrier is not bound by a mistake in a bill of lading, by which more property is receipted for than was in fact received. Neither is the carrier responsible to any one who has advanced money upon the same. *Hunt v. Miss. Central R. R. Co.*, 29 La. An., 446. 1877.

67. **Parol evidence.** The plaintiff entered into a verbal agreement with the defendant, a common carrier of goods from Paola, Kansas, to St. Louis, Missouri, to carry certain goods, at a stipulated price, from Paola to Philadelphia, Pa. The goods were all marked to a certain consignee in Philadelphia, Pa., and were delivered to the defendant under this contract, and put into the defendant's cars by the defendant, and the cars were locked. Afterward the defendant handed to the plaintiff a bill of lading for the goods, which showed that the goods were consigned to said consignee at Philadelphia, Pa., and were to be carried from Paola to "St. Louis station." The plaintiff accepted this bill of lading without objection, examining it only to see that it stated the amount of goods delivered, and that it contained the name of the proper consignee at Philadelphia, Pa., which it did, and did not look to see, and did not see or know that the bill of lading showed that the goods were to be carried by the defendant only to "St. Louis station." A portion of the goods was not carried to Philadelphia, but was lost, and the plaintiff sued the defendant for their value; *held*, that the plaintiff may show the original parol contract between the parties, and that, when shown, it, and not the bill of lading, will be considered as settling the rights of the parties; that the bill of lading taken under the circumstances will not be held to supersede or overturn or destroy the original parol contract between the parties. *Missouri Pacific R'y Co. v. Beeson*, 12 Amer. & Eng. R. R. Cases (Kans.), 52. 1883.

68. — Where goods are shipped under a verbal agreement for their transportation, such agreement is not merged in a bill of lading, which is partly written and partly printed, delivered to the shipper after he has parted with the control of his goods, notwithstanding such bill of lading, by its terms, limits the liability of the carrier, and expresses on its face that, by accepting it, the shipper agrees to its conditions. The mere receipt of the bill after the verbal agreement had been acted upon is not sufficient to conclude him from showing what the actual agreement was under which the goods had been shipped. *Schiff v. New*

Property not on Board — Recitals.

York Central and Hudson River R. R. Co., 52 Howard's Practice (N. Y.), 21. 1876.

69. — The plaintiffs made an oral contract with the agent of the "Red Line" to transport goods from New York to St. Joseph in a refrigerator car. The contract was made January 27, 1872, but the bill of lading was not received by plaintiffs until between five and six in the afternoon of that day, when it was too late to retake the goods, as the train on which they were left at half-past five. The bill of lading omitted to state "refrigerator car, through;" but, when spoken to, the agent said that it did not make any difference; that the car would go through all right. *Held*, that the verbal agreement was not merged in the bill of lading. *Shiff v. New York Central and Hudson River R. R. Co.*, 16 Hun (N. Y.), 278, 1878; affirmed, *Same v. Same*, 81 N. Y., 633, 1880.

70. — Where goods were delivered to a railway company in Indiana, marked and directed to a consignee in Leavenworth, Kansas, for transportation, its line of road terminating at Chicago, Ill., and it appeared that on the next day the company made out and delivered to the shipper a bill of lading, containing an agreement to carry the goods to the company's freight station in Chicago, and limiting its liability to its own line of road, and that the goods reached Chicago in safety, and were transferred to another company, in whose custody they were burned, it was held, in a suit against the company so giving such bill of lading to recover for the loss, that it was error to refuse to admit in evidence, on the part of the company, the shipping order, containing directions as to the shipment and the bill of lading. *Pennsylvania Co. v. Fairchild*, 69 Ill., 260, 1873.

71. — Where, upon the delivery of goods to a carrier for transportation, and before shipment, a receipt or bill of lading is delivered to the shipper, and received by him without objection, he is chargeable with notice of its contents, and is bound by its terms; prior parol negotiations cannot be resorted to to vary them. *Hill v. Syracuse, Binghamton and New York R. R. Co.*, 73 N. Y., 351, 1878; reversing *Same v. Same*, 8 Hun (N. Y.), 296, 1876.

72. — Where a freight bill is signed "W. T. Noell & Co., Agents," not appearing on its face to be the contract of a railroad company, parol evidence is not admissible to show that it is the contract of the company. *Dixon v. Columbus and Indianapolis R. R. Co.*, 4 Bissell (U. S. C. C.), 137. 1868.

73. **Property not on board.** As a general rule, bills of lading issued for property not yet on board are void. *Stone v. Wabash, St. Louis and Pacific R'y Co.*, 9 Bradwell (Ill.), 48, 1881.

74. **Recitals.** Where the agent of a railway company has authority to receive grain for shipment over its road, and issue in the name of the corporation a single bill of lading for each consignment received, receives twenty-three thousand pounds of wheat as a single consignment for transportation to St. Louis, and at the instance of the shipper issued in the name of the corporation two original bills of lading of the same tenor for such single consignment, and the shipper negotiated one of said original bills to W., and immediately thereafter negotiated and transferred by indorsement in writing the other of said original bills to the Wichita Bank, and the bank, knowing the custom of the railway company to issue only one bill of lading for each shipment, and relying wholly on the bill for its security, accepted the same, advanced money thereon in good faith, and in the regular course of its business, and having no knowledge of the issuance of the two bills of lading, and W., as the holder of the bill assigned to him, received all of the wheat so consigned and forwarded to St. Louis, *held*, that, the shipper being insolvent, and having absconded, the railway company is estopped by its statement and promise in the bill of lading to deny that it has received the grain mentioned therein, and is liable to the indorsee and assignee for its advances made by the bank in good faith on the bill of lading. *Wichita Savings Bank v. Atchison, Topeka and Santa Fe R. R. Co.*, 20 Kans., 519, 1878; 20 Amer. R'y Rep., 299.

75. — A common carrier is estopped from denying that certain barrels contain eggs, after having given a bill of lading for them as "barrels of eggs," the bill of lading having been transferred to a *bona fide* holder.

Purchase — Abutting Property — Agreed Statement.

Miller v. Hannibal and St. Joseph R. R. Co., 24 Hun (N. Y.), 607. 1881. *Held contra*, on appeal. *Same v. Same*, 90 N. Y., 480. 1882.

76. — A recital in a bill of lading that goods received by a carrier are in good order when received is not conclusive evidence of the fact. *Mitchell v. United States Express Co.*, 46 Ia., 214. 1877.

77. — Where a common carrier receives goods for shipment, and gives the consignor a bill of lading, in which the goods are described to be in apparent good order, the bill of lading is *prima facie* evidence, in a suit against the carrier, that the goods were in good condition. *Illinois Central R. R. Co. v. Cobb*, 72 Ill., 148. 1874.

78. — Defendant's agent, having authority to issue bills of lading, upon delivery to him by M. of a forged warehouse receipt, issued to M. two bills of lading, each stating a receipt of certain lard consigned to plaintiffs at New York, and to be transported and delivered to them. The agent was informed by M., at the time of the delivery of the bills of lading, that he intended to use them in bank. M. drew sight drafts on plaintiffs, to which he attached the bills of lading; these were delivered to a bank, and were forwarded to New York, and the drafts were paid by plaintiffs, on presentation, upon the faith and credit of the bills of lading. In an action upon the bills of lading; *held*, that the company was bound by the acts of its agent, and was estopped from denying the receipt of the lard, and that plaintiffs were entitled to recover. *Armour v. Michigan Central R. R. Co.*, 65 N. Y., 111. 1875.

79. — Where a railroad company gives a bill of lading reciting that the property is then lying in a depot at a certain place, and agrees to forward the same to the consignee, and others advance money on the faith of such bill of lading, which is assigned by the shipper, the railroad company will be estopped, as against such persons, from showing that at the time of giving such bill of lading and its indorsement, the goods were in the adverse possession of another person, so as to defeat an action brought by the consignee so advancing money on the bill of lading. *St. Louis and Iron Mountain R. R. Co. v. Larned*, 103 Ill., 293, 1882; 6 Amer. & Eng. R. R. Cases, 436.

80. **Salvage.** Where a bill of lading stipulated for the delivery of the cargo upon the payment of "freight and charges," and the vessel having sunk, the carrier paid for the recovery of the cargo, *held*, that the salvage paid was a charge for which the carrier held a lien upon the recovered property. *Chicago and Southwestern R. R. Co. v. Northwestern Union Packet Co.*, 38 Ia., 377. 1874.

BONDS OF RAILWAY COMPANIES.

See MORTGAGE.

1. **Purchase.** A purchaser of bonds held to be a *bona fide* holder. *Potts v. Norfolk and Petersburg R. R. Co.*, 61 N. Y., 636. 1874.

BONUS.

See SUBSCRIPTIONS BY INDIVIDUALS.

BRAKEMEN.

See INJURIES TO EMPLOYEES.

BRANCH RAILWAYS.

See LATERAL RAILWAYS.

BRIDGES.

See INJURIES TO EMPLOYEES.

1. **Abutting property; damages.** In an action by adjacent lot owners for damages occasioned by the construction of approaches to a bridge, evidence of damage caused by the bridge employes throwing dust and dirt from the bridge in baskets is not admissible. *East St. Louis v. Wiggins Ferry Co.*, 11 Bradwell (Ill.), 254. 1882.

2. **Agreed statement.** An agreed statement of the facts, in relation to the sufficiency of a bridge over a railway cut, *held* insufficient to enable the court to pass upon the same. *Newark, Somerset and Straitsville R. R. Co. v. Commissioners of Perry County*, 30 Ohio St., 120. 1876.

Constitutional Law — Draw-bridge.

3. Constitutional law. The statute of 1872, ch. 295, authorizing a railway company to erect across a river a bridge adapted to both highway and railway travel, upon a plan to be approved by the railway commissioners, and directing that a certain proportion of the cost of the same shall be paid by the county in which it is situated, such proportion to be apportioned by commissioners to be appointed by the court, between the county and the cities and towns specially benefited, is constitutional. *Brayton v. City of Fall River*, 124 Mass., 95. 1878.

4. Contract for construction; breach.

Where a contract calls for the construction of a draw-bridge upon which the cars of a railroad company can cross, it implies that the bridge shall be serviceable for that purpose and capable of being used with like facility as similar bridges properly constructed. If a defect in the condition of a pier upon which the bridge is to rest will prevent this result from being attained, it is the duty of the contractors to insist upon an alteration of the pier, or to make it themselves, before proceeding with the construction of the bridge. *Railroad Co. v. Smith*, 21 Wallace, 255, 1874; 7 Amer. R'y Rep., 382.

5. — Where a pier of a bridge was built under the supervision of an agent of the contractors for the bridge, and in accordance with his directions, he is held to have knowledge of any defect in the pier, and his knowledge in this particular is the knowledge of the contractors. *Ib.*

6. Contract to use a municipal bridge for a railway. The grant to a railroad company of the right to lay and maintain its track over a bridge belonging to the city, and to use and operate the same, in an ordinance which contains no reservation respecting tolls or other charges, is within municipal authority; and the city cannot, by a subsequent ordinance, impose such charges. Such a grant is not impaired by the fact that the railway company has increased its use of the bridge by the construction of another line whose business passes over it. The railway company has the right of use for all of its business. *Des Moines v. Chicago, Rock Island and Pacific R. R. Co.*, 41 Ia., 569. 1875.

7. Corporation organized in two states. The legislature of Kentucky incorporated a

bridge company with the usual powers, the object of which was the building of a bridge across the Ohio river at Covington, but withheld the power of organization until the Ohio legislature should confirm the act of incorporation, which was afterward done. *Held*, that the state of Kentucky had the power to create such corporation, with the right to exercise in that state any powers not in violation of the state or federal constitution, and it was essentially a Kentucky corporation. *Covington v. Covington and Cincinnati Bridge Co.*, 10 Bush (Ky.), 69. 1873.

8. County bonds in aid of. County bonds issued for the purpose of erecting a public bridge over the Platte river, conformable in all respects to the laws of the state authorizing the issuance of bonds in aid of works of internal improvement, are valid. *Union Pacific R. R. Co. v. Commissioners of Colfax County*, 4 Neb., 450. 1876.

9. — In determining what constitutes a work of internal improvement, it must be tested by the benefits to be derived by the public, and not by its extent or cost. *Ib.*

10. Draw-bridge. A pilot having mistaken his course, and not knowing where his boat was, attempted the dangerous passage of a bridge at night, at the highest rate of speed and without any lookout; *held*, that he was guilty of negligence. Under such circumstances, the collision with a barge moored to a bridge pier, which was out of the usual channel of navigation, and by which collision his own boat was lost, was held not to be sufficient to entitle the owners of the boat to recover, although the barge was without a light. *Baltimore and Ohio R. R. Co. v. Wheeling, etc., Transportation Co.*, 32 Ohio St., 116. 1877.

11. Although prudence dictates that a vessel, left during the night in the usual route of passing craft, should display a light as a signal of warning to others, yet, when such vessel is moored out of the usual path of navigation, where boats rarely, if ever, come, and in a place where the bridge work was going on from day to day, such work, at times, necessitating a temporary closing of the passage-way altogether, the absence of a light upon a vessel so circumstanced is not necessarily negligence. *Ib.*

Erection of Buildings upon Bridges — Ice Gorge.

12. Erection of buildings upon bridges.

The stringers of Cataract bridge rested one end on an abutment in the city of Saco, the other on a pier in which the plaintiffs' railway and the city had each an interest, but which the plaintiffs were bound to maintain. To these stringers beams were fastened, and projected at right angles beyond the sides of the bridge. On these beams, outside of the limits of the highway, and over the east branch of the Saco river, and over land in which the plaintiffs had no interest, the defendant built, by permission of the city, a shop. The city made repairs upon Cataract bridge before and after the erection of the shop. *Held*, that the railway could not maintain the process of forcible entry and detainer against the defendant for a part of their bridge. *Boston and Maine R. R. Co. v. Durgin*, 67 Me., 263. 1877.

13. Evidence; vibration. Where the plaintiff claimed damages by reason of the jar caused by the passage of loaded teams over a bridge, it is competent, upon cross-examination, to show how the opposite approach is constructed; that there is more vibration there, and that buildings at the opposite approach are not injured by the vibration. *East St. Louis v. Wiggins Ferry Co.*, 11 Bradwell (Ill.), 254. 1892.

14. Ferry franchise. Suit was brought to recover damages for injuries alleged to have been done to certain lands, and to a certain ferry franchise, by reason of the construction of a dike in the Mississippi river by the defendant. *Held*, that plaintiff had, under the laws of Illinois, and according to the evidence, no title to the lands, for injury to which the suit was brought; that the act of the general assembly of Illinois, granting a charter for a ferry across the Mississippi river, under which the plaintiff claims, did not give the grantee any right to control the channel of the river, or to prevent its improvement, without compensation to him by the United States. *Loneragan v. Mississippi River Bridge Co.*, 5 Federal Reporter, 777; 2 McCrary (U. S. C. C.), 451. 1881.

15. — The legislature of Illinois, in granting a charter for a ferry across the Mississippi river, cannot give the grantee any right which will hinder or in any manner obstruct the free navigation of the river or

impede the commerce of the country along or across the river. *Mississippi River Bridge Co. v. Lonergan*, 91 Ill., 508. 1879.

16. Floods. A railway company, in carrying its road across a watercourse or channel, is bound to provide for even those extraordinary floods which, by the exercise of the highest circumspection, may be anticipated. *Kansas Pacific R'y Co. v. Miller*, 2 Colo., 442, 1874; 20 Amer. R'y Rep., 245.

17. — The question being as to the character of a stream, a railway bridge over which had been destroyed by a flood, and whether the defendants were negligent in not foreseeing and providing against such occurrence, *held*, that evidence of floods subsequent to that which caused the injury was improperly received. *Ib.*

18. Highway; repairs. Without authority of law, a railroad company, thirty years ago, changed the public road at one of its crossings, cut out a new road, and at some expense built a bridge over a stream said new road crossed; and by common consent the old road was abandoned and the new one made public. *Held*, that the railroad company, in the absence of any contract so to do, is not bound to keep up said bridge, and the mere fact that the company first built it, and that it has since, at various times, repaired it (it being near one of its depots), does not make an implied contract with the county that the company will keep it in repair. *Brookins v. Central R. R. and Banking Co.*, 48 Ga., 523, 1873; 11 Amer. R'y Rep., 388.

19. Ice gorge. An instruction charging the jury "that notwithstanding the fact that the railroad company, when it constructed its bridge, did so in a prudent manner, according to the best information it could obtain at the time of its construction, yet, if it subsequently appeared that its construction was such that damages would result from the gorging of ice against the bridge, and that damages would result to the plaintiff and other property holders in the vicinity of the bridge, by reason of the overflow of ice and water in consequence of said gorge, and the defendant had the time and the opportunity and means, by a reasonable effort on its part in that behalf, to avoid

Injunction — International Bridge.

or prevent such damage, it was its duty so to do; and it was required to use all reasonable effort to avert such damages, and if it failed so to do, it is liable to plaintiff for the damages sustained by him as resulted directly from such failure." *Held*, erroneous, and a new trial awarded. *Omaha and Republican Valley R. R. Co. v. Brown*, 14 Neb., 170, 1883; 11 Amer. & Eng. R. R. Cases, 501.

20. Injunction. A preliminary injunction to restrain the erection of a bridge across a navigable river will not be allowed, where it is shown that such bridge will not be an obstruction necessarily amounting to a nuisance. *Northern Pacific R. R. Co. v. Barnesville and Moorhead R. R. Co.*, 4 Federal Reporter, 172; 2 McCrary (U. S. C. C.), 224. 1880.

21. Injury to bridges. Though a plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident which is the subject of the action, yet, if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him. A railway company was in the habit of taking full trucks from the siding of a colliery owner, and returning the empty trucks there. Over this siding was a bridge eight feet high from the ground. On a Saturday afternoon, when all the colliery men had left work, the servants of the defendant ran some trucks on the siding. All but one were empty, and that one contained another truck, and their joint height amounted to eleven feet. On the Sunday evening the railway employes brought on the siding many other empty trucks, and pushed forward all those previously left on the siding; some resistance was felt, the power of the engine pushing the trucks was increased, and the two trucks, the joint height of which amounted to eleven feet, struck the bridge and broke it down. In an action to recover damages for the injury, the defense of contributory negligence was set up. The judge at the trial told the jurors that the plaintiffs must satisfy them that the accident happened solely through the negligence of the defendant's servants, for that if both sides were negligent, so as to contribute to the accident, the plaintiffs

could not recover. *Held*, a misdirection, and a new trial ordered. *Radley v. London and North Western Railway Co.*, Law Reports, 1 Appeal Cases, 754, 1876; 18 Eng. (Moak), 37.

22. — The plaintiffs, colliery owners, had a siding adjoining the defendant's line, which was crossed by a bridge, and on to which the defendant was in the habit of conveying the plaintiffs' empty trucks from their line, the plaintiffs removing them as they thought fit. The defendant was accustomed to bring such empty trucks along its main line at any hour by day or night, and, without notice to the plaintiffs, to shunt such trucks on to the siding and leave them there to be disposed of by the plaintiffs. One Saturday evening, after working hours, the defendant brought on to the plaintiffs' siding and left there trucks of the plaintiffs, one of which was loaded with a broken truck to such a height that it would not pass under the bridge. More than twenty-four hours afterwards, but before work was resumed at the plaintiffs' works, the defendant, after dark, pushed on to the siding other trucks of the plaintiffs', which pushed the loaded truck up to the bridge, by which means the further progress of the train of trucks was checked. The engine-driver, believing that the obstruction was caused by a break, drew back the engine, and gave with it such a push to the train that the loaded truck knocked down the bridge. In an action for the damage so done, the jury found that the plaintiffs were guilty of contributory negligence in not removing the loaded truck — by the majority of the exchequer chamber (Denman, J. dissenting), reversing the decision of the court of exchequer, that there was evidence of contributory negligence to go to the jury. *Radley v. London and North Western Railway Co.*, Law Reports, 10 Exchequer Cases, 100, 1875; 12 Eng. (Moak), 544.

23. International bridge. The act of congress passed in June, 1870, providing, among other things, that "all railway companies desiring to use the said bridge shall have and be entitled to equal rights and privileges in the passage of the same, and in the use of the machinery and fixtures thereof, and of all the approaches thereto, under and upon such terms and conditions as shall

Jurisdiction to Abate — Personal Injuries.

be prescribed by the district court of the United States," etc., does not confer upon such court jurisdiction over a controversy relating solely to the compensation which is due the corporation for the use of the bridge. *Canada Southern R'y Co. v. International Bridge Co.*, 8 Federal Reporter, 190. 1881.

24. — A determination by a court, under the authority of a statutory enactment, in a case of disagreement, of the "terms and conditions" upon which a railway company should be entitled to the use of a bridge and its appurtenances, after hearing the allegations and proofs of the parties, is not an improper exercise of the judicial function. *Canada Northern R'y Co. v. International Bridge Co.*, 7 Federal Reporter, 658. 1880.

25. Jurisdiction to abate. A justice of the peace has no jurisdiction to abate, as a nuisance, a bridge erected by a railway over a navigable stream. *Macon and Brunswick R. R. Co. v. Pate*, 50 Ga., 156. 1873.

26. Over a dry channel. Where, in a newly settled country, a bridge was built over a channel then containing no water, and wherein no flow of water was known to have occurred, held, that due diligence required an inquiry and examination as to its character and the declivity of the circumjacent country, to ascertain the quantity of water likely to flow there in the future; that if indications existed in the vicinity, of former floods, *e. g.*, drift wood and the like in the branches of bushes, or water marks upon the trunks of trees, it was gross negligence to construct the bridge with its approach of light and unsubstantial soil, reaching into the water-way. *Kansas Pacific R'y Co. v. Miller*, 2 Colo., 442, 1874; 20 Amer. R'y Rep., 245.

27. Navigable streams. Congress may authorize the construction of a bridge over a public navigable water, although the same will, to some extent, interfere with navigation; and its determination as to the extent of the interference which will be permitted is conclusive. *People ex rel. v. Kelly*, 76 N. Y., 475. 1879.

28. — The power granted by the legislature to a railway company to build a road between two points carries authority to cross navigable waters and to build necessary draw-bridges, and this authority implies

the right and imposes the duty to maintain and repair or rebuild such bridges. A railway company having authority to build or rebuild a bridge across a navigable stream is not responsible in damages for temporary obstruction of the stream by scaffolding, or by the construction of a temporary stationary bridge, and for unavoidable delay in the completion of the bridge. *Hamilton v. Vicksburg, Shreveport and Pacific R. R. Co.*, 34 La. An., 970. 1882.

29. — The remedy for the obstruction of a navigable stream by a railway bridge is by indictment. An action will not lie at the instance of an individual. *Small v. Grand Trunk R'y Co.*, 15 Upper Canada, Queen's Bench, 283. 1857.

30. — Under the general railway law of Wisconsin (ch. 119, General Laws of 1872), a corporation duly organized in pursuance thereof, if its line of road crosses a navigable stream, is authorized to build a bridge over such stream, subject only to the restrictions specified in the law. *Miller v. Prairie du Chien and McGregor R'y Co.*, 34 Wis., 538. 1874.

31. — The power of the Northern Pacific Railway Company to build bridges over navigable streams considered. *Hughes v. Northern Pacific R'y Co.*, 18 Federal Reporter, 106. 1888.

32. — The federal court will not enjoin the erection of a bridge over the Raritan river, authorized by an act of the New Jersey legislature, although it may completely intercept navigation, except as accommodated by draws, where congress has not legislated on the subject. *Easton v. N. Y. and Long Branch R. R. Co.*, 9 Philadelphia (U. S. C. C.), 475. 1873.

33. Personal injuries. The owners of private grounds are liable for injuries to children, although trespassing at the time, where, from the peculiar nature and exposed position of the dangerous defect or agent, the owner should reasonably anticipate such injury to flow therefrom as actually happened. *Coppner v. Pennsylvania Co.*, 12 Bradwell (Ill.), 600. 1883.

34. — The liability of the owner of the franchise of a toll bridge for injury to persons and teams is not affected by the fact that a railway company is under obligation

Transit Company — Various Rivers.

to keep the bridge in repair. *Tift v. Towns*, 53 Ga., 47. 1874.

35. Transit company; injury to passengers. Where an arrangement between a transit company and a bridge company allowed collectors of the latter to mount trams of the former while passing over a bridge, for the purpose of collecting the bridge fare, but the running of the trains was under the control of the former, and the superintendents in charge of these operations were its agents, *held*, that an instruction to the effect that if the jury believe, from the evidence, that the bridge conductor was not employed by the transit company, and had no authority from said company to act for it, and was not authorized by it to exercise any control over the passengers on the train moved by the said company, but by the bridge company to collect the bridge fare on the trains passing the bridge, then the transit company cannot be held liable for any act done by said bridge conductor in exercising control over deceased, etc., was properly refused, as it did not meet or negative the state of facts disclosed by the record, as the two corporations were clearly acting together in such transportation. *Union Ry and Transit Co. v. Kallaher*, 12 Bradwell (Ill.), 400. 1883.

36. Wharves; damages. No action will lie to recover damages for the obstruction of a navigable stream by the erection of a bridge across the same, whereby the owner of a tract of land and a wharf above the bridge is prevented from coming to the wharf from the sea in vessels, although his wharf is the only one above the bridge used for business purposes; and he is thereby compelled to abandon the use of his wharf for such purposes, and to transport his goods by land at an enhanced expense. *Blackwell v. Old Colony R. R. Co.*, 123 Mass., 1. 1877.

37. Various rivers — Delaware river. The general railway law, approved April 2, 1873, provides for conferring the franchise of bridging the Delaware, so far as the authority of New Jersey can avail for that purpose. *Attorney-General v. Delaware and Bound Brook R. R. Co.*, 27 N. J. Eq., 631. 1876.

38. — When Pennsylvania has authorized one of its railroad corporations to bridge the Delaware so as to connect with any New

Jersey road, and New Jersey has authorized one of its railroad companies to bridge it so as to connect with any Pennsylvania road, the states have exercised concurrent jurisdiction under the treaty of 1783, in such manner as to give mutual consent to the erection of a bridge by the New Jersey and Pennsylvania companies jointly, each from its own bank to the center of the stream. *Ib.*

39. — Healy slough. The body of water in Cook county, connected with the south branch of the Chicago river, and known as the "Healy slough," is not a navigable stream. The public have no easement over the "Healy slough" of a character to render a permanent railroad bridge over the same a public nuisance. *Joliet and Chicago R. R. Co. v. Healy*, 94 Ill., 416. 1880.

40. — But, without reference to the rights of the public, or of riparian owners, in respect to the navigability of the "Healy slough," where it was sought by the owner of a lot of ground abutting upon the slough, by bill in chancery, to compel a railroad company to remove a permanent bridge it had erected over the same for railroad purposes, and to restore that body of water to its former condition, by constructing a draw-bridge or otherwise, so as not to impair its usefulness, and to enable complainants to avail thereof as a means of communication by vessels from the Chicago river to a canal or slip owned by them, it appeared there was a space of ground over which they had no control, between complainants' canal and the slough, which cut off the water connection, so that a swing-bridge over the slough, in place of the permanent bridge sought to be removed, would be of no avail to them for the purposes alleged. It was *held* a court of chancery would not grant the prayer of the bill to do so useless an act as the removal of the permanent bridge, inasmuch as such action could result only in injury and expense to the railroad company, without any corresponding advantage to the complainants. *Ib.*

41. — Ohio river. Congress could withdraw its assent whenever it determined that, in regard to the construction of the bridge, other requirements than those originally prescribed were essential to secure due protection to the navigation of the river.

Bridge — Obstruction.

Bridge Co. v. United States, 105 U. S., 470. 1881.

42. — The bridge over the Ohio river at Parkersburg being authorized by act of congress, the obstruction of navigation at that point, so far as it was reasonable and necessary to the construction of the work, was justified. *Baltimore and Ohio R. R. Co. v. Wheeling, etc., Transportation Co.*, 32 Ohio St., 116. 1877.

43. — Missouri river. Section 2 of the act of congress of July 25, 1866, authorizing the construction of bridges across the Mississippi river and across the Missouri river at Kansas City, construed as requiring that the passage way for vessels between the piers of any draw-bridge built under said act shall be one hundred and sixty feet wide in the clear, measured by a line running directly across the channel, and at right angles with the piers of the bridge. Where a bridge is built diagonally across the river, a measurement along the line of the bridge is not the proper measurement. *Missouri River Packet Co. v. Hannibal and St. Joseph R. R. Co.*, 2 Federal Reporter, 285; 1 McCrary (U. S. C. C.), 281. 1880.

44. — East river; New York and Brooklyn bridge. The statutes in relation to the above mentioned bridge, construed. *New York and Brooklyn Bridge, In re*, 72 N. Y., 527. 1878.

BY-LAWS.

See PENALTIES; BILLS OF LADING.

CANALS.

See EMINENT DOMAIN.

1. **Bridge.** A railway company must be enjoined from building a swinging bridge over a canal when the bottom of the bridge is to be within three feet of the surface of the water. *Pa. Canal Co. v. Philadelphia and Reading R. R. Co.*, 2 Pearson (Pa.), 354. 1879.

2. — The Philadelphia and Reading R'y Co. has authority by its charter to pass over as well as under canals. *Ib.*

3. **Contract for water power.** An agreement by the Delaware and Raritan Canal Co., guarantying to A., his heirs and assigns,

forever, out of the feeder of the canal, sufficient water for three runs of stones at all times, and for a fourth run of stones at all times except when the water could not be taken without injury to the company, etc., in consideration of a grant of land by A. to the company for its purposes according to its charter, and the release of damages awarded against the company in A.'s favor on proceedings in condemnation, and the relinquishment by A. of valuable water rights in the Delaware river, *held*, not to be *ultra vires*. *Hoppock's Executors v. United New Jersey R. R. and Canal Co.*, 27 N. J. Eq., 286. 1876.

4. **Erie canal; title.** The state of Indiana acquired an absolute title to the property used in the construction of the Wabash and Erie canal, which, upon the sale of the canal and its appendages after its abandonment as a canal, passed to the purchasers. *Mason v. Lake Erie, Evansville and Southwestern R'y Co.*, 9 Bissell (U. S. C. C.), 239. 1890.

5. **Failure to fence.** The owner of land adjoining a public road is under no obligation to fence excavations in his land unless they are so near to the road as to be dangerous to persons lawfully using it. Where a canal company constructed a canal by the side of an ancient public footway, at a distance of about twenty-four feet from it, with a towing-path on the bank of the canal and an intermediate space between them, and, in consequence of the acts of persons authorized by the company, the distinction between the footway and the canal had become obliterated; and it appeared that, although the public had no right to pass over the intermediate space between the footway and the canal, they were permitted by the company to do so without objection, — *held*, that the company was under no obligation to fence the canal; and consequently that no action lay against it, under the 9 and 10 Vict., c. 93, by the personal representative of a party who had quitted the footway, and, in consequence of the dangerous state of the canal, fell in and was drowned. *Binks v. South Yorkshire Railway Co.*, 8 Best & Smith, 244; 118 E. C. L., 242. 1862.

6. **Obstruction; limitation of action.** A railway company was empowered by stat-

Obstruction by Locomotive Falling through Bridge — Use for Railway Purposes.

ute to divert a canal, and it was enacted that if by any accident, or in the execution of any works authorized by the act (otherwise than from the neglect or mismanagement of the canal company), or by reason of the bad state of repair of the railway company's works, the canal should be so obstructed that boats could not pass, the railway company should pay the canal company, by way of ascertained damages, 10*l.* at least for every hour during which the obstruction should continue, and if it should continue beyond seventy-two consecutive hours, or should have been occasioned by any wilful act of the railway company, then at 20*l.* per hour, at least, by way of ascertained damages; and that in default of payment, on demand, etc., the canal company might recover the sum by action of debt, or on the case. But this clause was not to prevent the recovery of special damage in respect of injuries by machines or engines on the railway, or of the acts or defaults of the railway company in respect of which the lowest amount of liquidated damages was ascertained, as aforesaid, though the special damage might exceed the liquidated damages; but if such liquidated damages should have been paid, and any action for special damage should be brought, credit was to be given therein for such payment. It was also enacted that no action should be brought without twenty days' notice, nor unless brought within six calendar months next after the act committed, or, in case there should be a continuation of damage, then within six calendar months next after the doing such damage should have ceased. *Held*, 1. That an action of debt for liquidated damages incurred by obstructing the canal was an action for something done in pursuance of the act, and that the limitation clause applied. 2. The declaration stating that the canal, by means of the defendant's works, became obstructed on a certain day, and continued so obstructed for ninety-nine hours next following, and that defendant refused payment when demanded. *Held*, that the time of limitation ran from the last obstruction, and not from the demand of payment. *Kennet Co. v. Great Western Railway Co.*, 7 Adolphus & Ellis, N. S., 824; 53 E. C. L., 823. 1845.

7. Obstruction by locomotive falling through bridge; damages to boat owners. The defendant's line crosses the Seneca canal at the foot of Cayuga lake, over a draw-bridge. A bridge has been maintained at this point for a period of thirty-five years. While the draw was open and a canal boat was passing through, the defendant carelessly ran a locomotive into the draw and upon the boat, sinking it, and thereby suspending all navigation at that place for a period of five days. Immediately after the accident, the defendant proceeded with due diligence to remove the obstruction and repair the bridge. These actions were brought by the owners of canal boats, who were at the time of the accident engaged in carrying coal from Ithaca to Geneva, to recover damages sustained by their having to wait at the bridge until the obstruction was removed. *Held*, that they were entitled to recover. *Briggs v. New York Central and Hudson River R. R. Co.*, 30 Hun (N. Y.), 291. 1883.

8. Pennsylvania canal. In ejectionment, land covered originally by the slopes and embankments of the Pennsylvania canal, as well as any portion beyond it necessarily occupied by the ordinary accretions, may be recovered by the Western Pennsylvania Railway Co. to the extent of its ownership; and it cannot be estopped from doing so by the unauthorized acts of its agents in allowing parties to take and hold possession of the said land. *Western Pa. R. R. Co. v. Childs*, 3 Pittsburgh, 168. 1869.

9. Repair. The duty of the Pennsylvania R. R. Co. to repair a certain canal determined. *Pennsylvania R. R. Co. v. Patterson*, 73 Pa. St., 491. 1873.

10. Use for railway purposes. The board of public works of Ohio is not authorized by law to grant to a railway corporation the right to lay its track and to maintain and operate a railroad on and along the berme bank of a navigable canal belonging to the state. *State ex rel. v. Cincinnati Central R'y Co.*, 37 Ohio St., 157, 1881; 10 Amer. & Eng. R. R. Cases, 83.

11. — The state of Indiana, under various acts of the legislature, acquired the absolute title to the tow-path of the Wabash and Erie canal, and the mere fact that the land ceased to be used for that purpose did not re-

Contracts Limiting the Carrier's Liability.

vest the same in the original owners, where the property in controversy had been transferred to trustees for the benefit of creditors of the state. *Mason v. Lake Erie, Evansville and Southwestern R'y Co.*, 1 Federal Reporter, 712. 1880.

CARRIAGES.

See OMNIBUS LINES.

CARRIERS—COMMON.

See BAGGAGE; CARRIAGE OF MERCHANDISE; CARRIAGE OF LIVE STOCK; INJURY TO PASSENGERS; PASSENGERS.

[The various matters pertaining to common carriers are distributed under different heads throughout this Digest.]

CARRIAGE OF LIVE STOCK.

See CARRIAGE OF MERCHANDISE.

- I. CONTRACTS LIMITING THE CARRIER'S LIABILITY.
- II. EXTENT OF CARRIER'S LIABILITY.
- III. GENERAL MATTERS.

I. CONTRACTS LIMITING THE CARRIER'S LIABILITY.

1. **Carriage beyond destination.** Though a shipper of live stock contracted that the carrier was not to be responsible for attention, feeding or watering of the stock, but that it should afford the shipper reasonable facilities for those purposes, yet if the company carried the animals beyond the destination fixed by the bill of lading, and there detained them for several days before their return, it would not be relieved from liability for failure to care for the stock after passing the proper destination. *Bryant v. Southwestern R. R. Co.*, 68 Ga., 805, 1882; 6 Amer. & Eng. R. R. Cases, 348.

2. **Connecting lines.** Where a railway company contracted to carry cattle "through," the route being partly by water over the line of a packet company, which had made shipping arrangements with the

railway company, it was held that a contract exempting the railway company from the results of the negligence of the packet company was unreasonable, under the Railway and Canal Traffic Act of 1854. *Moore v. Midland R'y Co.*, 9 Irish Reports, Common Law, 20. 1875. *Held contra*, on appeal, and the statute held not to apply to such cases. *Doolan v. Same*, 10 ib., 47. 1876.

3. — The St. Louis, Kansas City and Northern Railway Co., owning and operating a line of railroad from Kansas City to Mexico, Mo., and there connecting with another road running to Chicago, made a contract to "forward" certain cattle from Kansas City to Chicago, stipulating therein that the shipper should "take care of the cattle while on the trip," and that "it and connecting lines over which such freight might pass should not be responsible for any loss, damage or injury which might happen in loading, forwarding or unloading, by suffocation, . . . or by any other cause except gross negligence," and that "it and such connecting lines should be deemed merely forwarders, and not common carriers, and only liable for such loss . . . as might be gross negligence only, and not otherwise." *Held*, that said St. Louis, Kansas City and Northern Railway Co. was liable as a carrier for the transportation the entire distance, and was responsible for any loss or injury occurring from ordinary negligence, whether such negligence was on its own or a connecting line. *St. Louis, Kansas City and Northern R'y Co. v. Piper*, 13 Kans., 505, 1874; 8 Amer. R'y Rep., 204.

4. — **unloading.** The plaintiff desired to send a cow from D. to S., and took her to the station at D., belonging to the G. N. Co., where he hooked her for S. by the defendant's railway. He signed a contract, under which it was agreed between him and the G. N. Co. that it should not be responsible for any loss or injury to cattle in the delivering, if such damage should be occasioned by kicking, plunging, or restiveness. The cow was put into a truck belonging to the defendant, and on arriving at S. was brought to a siding by the defendant's yard for the purpose of being unloaded. A porter in charge of the yard began to unfasten the

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truck. The plaintiff thereupon warned him not to let the cow out, as she would run at him; nevertheless he did let her out; she ran about the yard, and ultimately got on to the line and was killed. By an agreement between the defendant and the G. N. Co. it was provided that a complete and full system of interchange of traffic in passengers, goods, parcels, etc., should be established from all parts of one company and beyond its limits to all parts of the line of the other company and beyond its limits, with through tickets, through rates, and invoices and interchange of stock at junctions; the stock of the two companies being treated as one stock. . . . That the two companies should aid and assist each other in every possible way, as if the whole concerns of both companies were amalgamated. In an action brought against the defendant for the loss of the cow, the court having power to draw inferences, *held*: First, that the action was rightly brought, inasmuch as the agreement, if it did not constitute a partnership between the two companies, showed that the G. N. Co. became the agent of the defendant to make the contract for the carriage of the cow. Secondly, that the condition in the contract did not relieve the defendant from liability for negligence on the part of its servants in delivering the cow. *Gill v. Manchester, Sheffield and Lincolnshire Ry Co.*, Law Reports, 8 Queen's Bench Cases, 186; 5 Moak, 187. 1873.

5. Defective cars. If a common carrier by rail is negligent in furnishing unsuitable cars, even though they be cars for cattle, which cars the owner himself sees, and which cattle the owner himself attends, the carrier is not relieved from responsibility, even though there have been an agreement that he shall not be responsible. *Railroad Co. v. Pratt*, 22 Wallace, 123, 1874; 11 Amer. Ry Rep., 431.

6. — Where a railway company undertakes to transport live stock, it is its duty to furnish good and sufficient cars in which to carry the same; and if it does not, and animals escape from defects in its cars, beyond the terminus of its road, it will be liable for the loss, even though there be a special contract limiting its liability to the end of the road. *Indianapolis, Bloomington and*

Western Ry Co. v. Strain, 81 Ill., 504. 1876.

7. — Where a declaration alleged that defendant was a common carrier of horses from N. to S.; that plaintiffs, at request of defendant, delivered to it horses to be carried for hire from N. to S.; that, while the horses were being conveyed in the carriage (which, with the locomotive power thereof, was then in the management of the defendant), a wheel of the carriage took fire, of which defendant at a convenient time and place had notice, and was requested by plaintiffs not to persist in further carrying the horses in the carriage; but defendant persisted; and the wheel took fire again, for want of due precaution, and broke, and the horses were injured; defendant pleaded a special contract limiting its liability. *Held*, that defendant was entitled to have that issue submitted. *Austin v. Manchester, Sheffield and Lincolnshire Railway Co.*, 16 Adolphus & Ellis (N. S.), 600; 71 E. C. L., 600. 1851.

8. — An injury was caused to horses in transit by the breaking of a freight car wheel, which threw the car containing plaintiff's horses from the track. The track was in good repair; the wheel had been used for only a short time, and, upon inspection after the accident, showed no flaw or defect; and there was no evidence, except the mere fact of its breaking, which tended to show negligence of the company. *Held*, that there was no error in directing a verdict for the defendant. *Morrison v. Phillips and Colby Construction Co.*, 44 Wis., 405, 1878; 19 Amer. Ry Rep., 312.

9. — The plaintiff, who had some cattle conveyed by defendant, received for them a ticket which he signed, containing the terms on which the railway company carried the cattle. At the foot of the ticket there was a clause: "N. B.—This ticket is issued subject to the owner undertaking all risks of conveyance whatever, as the company will not be liable for any injury or damage, however caused, and occurring to live stock of any description traveling upon the L. and Y. Railway, or in its vehicles." The plaintiff saw the cattle put into the truck. During the journey some of the cattle got alarmed and broke out of the truck and were in-

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jured. The truck was so defectively constructed as to be unfit and unsafe for the conveyance of cattle. *Held*, that there was no implied stipulation that the truck should be fit for the conveyance of cattle; and that the company was protected by the terms of the ticket from liability to the plaintiff for the damage to the cattle. *Chippendale v. Lancashire and Yorkshire Railway Co.*, 7 Eng. Law & Equity, 395; 21 Law Jour. Rep., N. S., Q. B., 22; 15 Jurist, 1106. 1851.

10. — A railway company undertook the carriage of cattle under a special contract, by which the shipper assumed all injury, loss or damage which might be occasioned in certain contingencies, including the escaping of the cattle, and possible injury to them by fright or their own vice, as well as any other injury which might happen to them incidental to transportation, not caused by the fraud or gross negligence of the carrier. *Held*, that while this contract devolved on the owner the personal care of the cattle, with the duties and risks connected therewith, including the risk of their escaping or being injured in consequence of their own restiveness or viciousness, it did not exonerate the company from responsibility for damages resulting from a failure to provide a suitable and safe car for their carriage. *Rhodes v. Louisville and Nashville R. R. Co.*, 9 Bush (Ky.), 688. 1873.

11. — If the car is insufficient and unsuitable, the company is responsible for the damage resulting therefrom, even though the restiveness or viciousness of the cattle may have contributed to the injury incurred. *Ib.*

12. — The plaintiff brought three horses to the cattle station of the defendant's railway at Liverpool to be forwarded by a cattle truck to York. The defendant's servant provided a truck for the purpose, which, to all external appearance, and so far as the servant knew, was sufficient for the purpose. The plaintiff signed a ticket which contained the following memorandum: "This ticket is issued subject to the owner's undertaking all risks of conveyance, loading and unloading, whatsoever; as the company will not be responsible for any injury or damage (howsoever caused) occurring to live stock of any description traveling upon the Lancashire and Yorkshire Railway or in its vehicles."

The truck proved (as the fact was) to be insufficient for the carriage of the horses; and a hole was made in the bottom of it on the journey, by which the horses were injured. Two-pence a mile for hire was charged, being the regular conveyance in open trucks, under tickets in the above form, from the cattle station. Four-pence per mile was the charge for horses forwarded from the passenger station in "horse boxes," under similar tickets. *Held*: First, that the condition was reasonable; secondly, that it protected the defendant from liability in respect of the defect in the truck. *M'Manus v. Lancashire and Yorkshire R'y Co.*, 2 Hurlstone & Norman (Exchequer), 693. 1858.

13. Delay. Pigs were delivered by A. at a railway station at Alnwick, to be carried to Newcastle, A. paying the carriage, and receiving a ticket intimating the terms upon which alone the company undertook to carry them, one of which was as follows: "That the company be not responsible for the non-delivery of the stock within any certain or reasonable time, nor in time for any particular market, nor is it required to forward by any particular train." In an action by A. against the company in the county court, for injury to the pigs from delay in the conveyance of them, the judge left it to the jury to say whether the company received the pigs as a common carrier for hire for carriage, or whether it received them under the special contract set forth in the ticket. The jury having found against the company, *held*, a misdirection, inasmuch as there was no evidence whatever that the company had received the pigs upon any other contract than that set forth in the special contract. *York, Newcastle and Berwick R'y Co. v. Crisp*, 14 Common Bench, 527; 78 E. C. L., 527; 25 Eng. Law & Equity, 396. 1854. See *Hughes v. Great Western R'y Co.*, 78 E. C. L., 637.

14. Evidence; burden of proof. The duties of a common carrier do not originate in contract; and, where his liability has been limited by contract, it is not necessary, in an action against the carrier, to sue on the contract, but it is incumbent upon him to show how far his liability was limited by such contract. *Lupe v. Atlantic and Pacific R. R. Co.*, 3 Mo. App., 77. 1876.

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15. Fire. A contract with two railway companies for the carriage of certain sheep, by its terms, in consideration of a reduction of the charges for freight, released them from liability for injuries "caused by burning of hay, straw or other material used for feeding said animals, or otherwise." The contract contained no words expressly exempting the carriers from liability for their own negligence. A fire occurred in the cars, which destroyed a number of the sheep, the loss resulting from the negligence of the defendant, one of said companies, in omitting to supply the train with such appliances as would have enabled those in charge to have stopped it and extinguished the fire before serious damage had resulted. *Held*, that the exemption did not include negligence, and that defendant was liable. *Holsapple v. Rome, Watertown and Ogdensburg R. R. Co.*, 86 N. Y., 275, 1881; 3 Amer. & Eng. R. R. Cases, 487.

16. Horses. A railroad company may, by express contract, limit its liability in the carriage of horses. *Morrison v. Phillips and Colby Construction Co.*, 44 Wis., 405, 1878; 19 Amer. R'y Rep., 312.

17. — The ticket for the carriage of the horses given by the defendant to the plaintiff contained a memorandum to the effect that the defendant would not be liable for any injury occurring to the horses whilst traveling, or loading or unloading. *Held*, that the terms contained in the ticket formed part of the contract for the conveyance of the horses, and that the allegation of the defendant having received the horses, "to be safely and securely carried," was not supported by the evidence. *Shaw v. York and North Midland R'y Co.*, 6 Eng. R. R. & Canal Cases, 87. 1849.

18. — A declaration alleged that defendant, as a carrier, received from plaintiff a horse to be "safely and securely" carried by it upon its carriages, and to be safely and securely delivered to him, at a place mentioned, for hire. That thereupon it was its duty "safely and securely" to convey and deliver the horse as aforesaid; yet that defendant did not use due care about its conveyance, but so negligently by reason of the defective state of the carriage in which the horse was conveyed, it was killed. *Plea*,

denying that the horse was delivered and received, to be "safely and securely" carried as alleged. It appeared at the trial that the plaintiff had pointed out a defect in one of the partitions of a horse-box shown to him for the reception of his horse; that a servant of the defendant then endeavored to secure the partition, and assured the plaintiff that he had done so; that the horse was carried in that box; and that the horse's death was occasioned during the journey by the insecurity of the partition. A receipt was given to plaintiff for the amount paid for conveyance of the horse, at the foot of which receipt was written: N. B. "This ticket is issued subject to the owner's undertaking all risks of conveyance whatsoever, as the company will not be responsible for any injury or damage (however caused) occurring to horses or carriages; while traveling, or in loading or unloading." *Held*, that the terms of the memorandum formed part of the contract for the conveyance of the horse, and that they disproved the averment in the declaration that the defendant received the horse to be "safely and securely" carried. *Shaw v. York and Midland R'y Co.*, 13 Adolphus & Ellis, N. S., 347; 66 E. C. L., 345. 1849.

19. — The plaintiff, being the owner of a horse, delivered it to the defendant, to be carried subject to conditions, which stated that the owners undertook all risks of conveyance whatsoever, as the company would not be responsible for any injury or damage, howsoever caused, occurring to live stock of any description traveling on the railway. The horse having been injured by the horse-box being propelled against some trucks through the gross negligence of the company, *held*, *hesitante*, Platt, B., that the company, under the terms of the contract, was not responsible for the injury. *Carr v. Lancashire and Yorkshire Railway Co.*, 14 Eng. Law & Equity, 340; 21 Law Jour. Rep., N. S., Exch., 261. 1852.

20. — The plaintiff delivered a horse to the defendant for carriage, but, upon his doing so, he was required by the company to, and did, sign a ticket, which contained the following words: "This ticket is issued subject to the owner undertaking to bear all the risk of injury by conveyance and other

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contingencies; the company will not be responsible for any damage, however caused, to horses," etc. *Held*, that this amounted to a "special contract" within sec. 6 of the Carriers' Act, and that the company was thereby exempted from all liability for any damage that might be occasioned to the horse. *Morville v. Great Northern Railway Co.*, 10 Eng. Law & Equity, 366; 16 Jurist, 528. 1852.

21. Limitation as to value. Whether a contract is reasonable and just must be pronounced by the court in view of all the attending circumstances. A stipulation in a special contract, entered into in consideration of reduced rates and a free pass to the owner, that he shall attend the live stock and care for it, at his own expense, in case of accidents, is reasonable and valid; and the carrier, if not wanting in the diligence required of him, is not liable for losses occasioned by the shipper's inattention in these respects. A stipulation in a special contract (entered into in consideration of reduced rates and a free pass to the shipper) that the value at the time and place of shipment, not to exceed fifty dollars per head for ordinary beef cattle, should be the measure of recovery for any loss for which the carrier is liable, is just and reasonable, and is the measure of the carrier's liability. (Manning, J., dissenting on this point.) *South and North Ala. R. R. Co. v. Henlein*, 52 Ala., 608. 1875.

22. — A contract limiting the carrier's liability in advance to an amount less than the value of the property in case of loss is invalid. *Chicago, St. Louis and New Orleans R. R. Co. v. Abels*, 60 Miss., 1017. 1883.

23. — Notice to the shipper of the adoption of a rule that the carrier will not transport live stock unless the shipper signs a special contract, limiting the liability of the carrier, for loss or injury thereto, to \$100, does not create a contract between the parties by which such rules become binding upon the shipper. The assent of the shipper must appear before he can be bound. *Chicago, Rock Island and Pacific R'y Co. v. Harmon*, 12 Bradwell (Ill.), 54. 1882.

24. — A contract fairly entered into between carrier and shipper specifying a fixed sum as the value of the property, and limit-

ing the recovery in case of loss to that sum is binding on the shipper. *Harvey v. Tern Haute and Indianapolis R. R. Co.*, 74 Mo 538, 1881; 6 Amer. & Eng. R. R. Cases, 291.

25. Negligence. A common carrier can make no contract protecting him against liability for his own or his servant's negligence, but may, by special contract with the shipper, reasonably restrict his common law liability in other respects. The carrier can not escape liability for loss or injury to property transported under special contract unless he shows not only a loss or injury from a cause within the limitation, but also that it was occasioned without negligence on his part. *South and North Ala. R. R. Co. v. Henlein*, 52 Ala., 608. 1875.

26. — Where a railway company has in fact only one rate at which it carries or offers to carry cattle from O. to S., although it may have posted up in the office of its agent at O. other and higher rates, and an owner of cattle, without anything being said about any special contract, but with the consent of the company, places his cattle in the company's cars at O. to be transported to S., and the agent of the company at O. then presents to the shipper a certain contract for carrying said cattle at the full rate at which the company carries cattle, though less than said posted rates, and with certain restrictions, limitations, etc., as to the company's responsibility, and the agent then demands that the shipper shall sign said special contract or have his cattle unloaded, and the agent gives to the shipper no other option or alternative, and the shipper then signs said special contract, *held*, that said special contract, so far as it attempts to restrict the liability of the railroad company, or to impose additional burdens upon the shipper, as conditions precedent to a recovery for damages resulting from the negligence of the railway company, is without consideration and void. *Kansas Pacific R'y Co. v. Reynolds*, 17 Kans., 251. 1876.

27. — The defendant claimed to be exempt from liability for an injury to a horse caused upon its line, by reason of a stipulation in the bill of lading that it was not to be liable for any one of certain specified injuries or causes of injury to any animal thus carried. The court charged the jury that they were still

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liable for any injury caused by want of ordinary care on their part. *Held*, that the charge was correct. *Welch v. Boston and Albany R. R. Co.*, 41 Conn., 333. 1874.

28. — A contract entered into with a common carrier by the party who delivers goods to be conveyed, by which contract the carrier is exempted from all liability for any loss occasioned by his negligence, is binding upon both parties. *Carr v. Lancashire and Yorkshire Railway Co.*, 7 Welsby, Hurlstone & Gordon (Exchequer), 707. 1852.

29. — Horses were delivered to a railway company, to be carried from A. to B., for hire, subject to a note or ticket containing the following notice: "This ticket is issued subject to the owner's undertaking to bear all the risk of injury by conveyance and other contingencies, and the owner is required to see to the efficiency of the carriage before he allows his horses or live stock to be placed therein; the charge being for the use of the railway, carriage, and locomotive power only, the company will not be responsible for any alleged defects in its carriages or trucks, unless complaint be made at the time of booking or before the same leave the station; nor for any damages, however caused, to horses, cattle, or live stock of any description, traveling upon its railway or in its vehicles." *Held*, that giving to the words of the contract their most limited meaning, they must apply to all risks, of whatever kind and however arising; to be encountered in the course of the journey; and, therefore, that the company was not responsible for injury done to a horse from the firing of a wheel, in consequence of the neglect of the servants of the company to grease it. *Austin v. Manchester Railway Co.*, 10 Common Bench, 454; 70 E. C. L., 453, 1850; 5 Eng. Law & Equity, 329; 15 Jurist, 670; 20 Law Journal Rep., N. S., Q. B., 440; 11 Eng. Law & Equity, 506; 21 Law Jour. Rep., N. S., C. P., 179, 1852.

30. — A carrier cannot, by contract, exempt himself from liability for his own negligence, but may relieve himself from liability as an insurer. *Rhodes v. Louisville and Nashville R. R. Co.*, 9 Bush (Ky.), 688, 1873; *Louisville, Cincinnati and Lexington R. R. Co. v. Hedger*, ib., 645, 1873; *Nashville and Chattanooga R. R. Co. v. Johnson*, 6 Heis-

kell (Tenn.), 271, 1871; *Maslin v. Baltimore and Ohio R. R. Co.*, 14 West Va., 180, 1878.

31. — A carrier cannot by contract relieve himself from responsibility for his own negligence, or that of his servants. Neither can he limit his common law liability to safely deliver property received for transportation. *Wabash, St. Louis and Pacific R'y Co. v. Black*, 11 Bradwell (Ill.), 465. 1882.

32. — On grounds of public policy a common carrier is not allowed to stipulate for immunity against damage resulting from his own negligence. *South and North Ala. R. R. Co. v. Henlein*, 56 Ala., 368, 1876; 19 Amer. R'y Rep., 200; *Moulton v. St. Paul, Minneapolis and Manitoba R'y Co.*, 12 Amer. & Eng. R. R. Cases (Minn.), 13, 1883; *Mynard v. Syracuse, Binghamton and New York R. R. Co.*, 15 Amer. R'y Rep., 412; 71 N. Y., 180, 1877; reversing *Same v. Same*, 7 Hun (N. Y.), 399, 1876; but see *Schwartz v. Atlantic and Pacific Tel. Co.*, 18 Hun (N. Y.), 157, 1879; *Chicago, Burlington and Quincy R. R. Co. v. Hale*, 2 Bradwell (Ill.), 150, 1878.

33. — Upon the question of negligence, the burden of proof is upon the carrier. *Lupe v. Atlantic and Pacific R. R. Co.*, 3 Mo. App., 77. 1876.

34. **Overloading.** A railroad company transporting live stock may contract with the shipper for a consideration that the company shall be released from all liability for damages occurring to the stock, disconnected and apart from the conduct or running of the trains, as from overloading, suffocation, heat, and the like. *Ga. R. R. Co. v. Beatie*, 66 Ga., 438, 1881; *Ga. R. R. Co. v. Spears*, ib., 485, 1881; *Mitchell v. Georgia R. R. Co.*, 68 Ga., 644, 1882.

35. **Owner's risk.** Defendant's custom was to carry horses at the owner's risk, at reduced rates; and the letters "O. R.," signifying "Owner's Risk," were upon the receipt given plaintiff for his horses, and retained and put in evidence by him; and he testified that "he did not see" those letters, but not that he did not understand their meaning. *Held*, that the restricted liability of the company clearly appeared from plaintiff's evidence. *Morrison v. Phillips and Colby Construction Co.*, 44 Wis., 405, 1878; 19 Amer. R'y Rep., 312.

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36. Owner to take care of stock. Although a common carrier cannot by a special contract exempt himself from liability for his own negligence, yet in an action against him, the gravamen of which is negligence in the transportation of live stock, whereby one of the animals escaped or was stolen, it is competent for him to plead that he had a contract with plaintiff that plaintiff should accompany and take care of the stock, and defendant should not be liable for loss by escape from any cause whatever, and that plaintiff did accompany, but failed to take care of the stock. *Oxley v. St. Louis, Kansas City and Northern R'y Co.*, 65 Mo., 629. 1877.

37. — Where a contract for the shipment of stock, stipulating that the owner was to assume all risk of injury done by the cattle to each other, and also that the owner should be permitted to pass on the train to take charge of them, was not signed until four of the cars had been shipped without notice to him. *Held*, that such contract was *nudum pactum* and did not relieve the defendant from the necessity of exercising ordinary care. *German v. Chicago and Northwestern R. R. Co.*, 38 Ia., 127. 1874.

38. — A railway company which undertakes to carry live stock for hire for such persons as choose to employ it, assumes the relation of common carrier, with such modifications of the common law liability as arise from the nature of the animals, and their capacity for inflicting injury upon themselves and upon each other. The liability of the carrier for his own negligence is not modified by the facts that the bailment relates to live stock, or that by agreement the owner accompanies the property, and exercises care respecting it during the transportation. *Moulton v. St. Paul, Minneapolis and Manitoba R'y Co.*, 12 Amer. & Eng. R. R. Cases (Minn.), 13. 1883.

39. — Where the owner contracts to load and unload his stock, and to take charge of them during their transportation, and does in fact do so, the burden of proof, when the company is charged with negligence, for the loss or injury to the stock, is upon the owner. *Clark v. St. Louis, Kansas City and Northern R'y Co.*, 64 Mo., 440. 1877.

40. — notice of injury. Where a railway company transported a car-load of cattle for the plaintiff at special rates, under a special contract signed by both parties, by the terms of which the plaintiff was to accompany the stock and superintend it on the way, and where by another clause in the contract it was stipulated that damages to such stock in transit should not be allowed unless notice in writing of a claim therefor was given to the company at or before the time of unloading the cattle, and it appeared that plaintiff did accompany the stock and knew of the injury at the time, but did not give notice thereof for more than a year, *held*, that he could not recover. *Goggin v. K. P. R. R. Co.*, 12 Kans., 416, 1874; 8 Amer. R'y Rep., 278.

41. Reasonableness of contract. A railway company introduced into a special contract for the conveyance of horses at a low rate, a condition exempting itself "from all liability in respect of" the horses, "whether in the loading, unloading or in the transit and conveyance of the same, or whilst in the company's vehicles, or on its premises." *Held*, that the condition was in itself unjust and unreasonable. *Lloyd v. Waterford and Limerick R'y Co.*, 15 Irish Common Law, 37, 1862; 14 Irish Jurist, 240.

42. — A railway company issued a consignment note for the carriage of cattle from O. to B., one of the conditions of which was, "the company is not to be amenable for any consequences arising from detention or delay in or in relation to the conveying or delivery of the said animals, however caused." *Held*, an unreasonable condition within the first proviso in s. 7 of the Railway and Canal Traffic Act, 1854, 17 and 18 Vict., c. 31. *Allday v. Great Western Railway Co.*, 5 Best & Smith, 903; 117 E. C. L., 902. 1864.

43. — The owner of cattle, on sending them by a railway, signed a ticket stating that he thereby agreed to the following conditions of carriage: "1st. The company is to be free from all risk and responsibility with respect to any loss or damage arising in the loading or unloading, from suffocation, or from being trampled upon, bruised, or otherwise injured in the transit, from fire, or from any other cause whatsoever, it being

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hereby agreed that the same is to be carried at the owner's risk." "8d. That as the charge for conveyance is for the use of the wagon and locomotive power, the owner or his representative is required to see to the efficiency of such wagon before he allows his stock to be placed therein, and complaint must be made in writing to the station inspector or clerk in charge as to all alleged defects, either at the time of booking or before the wagon leaves the station." *Held*, that these conditions were unreasonable, and void under the Railway, Canal and Traffic Act, 1854. *Gregory v. West Midland Railway Co.*, 2 Hurlstone & Norman (Exchequer), 944. 1864.

44. — A contract for the conveyance of cattle by railway, signed by the party sending them, contained the two following, amongst other conditions: "The owner undertakes all risks of loading, unloading and carriage, whether arising from the negligence or default of the company or its servants, or from defect or imperfection in the station, platform, or other places of loading or unloading, or of the carriage in which the cattle may be loaded or conveyed, or from any other cause whatsoever." "The company will grant free passes to persons having the care of live stock, as an inducement to owners to send proper persons to take care of them." *Held*, that the first of these conditions was unreasonable, and that its unreasonable character was not removed by the fact that the company, under the second condition, granted, and the owner accepted, a free pass for a person who traveled with the cattle sent. *Rooth v. North Eastern Railway Co.*, Law Reports, 2 Exchequer Cases, 173. 1867.

45. — *Held*, that the condition exempting the defendant "in all cases from liability for injuries caused by fear or restiveness of animals," did not embrace cases in which the injury immediately flowed from the fear or restiveness of the animals, directly occasioned by some act of negligence or want of care on the part of the defendants, but applied only to injury from fear or restiveness caused by the transit with its ordinary incidents, and without any negligence or default on the part of the company; and that, taken in this limited sense, the condition was not

unreasonable. *Moore v. Great Northern Ry Co.*, 10 Law Reports, Ireland, 95. 1882.

46. — The 17th and 18th Vict., c. 31, s. 7, which makes void all notices, conditions and declarations, made and given by a railway limiting its liability, unless such as the court or the judge trying the cause may adjudge to be just and reasonable, extends to cases where a special contract has been signed in conformity with the subsequent provision in the statute. *McManus v. Lancashire and Yorkshire Ry Co.*, 4 Hurlstone & Norman (Exchequer), 327. 1859.

47. **Statute forbidding special contracts.** Where a contract for transportation limited the carrier's liability at common law, in consideration for which the shipper received special rates and a pass over the road, it was held that the contract was within the provisions of § 1308 of the Code, rendering such agreements void. *Brush v. S., A. and D. R. R. Co.*, 43 Ia., 554, 1876; 14 Amer. Ry Rep., 479.

48. — A contract between a shipper and a common carrier, limiting the latter's liability, made and to be performed within the state of Iowa, is in conflict with § 1308 of the Code. *McCoy v. Keokuk and Des Moines R. R. Co.*, 44 Ia., 424. 1876.

49. — A regulation of a railway company to the effect that no valuable live stock shall be received for shipment until a contract is signed by the owner releasing the company from all liability for injury to such stock in shipment, above the value of ordinary stock, is void, under § 1308 of the Code. *McCune v. Burlington, Cedar Rapids and Northern Ry Co.*, 52 Ia., 600. 1879.

50. — Under the Railway Act of 1879 a railway company cannot relieve itself from liability for negligence by a special contract in its shipping bill. *Vogel v. Grand Trunk Ry Co.*, 2 Ontario Rep., 197. 1883.

51. — The statute prohibits a common carrier from limiting, by contract, its liability to deliver the goods safely at their destination; but in this case, if the carrier was guilty of no negligence, it was not liable at common law, and the contract in that regard is not within the statute and prohibited thereby. *Indianapolis and St. Louis Ry Co. v. Jurey*, 8 Bradwell (Ill.), 160. 1880.

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52. Suffocation ; damages. There was a special contract exempting defendant from liability for any loss by suffocation, and several hogs were suffocated in the cars. *Held*, that if this resulted from the negligence of defendant, plaintiff was entitled to recover for the loss, and the measure of his recovery would be the difference in the value of the hogs when alive and when dead, at the point of delivery. *Sturgeon v. St. Louis, Kansas City and Northern R'y Co.*, 65 Mo., 569. 1877.

53. Time of presentation of claim. A carrier is not restricted from providing in a shipping contract that, in case any claim for damages is made, notice of the same shall be given within a prescribed time. Such a provision is reasonable, and is not a limitation upon the common law duty of a carrier to safely deliver property received for shipment. *Wabash, St. Louis and Pacific R. R. Co. v. Black*, 11 Bradwell (Ill.), 465. 1882.

54. — The liability of carriers of live stock may be limited by a special contract, whereby the shipper agrees that his claim for damages under the contract, if any, shall be made in writing to the general freight agent of the carrier within five days after the live stock shall have been unloaded or delivered at the point of destination. *Dawson v. St. Louis, Kansas City and Northern R'y Co.*, 6 Mo., 514. 1882.

55. — A contract of affreightment contained this provision: "Claims for loss and damages must be presented in thirty days from date of shipment in order to receive attention." *Held*, that failure to present within thirty days did not cut off a claimant's cause of action. *Dunn v. Hannibal and St. Joseph R. R. Co.*, 63 Mo., 268. 1878.

II. EXTENT OF CARRIER'S LIABILITY.

56. Common law liability. The common law liability of a common carrier to deliver live animals is not different from that where the delivery of merchandise or other matter is concerned. Cars of sufficient strength for such purpose should always be provided, and the want of them is negligence, for which the carrier will be responsible in case of any loss occasioned thereby. *St. Louis and Southeastern R'y Co. v. Dorman*, 72 Ill., 504. 374.

57. — When a railway company undertakes to carry live stock for hire, the fact that it does so establishes its relation as a common carrier, with the duties and obligations which grow out of it. *Atchison and Nebraska R. R. Co. v. Washburn*, 5 Neb., 117, 1876; 19 Amer. R'y Rep., 139.

58. — Railroad companies are not bound as common carriers of live stock. As carriers of live stock they are bound to use due and proper care, and deliver in reasonable time; but they are not insurers. *Baker v. Louisville and Nashville R. R. Co.*, 10 Lea (Tenn.), 304. 1882.

59. — The liability of a carrier of live stock is the same as that of a carrier of inanimate things at common law, except so far as such stock are liable to injury caused by their own propensities. *Bamberg v. South Carolina R. R. Co.*, 9 So. Car., 61, 1877; *South and North Ala. R. R. Co. v. Henlein*, 52 Ala., 606, 1875.

60. — Where the cause of the damage, for which recovery is sought, is not connected with the conduct, character or propensities of the animals undertaken to be carried, the ordinary responsibility of the carrier should attach. A common carrier of live stock is liable as in carriage of other property, except so far as the nature of live stock renders the common law rules inapplicable. *McCoy v. Keokuk and Des Moines R. R. Co.*, 44 Ia., 424, 1876; *Mynard v. Syracuse, Binghamton and New York R. R. Co.*, 15 Amer. R'y Rep., 412; 71 N. Y., 180, 1877; reversing *Same v. Same*, 7 Hun (N. Y.), 399, 1876.

61. — A railway company, which charges for the transportation of cattle, but permits the shipper to travel on a free pass upon the cars to take care of the cattle, is a common carrier for hire, both as to passenger and cattle. *Maslin v. Baltimore and Ohio R. R. Co.*, 14 West Va., 180. 1878.

62. — A common carrier cannot, by special contract relating to the transportation of stock, defeat an action in tort for their non-delivery, based on his common law obligation to use due diligence in transportation of the same. The liability of defendant in such case does not arise upon contract, but in spite of it. *Clark v. St. Louis, Kansas City and Northern R'y Co.*, 64 Mo., 440. 1877.

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63. — In Missouri a railway company, when engaged in the business of carrying cattle, is a common carrier. *Lupe v. Atlantic and Pacific R. R. Co.*, 3 Mo. App., 77. 1876.

64. — The statute, 3 W. 4, c. 34, empowered the defendant to build a railway, and constituted it a common carrier, etc. The act provided that no suit should be brought against the company "for anything done or omitted to be done in pursuance of the act," without fourteen days' previous notice in writing. In an action for not safely carrying certain horses, it was held that the company was not entitled to this notice, the liability being at common law, and not under the provisions of the special act. *Palmer v. Grand Junction R'y Co.*, 4 Meeson & Welsby (Exchequer), 749. 1839.

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65. Carriage beyond destination. When the Central R. R. Co. received live stock at Atlanta to be carried to Americus over its line and that of the Southwestern Railway, and by a mistake on the part of the first company they were consigned to a point beyond Americus, and were so received and carried by the connecting line, such facts would not relieve the latter from damages occurring by reason of inattention to the stock at the place to which they were actually carried. *Bryant v. Southwestern R. R. Co.*, 68 Ga., 805, 1882; 6 Amer. & Eng. R. R. Cases, 388.

66. Cleansing under cattle plague laws. By § 230 of 25 and 26 Vict., c. cccxiii, defendant was authorized to charge for loading, unloading, and "for any other extraordinary services performed." Held, that the carrier could not charge for cleansing the cars under this provision, as such cleansing was not a service rendered to the shipper as distinguished from the rest of the public. *Cox v. Great Eastern R'y Co.*, Law Reports, 4 Common Pleas Cases, 181. 1869.

67. Connecting lines. In the absence of a special contract a railway company, by receiving his stock for transportation over its own line and other lines therewith connected, is only bound to carry the same over its own line, and make safe delivery to the

next connecting carrier. *Myrick v. Michigan Central R. R. Co.*, 107 U. S., 102. 1892.

68. — A contract whereby the liability of the company is sought to be extended beyond its own line will not be inferred from loose and doubtful expressions, but must be established by clear and satisfactory evidence. Taking a through fare on the receipt of the cattle does not establish such liability. *Id.*

69. — Though where goods received at one place are to be carried over several distinct lines of road to another and distant one, the liability of the common carrier first receiving them (where no special contract is made) is limited to his own line, yet he may subject himself by special contract to liability for them over the whole course of transit. And this is true of a railroad corporation possessed of the powers given to railroad corporations generally and subject to corresponding liabilities; such railroad corporations, *ex. gr.*, as those incorporated under the general railroad law of New York. *Railroad Co. v. Pratt*, 22 Wallace, 123, 1874; 11 Amer. R'y Rep., 431.

70. — Where the contract of a common carrier contemplates the employment of a connecting carrier to complete the transportation, the mere reception of the property by the latter will create sufficient privity between it and the shipper to enable him to maintain an action against it on the contract, and in such case the connecting carrier will be entitled to the benefit of all valid limitations upon the carrier's liability provided in the contract, but in order to avail itself of them, they must be specially pleaded. *Haliday v. St. Louis, Kansas City and Northern R'y Co.*, 74 Mo., 159, 1881; 6 Amer. & Eng. R. R. Cases, 433.

71. — The plaintiff sent some oxen to the Craven Arms Station of the Shrewsbury and Hereford Railway to be carried to Birmingham. The railway from that station to Shrewsbury belongs to the Shrewsbury and Hereford R'y Co., and the railway from Shrewsbury to Birmingham belongs to the Great Western R'y Co. The plaintiff's drover signed a way-bill, which contained the following condition: "For the convenience of the owner . . . the company will receive the charges payable to other companies for conveyance of such cattle over their lines of

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railway, but the company will not be subject to liability for any loss, delay, default or damage arising on such other railway." One sum was charged for the carriage, which was to be paid at Birmingham. The oxen were placed in trucks belonging to the Great Western R'y Co., and on the arrival of the train at Wolverhampton, it was found that the bottom of one of the trucks was broken, and one of the oxen dead and others injured. In an action by the plaintiff against the Great Western R'y Co., *held*, that this was one contract with the Shrewsbury and Hereford R'y Co. for the entire journey from the Craven Arms Station to Birmingham, and consequently that the Great Western R'y Co. was not liable for the injury to the oxen. *Coxon v. Great Western R'y Co.*, 5 Hurlstone & Norman (Exchequer), 274. 1860.

72. — In the absence of a special contract, the liability of a common carrier does not extend beyond the terminus of his own route. *Stewart v. Terre Haute & I. R. R. Co.*, 3 Federal Reporter, 768; 1 McCrary (U. S. C. C.), 312. 1880.

73. — Unless forbidden by its charter, a railroad company may contract for a shipment over connecting lines; and, having done so, is liable in all respects upon them as upon its own lines. In such a case, the shipper is authorized to assume that it has made the requisite arrangements to fulfil its obligations. *Railroad Co. v. McCarthy*, 96 U. S., 258. 1877.

74. — *change of cars.* In the absence of an express agreement or special circumstances making it the duty of a connecting line to continue the transportation of cattle in the same cars in which they are delivered to him, he has the right to unload for the purpose of transferring them to his own cars, provided this is done without unnecessary delay. *McAllister v. Chicago, Rock Island and Pacific R. R. Co.*, 74 Mo., 351, 381; 4 Amer. & Eng. R. R. Cases, 210.

75. — The fact that a contract for the transportation of cattle by rail provides that the owner shall be entitled to pass, free of charge, on the train with the cattle to take care of them, and that the cattle are to be fed, watered, loaded and unloaded by him at his own risk, does not confer on him the right to decide when, where, and under

what circumstances the loading and unloading shall take place; but rather it imposes on him the duty of loading and unloading wherever and whenever the exigencies of the transportation may, in the judgment of the railroad company, render it necessary. *Ib.*

76. — In the absence of evidence to show that a carrier receiving cattle for transportation from a connecting carrier was for any reason bound to continue the transportation in the same cars in which the cattle came to it, or had notice that they were of a kind which it was unlawful to unload within the limits of the state, the receiving carrier will not be compelled to make good to the shipper damages sustained by him by reason of the seizure and sale of the cattle to pay a fine imposed upon him in consequence of its having, against his objection, unloaded the cattle for the purpose of reloading them into its own cars. Such damages are too remote, and cannot be held to have been within the contemplation of the parties. *Ib.*

77. — *delay.* It appeared that the defendant had undertaken to carry the stock to a point on a connecting road beyond its own line; that, owing to the departure of the train on the connecting road before defendant's train arrived at the junction, they were detained there about twenty-four hours in severe winter weather, without food or water. The stock was carried under a contract which exempted the defendant from liability for injuries occurring on connecting roads. Evidence having been admitted by the trial court to show that, when defendant's train was about to start, plaintiff requested defendant's agent to telegraph to the agent of the connecting line that the stock was coming, but he failed to comply with the request; and that it was usual to give such notice, and on receipt of it the trains of the connecting company were accustomed to await the arrival of defendant's train; to show the condition of the stock when they arrived at their destination, their value in that condition, and what they would have been worth if sound, — *held*, that the evidence was properly admitted. *Dunn v. Hannibal and St. Joseph R. R. Co.*, 68 Mo., 268. 1878. See, also, *Rice v. Kansas Pacific R'y Co.*, 68 ib., 314. 1876.

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78. — When upon arrival of the train at the junction it was found that the stock could not be forwarded immediately, and that, to prevent damage, it should be unloaded, fed and watered, it became the duty of the first company to see that this was done; and that duty could not be imposed on the owner; this, although he was accompanying the stock under a contract which provided that he should take care of, water and feed them while under transportation *Ib.*

79. — **delivery.** A contract obligated the carrier to transport a lot of hogs to a given point, ready to be delivered to the agent of a connecting line, "consigned, numbered and marked as per margin," to be by the connecting company carried to their place of destination, upon condition that the liability of the contracting company as a common carrier should cease when the hogs arrived at the point named, ready to be delivered to the next carrier. The name of the consignor was not given in the margin. The hogs were delivered by the company to the connecting company, marked to the consignee as indicated on the margin of the contract, and were duly delivered to the consignee. Another shipper of hogs, on the same train, from the same point, and to the same destination, accompanied his hogs and received the pay from the consignee for both lots. *Held*, that the company, having shipped the hogs, marked as indicated on the margin of the contract, discharged their whole duty, and there being no consignor named on the margin referred to, the company was guilty of no negligence which led the consignee to pay the wrong person. *Indianapolis, Bloomington and Western R'y Co. v. Murray*, 72 Ill., 128. 1874.

80. — **pleading; lease.** A declaration, the allegations of which made out a case for recovery against a railway company as the last of a connecting line, was not demurrable because, as a matter of fact, it may have been leased by another railway company, which was the real contracting party. If such facts existed, they could not be reached by demurrer. *Southwestern R. R. Co. v. Bryant*, 67 Ga., 212. 1881.

81. **Contract.** The written contract to carry being with another person, *held*, that

the plaintiff could not recover. *Southwestern R. R. Co. v. Millian*, 62 Ga., 607. 1879.

82. — **agent.** In a suit against a railway company for breach of a verbal contract, made with its station agent, to receive and ship plaintiff's cattle, and for that purpose to furnish a certain number of cars at such station on a day stipulated, *held*, that, as defendant had made it the duty of the agent to receive and forward freight, the contract was within the scope of his apparent authority, and was binding upon the company, unless plaintiff had actual knowledge that he had no such authority. *Harrison v. Missouri Pacific R'y Co.*, 74 Mo., 364, 1881; 7 Amer. & Eng. R. R. Cases, 332.

83. — Where the agent of a company, or his clerk, transacting the company's business in said agent's office, enters, on behalf of the company, into a special, absolute and unqualified contract outside of the ordinary regulations of the company, such contract is binding on the company, even though neither the clerk nor the agent had any authority to make such a contract. *Anderson v. Chester and Holyhead R'y Co.*, 4 Irish Common Law, 435. 1854.

84. — Where a person acting for himself, and also acting as the agent of a certain principal, entered into a contract in his own name with a railway company for the carriage of certain specific cattle, a portion of which belonged to himself and the other portion belonged to his principal, and the name of his principal was not disclosed in said contract, and the cattle were injured during their transportation through the negligence of the railway company, and the principal commenced an action against the railway company for the loss sustained by himself, not making the agent a party to the action, and no claim was made that there was any defect of parties, either plaintiff or defendant, but the action was tried upon its merits and judgment rendered for the plaintiff, *held*, that in such a case the action may be maintained. *St. Louis, Kansas City and Northern R'y Co. v. Thacher*, 13 Kans., 564. 1874.

85. — **consideration.** A complaint against a railway company alleged a breach, by the defendant, of a contract between the plaintiff and the defendant, whereby the latter

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agreed to ship certain live stock which the plaintiff agreed and attempted to deliver to the defendant for shipment. *Held*, that the contract was based upon a sufficient consideration. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Hollowell*, 65 Ind., 188. 1879.

86. — **parol evidence.** A., by parol, made arrangements with the defendant, a railway company, to convey cattle for him to K station; he at the same time, without noticing its contents, signed a consignment note, by which the cattle were directed to be taken to E., an intermediate station on the line to K.; *held*, that parol evidence was admissible to show that the defendant had agreed to carry on the cattle to K., as it did not contradict, but only supplemented, the written contract. *Milpas v. London and Southwestern R'y Co.*, Law Reports, 1 Common Pleas Cases, 336. 1866.

87. — Where a railroad company is sued for its breach of a verbal agreement to receive and ship freight on a certain day, a subsequent written contract between the same parties for the transportation of the same freight, which does not contain any release of defendant's liability already incurred, or waive any right of plaintiff already accrued, is not admissible in evidence to show a merger of the prior verbal agreement. *Harrison v. Missouri Pacific R'y Co.*, 74 Mo., 364, 1881; 7 Amer. & Eng. R. R. Cases, 382.

88. — **written notice of damage; waiver.** By a contract for the shipment of certain cattle on a railway no claim was to be allowed the shipper unless "made in writing before or at the time the stock was unloaded." While *en route*, the cars were thrown from the track and part of the stock injured. After considerable detention the train proceeded to its destination, where it arrived in the rain about midnight. The owner then, before unloading, verbally notified the company's yard-master and agent that he would not receive the cattle except under protest, and asserted his claim for damages without objection as to its form, and with the assurance from the agent that it was unnecessary to proceed to the company's office that night. From the accident till then he had been compelled to give his entire attention to the care of his stock. In

consequence of the unfitness of the stock-yard, and by consent of the company, the cattle were, on the night of their arrival, removed to plaintiff's farm, sixteen miles distant, where their examination by the company was not difficult. And three days afterwards he gave a written notice of his claim to an officer of the company, who refused to pay the same, insisting that the stock was not damaged, but making no objection on the ground of delay in the notice. *Held*, that the proof showed a substantial compliance with the purpose of the contract, viz.: to give an opportunity to the company for inspection of the stock before they were mixed with other cattle or slaughtered, or its ascertainment of damages otherwise rendered impracticable; that the conduct of the company amounted to a waiver of the delay in giving the notice. *Rice v. Kansas Pacific R'y Co.*, 63 Mo., 314, 1876; 20 Amer. R'y Rep., 424.

89. **Custom; contract.** Where it is the general and long established custom of a railroad company, in delivering freight to connecting lines, to deliver as consignors, a shipper who has been in the habit of shipping over such road will be presumed to be familiar with that custom, and to contract with reference to it. *Indianapolis, Bloomington and Western R'y Co. v. Murray*, 72 Ill., 128. 1874.

90. **Damages.** Though under the contract of shipment a railway company may have been liable only for damages arising from gross negligence in not attending to live stock, yet where it carried the stock beyond the agreed destination, and there kept them for a time, its liability as to such time was not limited to the results of gross negligence. *Bryant v. Southwestern R. R. Co.*, 68 Ga., 805, 1882; 6 Amer. & Eng. R. R. Cases, 388.

91. — **evidence.** Where a race horse was killed on the Isthmus of Panama, while in transit to California, evidence of the value of the horse in California is competent, there being no market for such horses on the Isthmus. *Harris v. Panama R. R. Co.*, 53 N. Y., 660. 1874.

92. — **Witnesses** should state the facts upon which an estimate of damages is based, instead of stating the sum at which they

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estimate such damage. *Fleming v. Delaware and Hudson Canal Co.*, 8 Hun (N. Y.), 358. 1876.

93. — In an action against a railway company as a common carrier, for damages to horses in transit, the measure of damages would be the value of the horses killed and the depreciation in the value of those injured, at the place of delivery; but direct testimony by the opinion of witnesses of the value or depreciation is not indispensable; it is sufficient if there is proof of these facts in the market of a neighboring state connected with the place by railway, and a full description of the animals and their qualities, and of the character of the injuries. *Louisville and Nashville R. R. Co. v. Mason*, 11 Lea (Tenn.), 116. 1883.

94. — **profits.** In an action against a carrier for an injury to a jack while being shipped to the owner, no recovery can be had for loss of profits to be derived from letting him to mares, when it is not averred in the declaration, and proved, that the carrier was informed of the intended use of the animal. *Chicago, Burlington and Quincy R. R. Co. v. Hale*, 83 Ill., 360. 1876.

95. — **value.** Where hogs are shipped by rail from Illinois to Pittsburgh and the freight paid through, and some of them are lost *en route*, proof of their value at their destination may be considered by the jury in fixing their value at the place of shipment, where there is no evidence showing any difference of value between the two places. *Indianapolis, Bloomington and Western R'y Co. v. Strain*, 81 Ill., 504. 1876.

96. Damages by lime in pens. A railway company was held responsible for damages resulting to pigs received in its loading pen, the damages being occasioned by coming in contact with lime that had been used as a disinfectant, although the disinfectant had been applied under orders made by virtue of the Contagious Diseases Act. *Shaw v. Great Southern and Western R'y Co.*, 8 Law Reports, Ireland, 10. 1881.

97. Degree of care required. Even if, in the absence of contract, the full liabilities of common carrier do not attach to railroad companies when engaged in the transportation of live stock, they must nevertheless exercise ordinary care in such employment.

German v. Chicago and Northwestern R. R. Co., 38 Ia., 127. 1874.

98. — Railway companies which become carriers of live stock must provide accommodations, whereby the stock can be safely and properly kept and cared for until a delivery can be made to the consignee according to the terms of the shipment. *Myrick v. Michigan Central R. R. Co.*, 9 Bissell (U. S. C. C.), 44. 1879.

99. — A railway company undertaking the carriage of live stock is not liable as insurer for all loss and injury not caused by acts of God or the public enemy; but the company is bound to the exercise of a high degree of diligence, such as a prudent and careful man would exercise in such matters, and is liable for ordinary negligence. *Louisville, Cincinnati and Lexington R. R. Co. v. Hedger*, 9 Bush (Ky.), 645. 1873.

100. — The liability of a common carrier as to animals is essentially different from his liability as to inanimate property. In the former case he is bound to furnish cars of sufficient strength, skilled employes, and to exercise that degree of care which the nature of the property requires, but he is not an insurer of animals against injuries or death caused by their nature, which could not be guarded against by foresight and vigilance. *Indianapolis and St. Louis R'y Co. v. Jurey*, 8 Bradwell (Ill.), 160. 1880.

101. — **value.** If a carrier has any special rules or custom, binding upon its servants, by which their care of live stock is to be proportioned to its value, it is the duty of the carrier to inquire of the shipper if the live stock, about to be shipped, possesses any special value. By the law of the common carrier, the same care is required to prevent destruction of animal life, whether of little or great value. *Chicago, Rock Island and Pacific R'y Co. v. Harmon*, 12 Bradwell (Ill.), 54. 1882.

102. — A custom that a carrier shall not be liable for injury to, or loss or destruction of live stock, beyond the value of \$100, is against public policy, as a custom which will excuse a carrier from acts of negligence is invalid. *Ib.*

103. Delay. A common carrier who has been guilty of no negligence is not liable for delay in the transportation of goods oc-

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casioned by an accident not inevitable, if the goods are finally safely delivered. *Nashville and Chattanooga R. R. Co. v. Jackson*, 6 Heiskell (Tenn.), 271, 1881; 12 Amer. R'y Rep., 54.

104. — A delay of twenty-four hours at a station on the way is an unnecessary delay, unless it is explained and excused by something which the law recognizes as sufficient. Such delay will not be excused by the fact that the railway company needed its rolling stock for the purpose of carrying passengers. It is settled, by repeated decisions of the supreme court of the United States, that a common carrier cannot relieve himself from responsibility for his own negligence, or the negligence of his employes, by any contract that he may enter into with the shipper. A common carrier may, however, enter into stipulations which do not relieve him in any degree from his responsibility for negligence, if the shipper assents and agrees to them by a special contract, either verbal or in writing. *Ormsby v. Union Pacific R. R. Co.*, 4 Federal Reporter, 706; 2 McCrary (U. S. C. C.), 48, 1880.

105. — act of God. Plaintiff's cattle were carried by defendant from B. to W. A., under a contract which provided, among other things, that, in consideration of a reduced price for transportation, plaintiff would assume the risk of damage sustained by delay in transportation; also that plaintiff shall load and unload at his own risk, defendant furnishing help, and that plaintiff should send a person with the cattle to take charge of them. The train was delayed by a flood which submerged the track, and the cattle, being without food, were injured. In a suit for damages for the injury, *held*, that defendant was not bound to unload the cattle when the train was stopped; but that it was its duty, on reasonable request, to so place the cars in which the cattle were as to be convenient to the usual and accessible means of unloading, if practicable, and for a failure so to do it was liable. *Bills v. New York Central R. R. Co.*, 84 N. Y., 5, 1881; 3 Amer. & Eng. R. R. Cases, 318.

106. — Plaintiff's agent made such a request; the engine drawing the train was disabled; but defendant had engines at U., forty-three miles distant; also that other mo-

tive power might have been readily obtained. The court, after referring to the evidence on this subject, and to a statement of defendant's conductor that he did not telegraph to U., submitted it to the jury as a question of fact whether it was not gross negligence for defendant to omit to send for assistance, if help could readily have been obtained. *Held*, proper; and that this was so even if the fair import of the charge was that the jury might determine that it was negligence not to send for assistance to U. *Ib.*

107. — The engine was disabled by the engine driver running it into the water, and there was evidence tending to show neglect on his part in so doing. The court charged that if the engine was disabled by the negligence and recklessness of defendant's agents, then their refusal to place the cars where plaintiff could unload was not to be excused by an absence of motive power. *Held*, proper; that defendant could not plead its own previous negligence as an excuse for its inability to perform an affirmative duty. *Ib.*

108. — snow. A carrier of goods or cattle is only bound to carry in a reasonable time, under ordinary circumstances, and is not bound to use extraordinary efforts or incur extra expense in order to surmount obstructions caused by the act of God, as a fall of snow. *Briddon v. Great Northern R'y Co.*, 4 Hurlstone & Norman (Exchequer), 847, 1858.

109. — Snow storms of such violence as to obstruct the passage of trains must be allowed to excuse delays by a railway company, in transporting articles during the continuance of the obstruction. *Pruitt v. Hannibal and St. Joseph R. R. Co.*, 62 Mo., 527, 1876.

110. — connecting lines. When a railway company contracts to ship stock to a given point, it is bound to forward and deliver it at that point within a reasonable time, and it will not be released from its liability by a delivery to another connecting road, but will still be liable for any unreasonable delay, although the same occurs on account of the crowded condition of said connecting road. *Toledo, Wabash and Western R'y Co. v. Lockhart*, 71 Ill., 627, 1874.

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111. — damage. In a suit for damages, caused by delay in delivering hogs, it appeared that there was a shrinkage in the weight of the hogs during the transit, greater than would have occurred if the train had gone through in the usual time. *Held*, that plaintiff was entitled to recover for this extra shrinkage, as well as for the decline in the market value of the hogs. *Sturgeon v. St. Louis, Kansas City and Northern R'y Co.*, 65 Mo., 589, 1877; *Glasscock v. Chicago and Alton R. R. Co.*, 69 ib., 589, 1879.

112. — Evidence is not admissible to show that between the time of their arrival and the time when they were sold, a decline in the market took place. *Glasscock v. Chicago and Alton R. R. Co.*, 69 Mo., 589, 1879.

113. — detention on groundless claim for unpaid freight charges. The plaintiff delivered cattle, carriage prepaid, to the defendant for carriage on the terms of signed conditions, whereby, in consideration of an alternative reduced rate, it was agreed that the company was "not to be liable for any loss or detention of or injury to the said animals, or any of them, in the receiving, forwarding or delivery thereof, except upon proof that such loss, detention or injury arose from the wilful misconduct of the company or its servants." The cattle were carried; but, on application made for them by the plaintiff, the defendant, in consequence of its clerk having negligently omitted to enter the cattle on the consignment note as "carriage paid," refused to deliver them, and alleged that the carriage was not paid. The cattle were kept exposed to the weather until the next day, when the mistake having then been ascertained, they were delivered. They were damaged by the exposure. In an action for damages by reason of wrongful detention and negligence, *held*, that the withholding of the cattle under a groundless claim to retain them at the end of the transit was not "detention" within the conditions, and the company was therefore liable. *Gordon v. Great Western Railway Co.*, Law Reports, 8 Queen's Bench Division, 44; 3 Amer. & Eng. R. R. Cases, 619. 1881.

114. Evidence. In an action against a railway company for not conveying cattle to market within a reasonable time, a county

court judge allowed evidence to be given of a conversation which took place a week after the alleged cause of action arose, between the plaintiff and a "night inspector" at one of the company's stations, whose duty it was to forward the cattle, in which the latter, in answer to a question as to why he did not send the cattle on, stated that "he had forgotten them." *Held*, that such evidence was improperly admitted,—it not being within the scope of the man's authority to make admissions as to by-gone transaction. *Great Western Railway Co. v. Willis*, 18 Common Bench, N. S., 748; 114 E. C. L., 748. 1865.

115. — exposure in pens. Whether exposure of hogs in uncovered pens, for twenty-five days in December, might not reasonably be expected to result in considerable loss from exposure and smothering, is a proper question to be left to the jury. *Pruitt v. Hannibal and St. Joseph R. R. Co.*, 62 Mo., 527. 1876.

116. — failure of owner to have stock ready. Where the stock to be shipped by plaintiff was not loaded upon the arrival of the defendant's train, and was not even in the yards of the company, but in a private yard, and had not been given into the possession of any authorized agent of defendant, it was *held* that defendant was not liable for refusing to delay the train until the stock could be loaded, notwithstanding the same train took cars of stock at other stations later, although in these instances the locomotive was required to assist in loading the cars, while in plaintiff's case it was not. *Frazier v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 48 Ia., 571. 1878.

117. — mob. A common carrier is only required to exercise due care and diligence against delay, and where its servants are overpowered by a mob and prevented from forwarding its trains, it will not be held responsible for the delay, provided it omits no reasonable effort to secure the property in course of transportation. *Indianapolis and St. Louis R. R. Co. v. Juntgen*, 10 Bradwell (Ill.), 295. 1881.

118. — negligence. When a common carrier receives cattle for transportation, it is his duty to carry them to their destination within a reasonable time, and for a failure,

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through gross negligence, to do so, an action will lie, whether the shipment was made under a special contract or not. *Wabash, St. Louis and Pacific R'y Co. v. McCasland*, 11 Bradwell (Ill.), 491. 1892.

119. — order of shipment. It was the usage of the defendants that cattle should be booked for carriage in the order in which they were delivered in the defendants' yard, and that they should be forwarded in the same priority. This usage was known to the plaintiff and his servant. The cattle of the plaintiff were brought to the defendants' yard late at night, and could not be taken in, owing to the illness of the defendants' porter. The next day the booking clerk of the defendants, under the circumstances, booked the cattle, though not yet in the yard. The plaintiff's cattle were not forwarded in the order in which they were booked, but were postponed to those of some other dealers which arrived at the yard before them, and they were delayed a considerable time in consequence. The plaintiff sued the company for the delay. Though the booking clerk violated his instructions, the company was held liable for the delay. *Page v. Great Northern R'y Co.*, 2 Irish Reports, Common Law, 228. 1868.

120. — reception in cattle pens. The reception of hogs in the pens of a railway company for carriage is equivalent to an obligation to transport them without unnecessary delay. *Pruitt v. Hannibal and St. Joseph R. R. Co.*, 62 Mo., 527. 1876.

121. — special contract. The performance by a railroad company of its unconditional agreement to furnish cars on a day certain, for the purpose of receiving and shipping freight, is not excused by unavoidable accident and delay preventing the arrival of the cars at the time stipulated. *Harrison v. Missouri Pacific R'y Co.*, 74 Mo., 364, 1881; 7 Amer. & Eng. R. R. Cases, 382.

122. — strike; connecting lines. In the absence of a special contract a common carrier is bound to transport and deliver goods marked to a certain destination beyond the end of its line, only according to the usage of its business, and is not liable for losses beyond its line. The giving a through rate to the shipper by the carrier is not of itself evidence of a special contract to carry be-

yond the latter's line. The receiving of goods for shipment to a point beyond its line, by a carrier having knowledge of an obstruction in transportation beyond its line, may not be a breach of its duty as a carrier. The obstruction in this cause was a general strike upon the connecting lines. *McCarthy v. Terre Haute and Indianapolis R. R. Co.*, 9 Mo. App., 159. 1880.

123. — Sunday laws. The plaintiff delivered to the defendant, as a common carrier, some cattle to be carried by it to their London station. The cattle arrived on a Sunday morning between eleven and twelve o'clock, but owing to certain police regulations the plaintiff was unable to take them away before twelve o'clock at night. Meanwhile they were placed by the defendant's servants, with the sanction and assistance of a man employed by the plaintiff to receive them, in pens at the station. Early on the Monday morning when the plaintiff's servant went to take them away, he found that two steers had been killed. He wished to take away the remaining cattle, but was refused permission unless he signed a receipt ticket for the whole number, which he declined to do. Later in the day the plaintiff came and removed them, but before he could reach the market at Islington, for which they were intended, it was over, and he could not sell them until the Thursday following. In an action for the value of the two steers which were killed, and for the damage done to the remaining beasts by delay, held (per Bramwell and Channell, B., Marlin, B., *dissentiente*), that the defendant's liability as a carrier had ceased when the alleged loss and damage occurred. *Shepherd v. Bristol and Exeter R'y Co.*, Law Reports, 3 Exchequer Cases, 189. 1868.

124. — A carrier having received live stock on Sunday for carriage is not permitted to exonerate itself from its neglect by pleading the Sunday law. The carrying forward of the cattle was a work of necessity. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Lehman*, 56 Md., 209, 1881; 6 Amer. & Eng. R. R. Cases, 194.

125. — Neither could the company show as a defense that the owners of the cattle were violating the Sunday law in having the cattle transported on that day. *Ib.*

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126. — unavoidable delay. The rules of law are not applicable, with the same degree of strictness, for unavoidable delay in receiving and carrying, as in case of failure to deliver the goods. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Hollowell*, 65 Ind., 188. 1879.

127. — unusual delay. A delay of twenty-five days in shipping one drove of hogs, and of forty-one days in shipping another drove, might be termed *prima facie* negligence on the part of the railroad, inexcusable unless by the total cessation of all business for the public. *Pruitt v. Hannibal and St. Joseph R. R. Co.*, 62 Mo., 527. 1876.

128. — want of cars. Where a railway company, in a suit against it for unreasonable delay in carrying stock from the west to the east, set up as an excuse that the delay was occasioned by the want of empty cars at a particular point on the route, it was competent for the plaintiff, for the purpose of meeting such excuse, to prove that empty cars passed that point, going west, whilst the stock was there waiting transportation. *Toledo, Wabash and Western R'y Co. v. Lockhart*, 71 Ill., 627. 1874.

129. Delivery; payment to wrong person. Plaintiffs shipped certain hogs by defendant's road, prepaying charges; at the place of destination they were taken from the carrier by a stranger and a drayman who was an employe of consignees, and taken by them to consignees, the stranger representing that he had bought them of consignees, and exhibiting an expense bill he had obtained from the carrier, whereupon he was paid for them by the consignees. *Held*, that the shipper could not recover from the carrier, but his remedy was against the consignees. *Ryder v. Burlington, Cedar Rapids and Northern R'y Co.*, 51 Ia., 460. 1879.

130. Dogs. A valuable greyhound was delivered by its owner to the servants of a railway company which was not a common carrier of dogs, to be carried, and the fare demanded was paid. At the time of delivery the greyhound had on a leathern collar with a strap attached to it. In the course of the journey, it being necessary to remove the greyhound from one train to another, which had not then come up, it was fastened

by means of a strap and collar to an iron spout on the open platform of one of the company's stations, and, while so fastened, it slipped its head from the collar and ran upon the line and was killed. *Held*, that the fastening the greyhound by the means furnished by the owner himself, which at the time appeared to be sufficient, was no evidence of negligence on the part of the company. *Richardson v. North Eastern Railway Co.*, Law Reports, 7 Common Pleas Cases, 75, 1872; 1 Eng. (Moak), 126.

131. — contract limiting liability. A passenger by railway from L. to W. took with him two horses and a retriever dog; the horses were put into a horse-box, and a servant of the defendant proposed that the dog should be placed in the horse-box, to which the plaintiff assented. The dog was fastened in the horse-box by means of a leather collar round its neck, and a strap thereto, which passed through a ring fixed to the side of the horse-box; the collar and strap were furnished by the plaintiff, and were his property. The plaintiff's agent signed a ticket, subject to the following conditions: "The company will not be liable in any case for loss or damage to any horse or other animal above the value of 40*l.*, or any dog above the value of 5*l.*, unless a declaration of its value, signed by the owner or his agent at the time of booking the same, has been given, and by such declaration the owner shall be bound, the company not being in any event liable to any greater amount than the value so declared. The company will in no case be liable for injury to any horse or other animal or dog, of whatever value, when such injury arises wholly or partially from fear or restiveness. If the declared value of any horse or other animal exceed 40*l.*, or any dog 5*l.*, the price of conveyance will, in addition to the regular fare, be after the rate of 2½ per cent., or 6*d.* in the pound, upon the declared value above 40*l.* [or 5*l.*], whatever may be the amount of such value, and for whatever distance the horse or other animal is to be carried." The plaintiff made no declaration of the value of the dog, and paid 3*s.* for the carriage of it. On the arrival of the train at W. a window in the horse-box was found open, through which the dog had escaped,

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and was lost. *Held*, by this court, and affirmed by the exchequer chamber, that the loss of the dog was not occasioned by neglect or default of the plaintiff, or of the defendants. *Held*, per Cockburn, C. J., and Blackburn, J., that a dog is one of the animals to which the proviso in section 7 of the Railway and Canal Traffic Act, 1854, 17 and 18 Vict., c. 31, relates; and per Wightman, J., and the exchequer chamber, that the defendant had made itself liable as a common carrier for carrying the dog. *Harrison v. London, Brighton & South Coast R'y Co.*, 2 Best & Smith, 122; 110 E. C. L., 121. 1860.

132. — A condition that a railway company will not be liable "in any case" for loss or damage to a horse or dog above certain specified values delivered to it for carriage, unless the value is declared, is not just and reasonable within sec. 7 of the Railway and Canal Traffic Act, 1854, as it is in its terms unconditional; and would, if valid, protect the company even in case of the negligence or wilful misconduct of its servants. *Ashenden v. London, Brighton and South Coast R'y Co.*, Law Reports, 5 Exchequer Division, 190, 1880; 31 Eng. (Moak), 644.

133. Evidence; declarations of agents. The statements of agents of a railway company as to the condition of the road and cars, made some time before or after the accident in question, are inadmissible. *Va. and Tenn. R. R. Co. v. Sayers*, 26 Grattan (Va.), 328. 1875.

134. — burden of proof. The burden of proof is upon a common carrier who has received property for transportation to establish the facts which excuse or relieve him from liability. *McCoy v. Keokuk and Des Moines R. R. Co.*, 44 Ia., 424. 1876.

135. — The loss or injury of live stock in transportation is *prima facie* evidence of the carrier's negligence; but where the owner of the animals agrees to load and unload them, and in part does so, the burden of proof is upon him to show negligence causing such loss or injury. *Louisville, Cincinnati and Lexington R. R. Co. v. Hedger*, 9 Bush (Ky.), 645. 1873.

136. Facilities for unloading. It is the duty of a railroad company receiving live stock for transportation to have proper

machinery and facilities for unloading them whenever, in the course of transit, it may become necessary to unload them for the purpose of feeding. *Dunn v. Hannibal and St. Joseph R. R. Co.*, 68 Mo., 268. 1878.

137. Failure to notify carrier of the physical condition of the stock. The failure of the owner of stock shipped to inform the agent of the carrier that the physical condition of the animals renders extraordinary care necessary in their handling, will not release the carrier from liability for negligence causing injury to the stock. *McCune v. Burlington, Cedar Rapids and Northern R'y Co.*, 52 Ia., 600. 1879.

138. Feeding and watering. A railway company shipped a car of stock, and the contract to ship provided: "And it is further agreed that, in case of accident to, or delay of time, from any cause whatever, the owners or shippers are to feed, water and take proper care of the stock." The circuit judge charged that in all cases of unavoidable delay the company was, by the contract, obliged to feed and water the stock. This was error. The terms of the contract only provide that the owner or shipper shall feed and water the stock in certain defined emergencies, and does not undertake that in all other cases the carrier shall do so. *Louisville and Nashville R. R. Co. v. Trent*, 11 Lea (Tenn.), 82. 1883.

139. — It is as much the duty of the servants of a railway company to provide water, at suitable points on the line of its road, for the use of stock, as it is their duty to carry such stock; and where hogs, while being transported, died for the want of water, it was held that the company was liable. *Toledo, Wabash and Western R'y Co. v. Hamilton*, 76 Ill., 393. 1875.

140. Freight charges; set-off. The owner of live animals transported by railroad, when sued for the charges of transportation, may recoup damages sustained by reason of injuries to them through the carrier's negligence. *South and North Ala. R. R. Co. v. Henlein*, 56 Ala., 368, 1876; 19 Amer. R'y Rep., 200.

141. Government interference. If the government monopolizes a railroad, to relieve itself from liability the company should abdicate its functions as a common

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carrier for the public at large. *Pruitt v. Hannibal and St. Joseph R. R. Co.*, 62 Mo., 527. 1876.

142. Horses — Charges for keeping. The defendant sent a horse by the plaintiff's railway, directed to himself at S. station. On the arrival of the horse at S. station at night there was no one to meet it, and the plaintiff having no accommodation, sent the horse to a livery stable. The defendant's servant soon after arrived and demanded the horse; he was referred to the livery stable keeper, who refused to deliver the horse except on payment of charges, which were admitted to be reasonable. On the next day the defendant came and demanded the horse, and the station-master offered to pay the charges and let the defendant take away the horse; but the defendant declined and went away without the horse, which remained at the livery stable. The plaintiff afterwards offered to deliver the horse to the defendant at S. without payment of any charges, but the defendant refused to receive it unless delivered at his farm and with payment of a sum of money for his expenses and loss of time. Some months after the plaintiff paid the livery stable keeper his charges, and sent the horse to the defendant, who received it. In an action brought to recover the amount of the charges, *held*, that the plaintiff acted reasonably in putting the horse in the livery stable, and that the defendant, having refused to take the horse, was liable to the plaintiff for all the livery charges which it had paid. *Great Northern R'y Co. v. Swaffield*, Law Reports, 9 Exchequer Cases, 132; 8 Moak. 567. 1874.

143. — escape from cars. Where the plaintiff contracted with the defendant for the transportation of a number of horses, and the horses were placed in the defendant's cars, whose agent ordered a servant to lock the cars, and the servant was prevented from doing so by the agent of the plaintiff, and on the passage some of the horses were lost, *held*, that the defendant was guilty of no negligence in failing to lock the door, and was not liable for the loss of the horses. *Lee v. Raleigh and Gaston R. R. Co.*, 72 N. C., 286. 1875.

144. — A horse fastened in the usual way in a railway horse-box struggled through

the feeding window (about twenty-five inches square) into the adjoining compartment, and was thereby injured. *Held*, that the accident was not of a kind that the railway company was bound to have foreseen, and to have provided against, and that it was not liable in damages. *Ralston v. Caledonian R'y Co.*, 5 Scotch Session Cases, 4th series, 671. 1878.

145. — evidence; inference of cause of injury. The plaintiff delivered to the defendant a horse to be carried by its railway. At the end of the journey the horse was found to be injured. No accident had happened to the train, and the defendant was guilty of no negligence. The cause of the injuries was unknown, except that from their nature they appeared to have been caused by the horse getting down upon the floor of the horse-box. The horse was quiet, and accustomed to travel by rail. In an action brought to recover damages for these injuries, *held*, by the court, drawing inferences of fact (Martin and Bramwell, BB., Pigott, B., dissenting), that the defendant was not liable, since it was to be inferred that the injuries resulted from the natural vice of the horse. *Kendall v. London and Southwestern R'y Co.*, Law Reports, 7 Exchequer Cases, 373; 2 Moak, 705; 20 Weekly Reporter, 886. 1872.

146. — failure to carry. A railway company having failed to provide horse-boxes pursuant to contract, for the conveyance of horses for sale by auction in Dublin on the day but one following, the owner was compelled to send them by road a distance of twenty-four miles, in order that they might arrive in due time for the sale and for previous inspection by purchasers. The horses, which were valuable hunters, were in soft condition at the time. They were deteriorated in appearance by the fatigue of the road journey; one of them was lamed, and such as were sold realized prices below what would have been otherwise obtained, the others being left on the owner's hands. It appeared that if they had been in hard-fetched hunting condition they would have borne the journey without injury. The company's station-master was, at the time of the contract, aware of the intended sale and of the day on which it was to take place.

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Held, that the company was liable in damages for the loss which the owner sustained in consequence of the injuries occasioned to the animals by the road journey. *Waller v. Midland Great Western R'y Co.*, 2 Law Reports, Ireland, 520. 1878.

147. — *Held*, on appeal, that the true measure of damages was not the entire loss of the owner, but the deterioration which the horses, if in ordinary condition and fit to make the journey, would have suffered thereby, and the time and labor expended on the road. *Same v. Same*, 4 ib., 876. 1879.

148. — *failure to deliver promptly*. A horse was sent by railway directed to the owner at Eton. The sender signed a document in the following terms: "Mr. Wise paid for one horse 12s. 6d., Newbury to Windsor. Notice: The directors will not be answerable for damage to any horses conveyed by this railway." The horse arrived safe at the Windsor station, but the owner not appearing to claim it, it was forgotten and left tied up in a horse-box in an exposed situation for twenty-four hours, and was seriously injured by such neglect. *Held*, that the company was not responsible for the injury done to the horse. *Wise v. Great Western R'y Co.*, 1 Hurlstone & Norman (Exchequer), 63, 1856; 36 Eng. Law & Equity, 574.

149. — *injuring one another*. A railway company is not liable for injuries inflicted by one horse upon another while they were being transported, if the injuries were caused by the fault or neglect of the owner of the horses in attaching their halters or not removing their shoes. *Evans v. Fitchburg R. Co.*, 111 Mass., 142. 1872.

150. — *loading and unloading*. A bill of lading providing that live stock will only be taken at the owner's risk during the loading thereof, unless specially agreed to the contrary, does not exempt the carrier from liability for injuries sustained by a horse while being put upon the car, if the injury be occasioned by the negligence of the carrier in furnishing unsafe and insufficient accommodations for receiving it. *Potter v. Sharp, Receiver*, 24 Hun (N. Y.), 179. 1881.

151. — Where race horses are being loaded under the direction of an agent of the owner, the company is not responsible as a

common carrier for injury received in such loading. *Bowie v. Baltimore and Ohio R. Co.*, 1 MacArthur (Dist. of Columbia), 94. 1878.

152. — A contract was entered into by which four horses were to be transported from Washington to Baltimore, on the railroad of defendant, and the horses were to be accompanied by their grooms. If the horses, in accordance with the agreement, were admitted to the inclosure where the defendant usually received such freight, and the defendant notified that they were there; and if the process of loading them had been partially completed by the shipment of three of the horses with their grooms,—*held*, that, although the agents of both parties were engaged in such loading when the injury occurred, these facts would constitute a delivery of the animals. *Same v. Same*, ib., 609. 1874.

153. — *value stated in contract*. Where the shipper stated the value of horses at 10l. in order to obtain a lower rate, and the horses were injured in transit, it was held that he was estopped from showing a higher value than 10l. *McCance v. London and North Western R'y Co.*, 7 Hurlstone & Norman (Exchequer), 477. 1861.

154. — Where horses are shipped and their value declared at 10l. each, and the increased charges upon horses of a higher value not paid, it was held that the plaintiff would not be permitted to deny the truth of the statement of the value, as signed by him. *McCance v. London and North Western Railway Co.*, 3 Hurlstone & Coltman (Exchequer), 843. 1864.

155. — Where five horses, some saddles, etc., were shipped by rail, and the bill of lading was signed by both the carrier and shipper, and provided, among other things, "that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses, . . . not exceeding \$200 each; . . . if a chartered car, on the stock or contents in same, not exceeding \$1,200 for the car load;" and through the carrier's gross negligence one of the horses, alleged to have been worth \$15,000, was killed, the others injured and the saddles, etc., lost,—*held*, in a suit by the shipper for damages, that his recovery could not exceed the

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amount fixed in the bill of lading. *Hart v. Pennsylvania R. R. Co.*, 7 Federal Reporter, 680; 2 McCrary (U. S. S. C.), 333. 1881.

156. — By s. 7 of the Railway Traffic Act, 17 and 18 Vict., c. 31, a railway company is not liable for loss of or injury to a horse on the railway, beyond the value of 50*l.*, unless the sender shall, *at the time of delivering it* to the company to be carried, have declared it to be of a higher value, in which case the company is empowered to charge a reasonable percentage for the increased risk and care thereby occasioned. *Held*, that the declaration of value must be such as to convey a distinct intimation to the company that the sender intends to hold it responsible for the higher sum. Where, therefore, a servant of a railway company, having casually learned that a mare tendered for carriage was worth 135*l.*, refused to carry her unless insurance money was paid beyond the usual charge for carriage, *held*, that the company was responsible for such refusal. *Robinson v. London and South Western R'y Co.*, 19 Common Bench, N. S., 51; 115 E. C. L., 49. 1865.

157. Injury caused by interference by the owner. A common carrier will not be liable for injury to a horse, occasioned by the improper or unwarrantable interference of the plaintiff or his agent, with the management of the car, by the servants or employees of the company. *Roderick v. Railroad Co.*, 7 West Va., 54. 1873.

158. Overheating and suffocation. Where live hogs are shipped by railroad, it is the duty of the railroad company to apply water to them when heated and in danger of dying for the want of such an application; and it is gross negligence on the part of the company to neglect to do so. *Toledo, Wabash and Western R'y Co. v. Thompson*, 71 Ill., 434. 1874.

159. — It is *prima facie* evidence of negligence for a railroad company to permit its pump at a station to be out of repair, so that water cannot be provided for live hogs on its train. *Ib.*

160. — A railroad company is a common carrier of cattle, but as such is not responsible for losses occasioned by the cattle dying, or being injured by heat, unless the loss or damage has been occasioned by some

negligence or misfeasance of the company or its servants. *Martin v. Baltimore and Ohio R. R. Co.*, 14 West Va., 180. 1878.

161. — A person sending cattle by railway signed a contract containing the following, amongst other, conditions: "A pass for a drover to ride with his stock will be given. The company is to be held free from all risk in respect of any damage arising in the loading or unloading, from suffocation, or from being trampled upon, bruised or otherwise injured in transit, from fire, or from any other cause whatsoever." A drover received a pass to go with the cattle. The cattle were not put into proper cattle trucks; but into vans closing with lids, ordinarily used for the conveyance of salt, the drover not objecting. The lid of one of the vans having become closed in the course of the journey, several of the cattle were suffocated, the drover being at the time in another carriage. *Held*, that the conditions were reasonable, and that the company was not responsible. *Pardington v. South Wales R. R. Co.*, 1 Hurlstone & Norman (Exchequer), 392, 1856; 38 Eng. Law & Equity, 432.

162. — Where a railroad, which is the last of a connecting line, receives, for the purpose of completing the transportation, cars loaded with hogs, which were so crowded that some of them were suffocated when they reached the point of destination, such road becomes responsible to the owner of the hogs for their delivery, and the burden is on it to show whether the suffocation occurred before or after its reception of such cars. *Paramore v. Western R. R. Co.*, 53 Ga., 383. 1874.

163. Penalty for failure to unload; federal statute. Section 4386 of the Revised Statutes of the United States, imposing a penalty upon railroads carrying sheep, swine, etc., if they allow such sheep, swine, etc., to be more than twenty-eight consecutive hours confined without unloading them for at least five hours for rest, water, and feeding, does not apply to a railroad carrying sheep, swine, etc., *from a point within a state to another point therein*, but only to such as convey swine, sheep, etc., from one state to another. *United States v. East Tennessee, Va. and Ga. R. R. Co.*, 13 Federal Re-

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porter, 642, 1882; 9 Amer. & Eng. R. R. Cases, 259.

164. — By the provisions of the Revised Statutes, §§ 4386-4390, any railway company, whose road forms any part of a line of road over which animals are conveyed from one state to another, is prohibited from confining the same in cars over twenty-eight consecutive hours without unloading them for rest, water and food for at least five consecutive hours. Section 4388 fixes the penalty for the violation of this statute at not less than \$100 nor more than \$500. *United States v. Louisville and Nashville R. R. Co.*, 18 Federal Reporter, 480. 1883.

165. — But, with this exception made by the statute, the carrier is liable only for the default occurring upon its own line; and, if other connecting lines confine the animals beyond the time prohibited, after they pass out of the control of the first carrier, there is no violation of the statute by it. This would be so, although the first carrier contracted for itself and its connecting lines to carry them to their destination. *Ib.*

166. — By the provisions of the Revised Statutes of the United States, §§ 4386-4390, no common carrier of cattle, sheep, swine, or other animals, conveying the same from one state to another, shall confine the same in cars, boats or vessels for a longer time than twenty-eight consecutive hours without unloading the same for rest, water, and feeding, for a period of at least five consecutive hours. Section 4387 gives to those who give such care a lien on the animals for the expenses incurred, and relieves them from liability for the detention. Section 4388 fixes the penalty for violating such statute at not less than \$100, nor more than \$500. Sections 4389 and 4390 provide that the penalty may be recovered by civil action in the name of the United States in the circuit and district courts, and that the lien given by section 4387 may be enforced by petition in the district courts. *United States v. Boston and Albany R. R. Co.*, 15 Federal Reporter, 209. 1883. The penalty imposed by section 4388 is not less than \$100 nor more \$500, where more than one animal is carried and confined in violation of the statute. The statute cannot be so construed as to make the unlawful confinement of each animal

constitute a separate offense, and thus multiply the penalty by the whole number of animals. *Ib.*

167. Pleading. In a complaint against a railway company for a violation of a contract to furnish, at a certain time and place, the necessary cars, and to carry a certain number of hogs, it is not necessary to allege that the defendant, at the time complained of, had the ability to transport or to furnish the means to transport said hogs. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Hays*, 49 Ind., 207. 1874.

168. — In an action against a railway company for injury to stock shipped on its cars, the company answered as follows: "That the plaintiff received the stock from the defendant in good condition, and paid the freight thereon, and gave defendant no notice that the said stock was not delivered to him in good order, and made no demand for any damages on account of any injuries, or supposed injuries, to said stock." Held, on demurrer, that the answer was not good in confession and avoidance, and at best could be deemed only an argumentative denial. *Ohio and Mississippi R'y Co. v. Nickless*, 78 Ind., 382. 1881.

169. — If a railway company is guilty of an illegality by working steamboats, not being authorized by law to work them, it cannot set up such illegality as an answer to a claim for damages arising out of the working of such steamboats. *Doolan v. Midland R'y Co.*, Law Reports, 2 Appeal Cases, 792. 1877; 21 Eng. (Moak), 48.

170. — A complaint construed and held to be based upon defendant's negligence in causing injury to plaintiff's horses carried on defendant's railroad, and not upon any absolute liability of the defendant carrier as an insurer of the property. *Morrison v. Phillips and Colby Construction Co.*, 44 Wis., 405, 1878; 19 Amer. R'y Rep., 312.

171. — amendment. Where a suit was brought against a railway company on a written contract for the shipment of live stock, the declaration could not be amended by alleging that the agents of the company procured the contract by fraud and deceit as to the capacity and construction of the car to be used in the carriage of the stock, such representation not being in the written con-

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tract sued on, and that by reason of such deception the animals were badly crowded in loading, and were seriously damaged. The first suit was on a contract; the amendment was based on a tort. *Mitchell v. Georgia R. R. Co.*, 68 Ga., 644. 1882.

172. — variance. Where the pleading declared upon the common law duty of a carrier, but the evidence showed a special contract, *held*, that the variance was fatal. *Lake Shore and Michigan Southern R'y Co. v. Bennett*, 89 Ind., 457, 1883; 6 Amer. & Eng. R. R. Cases, 391.

173. — Appellee declared against appellant as a common carrier, alleging a contract to carry appellee's cattle, etc. Appellant insisted that appellee, with one B., hired a car, paying a stated price for the same, and assuming all the risk of transportation in consideration that appellant would allow the servants of appellee and B. to take charge of the car. If the contract was as is insisted by appellant, it would vary from the one declared upon, as not being between the same parties or in the same terms. But if it should appear that the railway company fixed the rate per car, and the interest and ownership of the cattle were several, and appellee's cattle alone were injured, then the right of action would be in him. *Jacksonville Northwestern and Southeastern R'y Co. v. Hall*, 2 Bradwell (Ill.), 618. 1878.

174. — Where, in an action against a railway company to recover damages arising from delay in the carriage and delivery of live stock, the complaint is based upon a special contract, the plaintiff cannot sustain his action by proof of a breach of an implied contract, or of the legal duty of the defendant, as a common carrier, to carry the stock in a reasonable time. In such case, there would be, not a variance, but a failure of proof. *Jeffersonville, etc., R. R. Co. v. Worland*, 50 Ind., 339, 1875; *Same v. Ensley*, *ib.*, 378.

175. Receipt. The conditions of the company, printed on the back of the receipt for the payment of fares, given to a third party, do not necessarily form part of special contract between the agent or clerk and such third party. But it is a proper question to leave to the jury, whether such receipt was given merely as an acknowledgment of the

payment of the fares, or whether it was intended that the conditions indorsed on the receipt should affect or qualify the contract. *Anderson v. Chester and Holyhead R'y Co.*, 4 Irish Common Law, 435. 1854.

176. — Where the defendant received at Chicago certain cattle consigned to Philadelphia, giving shipping receipts therefor, *held*, that these receipts constitute through-contracts, by which the defendant was liable for the proper transportation of the cattle beyond the line of its own road. *Myrick v. Michigan Central R. R. Co.*, 9 Bissell (U. S. C. C.), 44. 1879.

177. Refusal to carry. A railway company, as a common carrier, is bound to receive and carry cattle when they are first offered for shipment, unless it has a reasonable excuse for its refusal; and when its refusal to take and ship cattle when first offered is without such excuse, it will be liable in damages to the owner for the deterioration in the value of the cattle between the time when they were first offered for shipment and the time when they were received and shipped. *Chicago and Alton R. R. Co. v. Erickson*, 91 Ill., 613. 1879. The carrier cannot justify its refusal by reason of the "Texas Cattle Act," the same being unconstitutional. *Ib.*

178. Title to property transported. One H., being the owner of a trotting horse, delivered him to D. to keep for one year, upon an agreement that D. should have the exclusive management, charge and control over him, with the privilege of trotting him at whatsoever place or places D. might deem best, D. and H. dividing between them the net profits of racing. H. reserved to himself the right to sell the horse at any time during the year, upon making compensation to D. While this arrangement was in force, D. made a contract for the transportation of the horse. *Held*, that D., and not H., was the proper party to sue for a violation of this contract. *Harvey v. Terre Haute and Indianapolis R. R. Co.*, 74 Mo., 533, 1881; 6 Amer. & Eng. R. R. Cases, 293.

179. When liability ends. An instruction that the responsibility of a railroad company as a common carrier continued from the time stock were intrusted to it for transportation until the same reached their desti-

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nation, is not open to the objection that it asserts an absolute liability, without regard to any defense set up by the defendant. *McCullom v. Indianapolis and St. Louis R. R. Co.*, 94 Ill., 584. 1880.

180. Vice of animal. A carrier of live stock is not responsible for injuries resulting from what is termed their own "proper vices," and especially is this so when, by the shipping contract, the owner or his agent is obliged to accompany them and take the care and oversight of them while in transit. *Wabash, St. Louis and Pacific R. R. Co. v. McCasland*, 11 Bradwell (Ill.), 491. 1882.

181. — The plaintiff delivered a bullock to the Great Western Railway Company at D., to be carried to N. In the course of the journey the animal escaped from the truck in which it was placed, and was killed. In a case stated by a county court judge, it was found that the escape of the bullock was wholly attributable to the efforts and exertions of the animal itself, and not to any negligence on the part of the company, and that the truck was in every respect proper and reasonably sufficient for the conveyance of cattle. *Held*, that upon this state of facts, the judge ought to have directed a verdict for the defendant — the company (assuming it to be a common carrier of cattle) not being responsible for the consequences of an inherent vice in the thing (or animal) to be carried, which results in its destruction without any negligence on the part of the carrier. *Blower v. Great Western R'y Co.*, Law Reports, 7 Common Pleas Cases, 655, 1872; *Blower v. Great Western R'y Co.*, 2 Moak, 700; 20 Weekly Reporter, 776, 1872.

182. — Cattle having been delivered by respondent to be carried on the appellant's railway, were safely secured in a proper truck. During the transit, one of them escaped and was killed, its escape being wholly attributable to its own efforts, and in no way to the negligence of the appellant or its servants. *Held*, that whether the appellant was considered as a common carrier or not, it was exempt from liability for anything happening by reason of the "proper vice" of the thing carried, and that, therefore, the appellant was not, under the circumstances, liable. *Great Western R'y Co. v. Blower*, 20 Weekly Reporter, 776; 2 Eng. (Moak),

700, 1872; *Kendall v. London and South Western R'y Co.*, 20 Weekly Reporter, 886; 2 Eng. (Moak), 705, 1872.

183. Violation of rules of company by the shipper. A railway company is not responsible for the non-delivery of live stock, when the owner has, in defiance of the known course of business of the company, permitted them to be delivered at one of the company's stations without an acknowledgment from the proper officer of their receipt for the purpose of being carried, although they are proved to have been delivered to one in the company's employ. *Slim v. Great Northern R'y Co.*, 14 Common Bench, 647; 78 E. C. L., 645. 1864.

184. Yard; animals frightened upon the track. The first count of the declaration stated that the defendant was the owner of a railway, and of a station thereon for the loading, unloading, etc., of cattle carried thereby, and of a yard adjoining the station and railway, into and through which yard cattle brought by the railway to the station were used and accustomed and were obliged to pass in going from the station to a certain common highway near thereto; and that the defendant, by reason of the premises, ought to have made and maintained good and sufficient fences between the said yard and the railway, so as to prevent cattle lawfully being in the yard from straying thereout into and upon the railway; but that it omitted to make and maintain such fences, whereby a bull of the plaintiff, lawfully being in the yard, on his way to the highway, without default or negligence on his part, strayed from the yard on to the railway, and was killed by a passing train; *held*, that there was no liability upon the company, either by the common law or by the statute (8 and 9 Vict., c. 20, s. 68), to fence its yard from the railway, and consequently that the count disclosed no cause of action. The second count alleged that a certain bull of the plaintiff was lawfully in a close adjoining a railway of which the defendant was owner, and along which railway it had not made any fences for preventing cattle being in the close from straying thereout upon the railway, and that, whilst the bull was lawfully in the close, the defendant's servants negligently and wrongfully chased,

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startled and frightened the bull, and so caused it to run upon the railway, where it was killed. At the trial it appeared that the bull, with other cattle which had been brought by the railway, being in the station yard, a place unlighted and not fenced from the railway, a porter came out of the office with a lantern, such as were ordinarily used by porters, in his hand, and that the light startled some of the beasts, and caused the plaintiff's bull to run upon the line, where it was knocked down and killed by a passing train. *Held*, no evidence for the jury that the company's servants had been guilty of negligence. *Roberts v. Great Western R'y Co.*, 4 Common Bench, N. S., 506; 93 E. C. L., 504. 1858.

CARRIAGE OF MAILS.

1. Compensation; connecting lines. A., a railroad company, in the execution of its contract with the government, carried the mails from P. to F., the route being partly over its own road and partly over a portion of the road of company B., which also had a contract for carrying the mails over its entire line. After the passage of the act of March 3, 1878, ch. 231, the Postoffice Department made frequent adjustments of the amount due to the respective companies, which was from time to time received without protest or objection. B. having received the amount due for conveying all the mails over its road, although over a part of it a portion of them had been carried by A. under its contract, the latter brought suit against the United States to recover compensation for the portion so carried. *Held*, that A.'s acquiescence in the adjustments precluded the maintenance of the suit. *Rail-road Co. v. United States*, 103 U. S., 703. 1880.

CARRIAGE OF MERCHANDISE.

See BAGGAGE; EVIDENCE; RATES; RECEIVER; STOPPAGE IN TRANSIT; WAREHOUSEMAN.

[The various matters relating to carriage of merchandise will be likewise found under various other headings in the digest.]

I. CONNECTING LINES.

II. CONTRACTS LIMITING LIABILITY.

III. DAMAGES.

1. Delay.

2. Damages generally.

IV. LOSSES BY FIRE.

1. Liability as carriers.

2. Liability as warehousemen.

V. LIABILITY OF CARRIERS GENERALLY.

VI. GENERAL MATTERS.

I. CONNECTING LINES.

1. Carriage of goods for another common carrier. The plaintiff, by an agent at B., received small parcels, and had them put into a hamper, addressed to himself at L., and sent by the L. and N. W. Railway. These small parcels, which were addressed to different persons, it was the business of the plaintiff to deliver as addressed. In its transit on the railway, a small parcel, addressed to Mr. K., was abstracted from the hamper. *Held*, in an action by the plaintiff against the company for loss of the parcel, that it was sufficient to prove that it was not in the hamper when delivered to the plaintiff by the company, and that it was not necessary to go into evidence to show that the company had not delivered it to Mr. K., and that the amount of damages in such action is the value of the lost parcel, as the plaintiff would be liable to that amount to the owner of it. A railway company has no right to open a parcel to ascertain whether it contains other parcels addressed to different persons. *Crouch v. London and Northwestern R'y Co.*, 2 Carrington & Kirwan, 789; 61 E. C. L.; 789. 1849.

2. Change in direction by order of shipper. The plaintiff delivered at a station of the South Staffordshire R'y Co. certain goods, addressed "to the East India Docks, London," and paid one sum for their carriage the whole distance. By the practice of the South Staffordshire Railway, all goods delivered at that station for London are forwarded on its own line to Birmingham, and from thence by the London and North Western Railway. Before the goods in question arrived in London, the plaintiff directed a clerk at the London station of the latter company to forward them to another place, which the clerk promised to do. The

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goods were, however, delivered according to the original address, and thereby lost. *Held*, that the South Staffordshire Railway Company was responsible for the loss. *Scothorn v. South Staffordshire Ry Co.*, 8 Welsby, Hurlstone & Gordon (Exchequer), 341. 1852.

3. Common law. Where a connecting carrier receives goods for carriage, the presumption is that they were received under the liabilities of the common law. *Southern Express Co. v. Urquhart*, 52 Ga., 142. 1874.

4. Condition of goods; presumption. Where goods are delivered to the first carrier, in a line of several different carriers, to be transported over the entire line, there being no direct evidence to show where they were injured, the jury, if there is nothing in the case to render the presumption improbable, may presume that the goods reached the hands of the last carrier in the same condition as when delivered to the first in the line. *Shriver v. Sioux City and St. Paul R. R. Co.*, 24 Minn., 506. 1878.

5. — A. shipped from Boston, Mass., in good order, a piano, to be delivered at Greensboro, N. C. The piano was in good condition when it reached New York, and, nothing appearing to the contrary, it was also in like condition when received by defendant's agent, but was delivered at Greensboro, to A., greatly damaged; *held*, that the burden of proving that the piano was damaged on some other of the connecting lines of road, and not its own, rested with the defendant, who, failing so to prove, is responsible to the plaintiff for the injury to his piano. *Dixon v. Richmond and Danville R. R. Co.*, 74 N. C., 538, 1876; 13 Amer. Ry Rep., 99.

6. — Where a railway company received goods, and carried them over its line from a connecting road, such goods are presumed to be received "as in good order," within the meaning of § 2084 of the Revised Code, if nothing appears to the contrary. *Central R. R. Co. v. Rogers*, 66 Ga., 251. 1880.

7. — It is sometimes held that when goods are delivered in good order to the first carrier, the presumption will be indulged that they continue in that condition until the contrary is shown; and in such cases the burden is upon the carrier in whose hands

the goods are found in a damaged condition to show they were damaged before he received them. In an action against a carrier for delivering goods in a damaged condition, the burden is upon the plaintiff to prove that they were damaged while in possession of the carrier. Proof that they were in good condition when shipped may raise a presumption and cast the burden upon the last carrier of proving their condition when received by him. *Lake Erie and Western Ry Co. v. Oakes*, 11 Bradwell (Ill.), 489. 1882.

8. — The rule is not changed by the fact that the last carrier, instead of transferring the goods, transports them over its line in the foreign car in which it received them. *Leo v. St. Paul, Minneapolis and Manitoba Ry Co.*, 30 Minn., 438. 1883.

9. — Upon proof that goods "in good order," or "in apparent good order," or "as in good order," are received on any railroad of a line in connection with which "the last company" runs its road, the presumption will arise that such condition of the goods continued up to the time when the last company received them, and the last company will be responsible to the consignee, unless it shows that the goods were not received by it in such good order, or apparent good order; but there must be some legal evidence to show either that the last company received the goods as in good order, or that some other railroad company connecting with it so received them; and in the absence of any legal evidence of either fact, a non-suit was properly awarded — especially, as in this case, there was no proof that defendant received the corn from any other carrier, or how it was received, after certain indorsements upon the bill of lading by the agent were rejected as evidence. *Evans v. Atlanta and West Point R. R. Co.*, 56 Ga., 498. 1876.

10. Connecting lines; contract limiting liability. A steamship company, by its bill of lading, agreed to carry goods from Liverpool to Portland, and there to deliver them to the defendant to be carried by it to Montreal. The goods, consisting of plate glass, were delivered to defendant, and while in its custody were damaged. *Held*, that the defendant could not avail itself of a limitation of liability contained in the bill of

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lading of the steamship company. *Atwater v. Grand Trunk R'y Co.*, 17 Lower Canada Jurist, 1. 1872.

11. — A railway company which gives a bill of lading for the carriage of goods over its own line, and other connecting carriers, to a point beyond the terminus of its line, may stipulate against liability for loss of, or damage to, the goods, while in the custody of a connecting carrier. *Taylor v. Little Rock, Miss. River and Tex. R. R. Co.*, 32 Ark., 393. 1877.

12. — The contract made by the first carrier restricting liability, and acted upon by successive lines, inures to the benefit of the connecting lines. *Whitworth v. Erie R'y Co.*, 87 N. Y., 413; 45 N. Y. Superior Ct., 602. 1879. See *Same v. Same*, 6 Amer. & Eng. R. R. Cases, 349.

13. — The last of a series of connecting lines over which freight is transported is liable for loss or damage, subject to the limitations stipulated for in the contract of shipment with the first line, unless it appears that the loss did not occur on the road sued. The burden is upon said road to show that the loss did not occur on its line. *Memphis and Charleston R. R. Co. v. Tatum*, 9 Baxter (Tenn.), 188. 1877.

14. — Where the receipt declares that the company, in sending forward goods beyond its termini, shall act "as the agent of the consignor or consignee, and not as a carrier," it is its duty as such agent to give correct information and instructions to the succeeding carrier as to the destination and delivery of the property transferred to the latter company; otherwise it is liable in damages to the consignor for all loss and injury to the property which, by its agreement with him, it undertook to carry to its destination. *Dana v. N. Y. Central and Hudson River R. R. Co.*, 50 Howard's Practice (N. Y.), 428. 1875.

15. — Where a railway company, without contracting for restricted liability, receives goods consigned to a point beyond its terminus, but on the line of a connecting route, it is bound to deliver them at their destination. But where goods so consigned are received under a contract restricting the liability of the company as a carrier to their delivery at its terminus, it is then

bound to deliver them there with all convenient speed, according to the usual course of business, to the next carrier; and if there is none ready at the terminus to receive the goods and forward them along the proper route, then it ought to retain them and notify the owner. The company is not bound in such case to transport the goods beyond its terminus upon any link, however short, of the connecting route, unless its established usage imply such undertaking. *Louisville and Nashville R. R. Co. v. Campbell*, 7 Heiskell (Tenn.), 253, 1872; 12 Amer. R'y Rep., 490.

16. — While the law imposes upon common carriers the duty of carrying all goods offered to them in the usual course of business, it does not impose upon them the duty of transporting goods beyond the termini of their respective routes, and they may, therefore, by special agreement, contained in a bill of lading or receipt, lawfully stipulate that they shall not be liable beyond such point. *Mulligan v. Illinois Central R'y Co.*, 36 Ia., 181. 1873.

17. — fire. The plaintiff delivered at the station of the Great Western Railway Company at Bath, a van-load of furniture to be conveyed to Torquay. He signed a receipt note, which was headed — "Bath Station.— To the Great Western Railway Company.— Received the under-mentioned goods on the conditions stated on the other side, to be sent to Torquay station and delivered to the plaintiff or his agent." One condition was, that the company would not be answerable for loss or damage by fire. Another condition stated that the company would not be responsible for loss or damage to goods beyond the limits of its railway. The van was placed on a truck and conveyed to Bristol, where the Great Western line ends, and the defendant's (the Bristol and Exeter) line begins. The same truck and guard proceeded with the van to Exeter, where the defendant's line ends, and is joined by the line of the South Devon Company, which runs to Torquay. Whilst the van and furniture were at the defendant's station at Exeter, they were accidentally destroyed by fire. *Held*, that this was one contract with the Great Western Railway Company for the conveyance of the van and furniture from Bristol

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to Torquay, subject to the conditions in the receipt note; and that, consequently, none of the companies were responsible for the loss. *Collins v. Bristol and Exeter R'y Co.*, 11 Hurlstone & Gordon (Exchequer), 790. 1856.

18. Contract for shipment beyond terminus. A common carrier (except in the case of an incorporated company disabled by the provisions of its charter) may by special contract bind itself to convey and deliver goods to points beyond its own lines and outside the limits of the state wherein its road lies. *Phillips v. North Carolina R. R. Co.*, 78 N. C., 294, 1878; 16 Amer. R'y Rep., 206.

19. — The plaintiff delivered to P., at Worcester, a package, addressed to him to be carried from Worcester to Chester. P. (who stood as agent for receiving goods both of the Great Western Railway and London and North Western R'y Co.) wrote under the address, "Via Stafford," and delivered the package to the Great Western R'y Co., which carried it on its line to Stafford, from whence it was carried in the defendant's cars on the line of the London and North Western Railway to Chester. *Held*, that there was evidence of a contract with the Great Western R'y Co. to carry the whole distance from Worcester to Chester, and, therefore, it was liable for damage to the contents of the package during the journey. *Webber v. Great Western R'y Co.*, 8 Hurlstone & Coltman (Exchequer), 771. 1865.

20. — Goods were delivered to a railway company for transportation to New York, and the freight was paid to it for the entire distance; the goods were receipted for as "for transportation;" the shipper knew that the railway terminated at an intermediate point, whence the goods were to be carried the rest of the way by a steamer of another company, and that the freight money was to be divided between the corporations. In an action against the railway company to recover for damage to the goods, happening upon the steamer, *held*, that the corporation was not a common carrier beyond the end of its road, and was not liable. *Washburn and Moen Manufacturing Co. v. Providence and Worcester R. R. Co.*, 118 Mass., 490. 1878.

21. — The duty or obligation of a carrier to convey goods beyond its own line, and to deliver them at a point beyond its own line, is not imposed by law, but depends upon the contract between the shipper and the company. *Piedmont Manufacturing Co. v. Columbia and Greenville R. R. Co.*, 19 So. Car., 353, 1882; *Grover and Baker Sewing Machine Co. v. Missouri Pacific R'y Co.*, 70 Mo., 672, 1879; *Erie R'y Co. v. Wilcox*, 84 Ill., 239, 1876; 16 Amer. R'y Rep., 457.

22. — A railway company may make a special contract to deliver goods beyond its line, and become liable for the loss of goods on another line to which it delivered them to be transported to place of destination. *Bryan v. Memphis and Paducah R. R. Co.*, 11 Bush (Ky.), 597, 1875; 14 Amer. R'y Rep., 395.

23. — The general freight agent of a railway company has power to bind the company by a contract for transportation to points beyond its own line; but a station agent has no such power; and such a contract entered into by him is void, unless the authority has been expressly conferred by the proper superior officer, or there have been previous dealings from which the authority may be reasonably inferred, or the company has held itself out as a common carrier to such points. *Grover and Baker Sewing Machine Co. v. Missouri Pacific R'y Co.*, 70 Mo., 672. 1879.

24. — Where a railway company receives goods for hire to carry from one station to another, it is answerable for a loss occurring between them during the transit, though it may happen on a line of railway belonging to another company. *Scotthorn v. South Staffordshire R'y Co.*, 18 Eng. Law & Equity, 533; 22 Law Jour. Rep., N. S., Exch., 121; 17 Jurist, 214. 1852.

25. — It is only where the contract is for through transportation that each connecting carrier will be entitled to the benefits and exemptions of the contract between the shipper and the first carrier. *Merchants' Despatch Transportation Co. v. Bolles*, 80 Ill., 473. 1875.

26. — A contract for carriage of goods construed, and the carrier held liable beyond its own line. *Cummins v. Dayton and Union R'y Co.*, 9 Amer. & Eng. R. R. Cases (Ind.), 36. 1882.

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27. — While a railway company could not, in the absence of express contract or custom, be required to deliver or receive goods beyond its terminus, yet such duty could be created by contract or a course of business, which would warrant those dealing with it in presuming that their goods would be received or delivered beyond such terminus. *Cobb v. Ill. Central R. R. Co.*, 38 Ia., 601. 1874.

28. — If the defendant relies upon any special custom in regard to the delivery of the goods to the succeeding carrier, or affecting such delivery, the burden of proof is upon him to establish such custom. *Irish v. Milwaukee and St. Paul R'y Co.*, 19 Minn., 376. 1872; 19 Amer. R'y Rep., 89.

29. Delay. Where a railway company receives goods from a connecting line to be carried to the owners, it is bound to forward them at once. The delay cannot be excused on the ground of a regulation requiring that goods be not forwarded until a bill of back charges should be received. *Dunham v. Boston and Maine R. R. Co.*, 70 Me., 164. 1879.

30. Delivery. If there is an agreement between two persons, occupying the relative positions of intermediate and succeeding carrier, that property intended for transportation by the latter may be deposited at a particular place without express notice to him, such deposit amounts to notice, and is a delivery. *Pratt v. Railway Co.*, 95 U. S., 43. 1877.

31. Delivery to next carrier. A railway company having receipted for merchandise, "to forward . . . to T. M., Tuscaloosa, Ala." (a point beyond its line), proved the delivery of the merchandise, in good order, to the next carrier in the regular course of transportation to Tuscaloosa; *held*, that the company had fully performed its duty, and was not liable for damage occurring after such delivery. *Mullarkey v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 9 Philadelphia, 114. 1873.

32. — Where goods were received to be forwarded to a point beyond the defendant's line, "as opportunity might offer," *held*, that its liability as a common carrier ended when the goods arrived at the end of its own line, and were there stored ready for reshipment. *Armstrong v. Grand Trunk R'y Co.*,

2 Pugsley & Burbridge (New Brunswick), 445. 1879.

33. — In the absence of any special agreement or custom which enters into the contract, where goods are delivered to a common carrier for transportation, directed to a point beyond the terminus of his route, between which and the place of destination of the goods there are other succeeding connecting lines of transportation by common carriers, the intermediate carrier is bound to transport the goods safely to the end of his route, and deliver them to the next carrier on the route beyond, and in such case he is not relieved from his liability as insurer of the goods by simply unloading the goods at the end of his route, and storing them in a warehouse, without delivery to the next carrier. *Irish v. Milwaukee and St. Paul R'y Co.*, 19 Minn., 376, 1872; 19 Amer. R'y Rep., 89.

34. — The fact that a railway company, in the month of November, left a car containing perishable property upon the track of another company, without making such delivery, to the latter, of the car, freight bill and expense voucher, as a reasonable usage and regulation between the two companies required, and for that reason the latter company did not assume the actual custody of the car, but returned it to the track of the former, is sufficient evidence of negligence to charge the former with subsequent injury to the property resulting from the weather. *Reynolds v. Boston and Albany R. R. Co.*, 121 Mass., 291. 1876.

35. — Where a common carrier makes only a partial delivery of goods, the presumption is that the loss occurred by its default; and if its contract be such that it is liable only for losses occurring on its own, and not on connecting lines, and there is any evidence of the delivery of the goods to it, and that the loss could have occurred while in its custody, it must account for the loss. *Southern Express Co. v. Hess*, 53 Ala., 19. 1875.

36. Evidence. In an action against a railway company for negligence in carrying hay, whereby it was wet and damaged, it is a necessary part of the plaintiff's case to show the condition of the hay when it was delivered to the carrier; and evidence of its

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condition at a distant place from which it was shipped by another carrier could only be resorted to in the absence of more direct proof. *Marquette, Houghton and Ontonagon R. R. Co. v. Langton*, 32 Mich., 251. 1875.

37. — When two carriers connect at a point from which the one is accustomed to receive, for the purpose of completing transportation, goods carried by the other, and destined to points on its line,—the goods in question being thus received,—and the only evidence of their relation to each other is that they do not pro rate freight, the one carrier will be held to be the agent of the other carrier, and of the consignor and consignee, for the transportation of the goods to their destination. *Southern Express Co. v. Hess*, 53 Ala., 19. 1875.

38. — A carrier's duty to carry safely what he has received safely is independent of the question of negligence; but in the absence of proof that goods were delivered to him, or delivered safely, any presumption that he received them goes behind his duty and enters into the origin of the contract for carriage; and as there is nothing for the contract to act on until the goods come into his charge, until that is proved, the contract is not established. *Marquette, Houghton and Ontonagon R. R. Co. v. Kirkwood*, 45 Mich., 51, 1880; 9 Amer. & Eng. R. R. Cases, 85.

39. Forwarding. It was proper for the carrier, having carried goods to St. Louis, to store them or to forward them at once, as might be most expedient, regard being had to the nature of the goods; and that having, in the exercise of a sound distinction, forwarded them by a usual mode of transportation, the carrier's liability ceased. *Cramer v. American Merchants' Union Express Co.*, 56 Mo., 524. 1874.

40. Intermediate carrier. The owner of property shipped over connecting railways can, on failure to deliver, recover of an intermediate road into whose custody and exclusive control it had come. *Knowles v. Pittsburgh, Ft. Wayne and Chicago R. R. Co.*, 4 Bissell (U. S. C. C.), 466. 1865.

41. — The liability of an intermediate common carrier for the safety of goods delivered to him for carriage is discharged by their delivery to and acceptance by a suc-

ceeding carrier or his authorized agent. *Pratt v. Railway Co.*, 95 U. S., 43. 1877.

42. — Where goods are shipped with a certain company, and the goods pass through other companies merely as agents of the first, and are lost, suit should be brought against the first company alone, and it is error to take judgment against all the companies. *Anchor Line v. Dater*, 68 Ill., 369. 1873.

43. Lien for back charges. Cotton was forwarded from Louisiana to be delivered in Providence, R. I., "rates guarantied to Providence." By the error of some intermediate carrier the destination, Providence, was changed to Chicopee, Mass., whence, by the owner's direction, the P. and W. R. R. Co., after paying charges, brought it to Providence. The owner refused to refund to the P. and W. R. R. Co. its charges for freight paid, and replevied the cotton. *Held*, that the P. and W. R. R. Co. had a lien on the cotton for its freight and charges for back freight paid. Sending the cotton to Chicopee raised the freight above the amount guarantied by the first carrier. *Held*, that for this the owner might have his action against such first carrier, or against the carrier by whose error the cotton was sent to Chicopee. A carrier receiving goods from a tortious holder has no lien on them against the owner; but a carrier receiving goods from one who, by the owner's act, has been clothed with an apparent authority, has a lien on them against such owner. *Vaughan v. Providence and Worcester R. R. Co.*, 13 R. I., 578, 1882; 9 Amer. & Eng. R. R. Cases, 41.

44. — The P. and W. R. R. Co. received certain lots of cotton to be shipped from Louisiana to Providence, paid the freight charges on them, forwarded and delivered the cotton to the consignees. On delivery the cotton was found to be badly damaged by water, and the consignees claimed the right to recoup the damage from the bill of freight and charges of the P. and W. R. R. Co. It appeared that the P. and W. R. R. Co. was not associated with the preceding carriers, and it did not appear where on the line of transit the damage occurred. *Held*, that the recoupment could not be allowed. A carrier receiving goods marked for delivery beyond the end of his line is, in the absence of a

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special agreement, only responsible for safe carriage over his line and safe delivery to the next carrier. When several independent carriers successively receive goods for carriage, each is entitled to demand payment in advance or to a lien on the goods for the carriage price. In such cases each road is by mercantile custom entitled to pay the back charges, and to a lien on the goods for such charges and for its own carriage price. *Knight v. Providence and Worcester R. R. Co.*, 13 R. I., 572, 1882; 9 Amer. & Eng. R. R. Cases, 90.

45. Marks. A carrier receiving goods delivered to him for transportation, marked and destined to a point beyond his own line, undertakes, in the absence of an express agreement to the contrary, to deliver the goods to the consignee. *East Tenn. and Ga. R. R. Co. v. Rogers*, 6 Heiskell (Tenn.), 143, 1871; 12 Amer. R'y Rep., 47; *Western and Atlantic R. R. Co. v. McElwee*, 6 Heiskell (Tenn.), 208, 1871; *Milwaukee and St. Paul R'y Co. v. Smith*, 74 Ill., 197, 1874.

46. — The acceptance of goods delivered for carriage, marked to a point beyond the terminus of the carrier's line, is considered *prima facie* as a contract for through transportation. *Erie R'y Co. v. Wilcox*, 84 Ill., 239, 1876; 16 Amer. R'y Rep., 457.

47. — Where a carrier receives goods for transportation, marked for a place beyond the terminus of its line, without any special contract, its liability as an insurer will continue until it delivers them to a connecting carrier. If burned in its warehouse before such delivery, it will be liable for their value. *Merchants' Despatch Transportation Co. v. Bolles*, 80 Ill., 473, 1875.

48. — The acceptance by a railroad company of goods marked to a designation beyond the terminus of its road creates a *prima facie* liability to transport to and deliver the goods at that point, which, however, may be modified by proof of a different usage known to the shippers at the time of making the consignment. *Mulligan v. Illinois Central R'y Co.*, 36 Ia., 181, 1873.

49. — Mere marks or direction to a destination beyond the terminus of the first carrier's line will not make such first carrier liable for the loss of the goods beyond such terminus, but the question in every such

case is, what is the contract or undertaking? *Crawford v. Southern R. R. Association*, 51 Miss., 222, 1875.

50. — Where no special contract is made, and goods are delivered to a road for transportation over it, though marked to a place beyond its terminus, the carrier discharges its duty by safely conveying over its own road, and then delivering to the next connecting road, in the direct and usual line of common carriers, towards the point of ultimate destination, unless some special arrangement for carriage of goods is shown to have been made by the connecting line. *Phillips v. North Carolina R. R. Co.*, 78 N. C., 294, 1878.

51. Notice of arrival. Where a carrier receives goods for transportation to a point beyond its own line, it must give notice of their arrival to the next carrier, in order to terminate its responsibility as a common carrier. *Ayres v. Western R. R. Corp.*, 14 Blatchford (U. S. C. C.), 9, 1876.

52. Rates. A common carrier who receives freight for transportation over his own route and the line of other carriers cannot bind such other carriers as to the rate to be charged for transportation, unless there is an agreement to that effect between them. And such other carriers will not be held to have impliedly assented to the rates charged by the first carrier, if, in receiving freight to be shipped over their routes under a bill of lading issued by the first carrier, they discover that the articles shipped are of a different character from those named in the bill of lading, and upon which the rates are higher. In such case they can transport the goods to their destination, and charge and collect the increased rate. *Sumner v. Southern R. R. Association*, 7 Baxter (Tenn.), 345, 1874; 9 Amer. & Eng. R. R. Cases, 18.

53. — Where, pursuant to a contract between connecting railways, freight is received by one, to be delivered at a point on the other for a sum less than the aggregate regular charges of both, the latter, upon receiving the freight, must deliver it at such point to the consignee, upon his tendering such sum to the proper agent of the latter. *Evansville and Crawfordsville R. R. Co. v. Marsh*, 57 Ind., 505, 1877; 18 Amer. R'y Rep., 482.

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54. — through rate; irregularity. The defendant, in addition to its business of a carrier by rail, carried on the business of a common carrier off its line. It charged an equal rate to all the public for carriage on its line between its termini. It also undertook to collect at one terminus, to carry on its line, and to deliver at a place distinct from, at some distance beyond, its other terminus; and for this it charged a through rate to all the public alike. *Held*, that the carriage beyond the second terminus was not auxiliary to its business as a railway carrier, but was done by it in its business as a common carrier generally, and that the plaintiffs were not entitled to deduct the cost of this carriage and of collection at the first terminus from the through rate, and to claim to have their goods carried between the termini for the difference. *Baxendale v. London and South Western R'y Co.*, Law Reports, 1 Exchequer Cases, 137. 1866.

55. Refusal of intermediate carrier to receive goods. A railroad company received freight for carriage and delivery at a point beyond its line on a connecting road. In the absence of special contract limiting the responsibility, the company receiving the freight is bound to deliver it at its destination. It is no excuse for not doing so, that the connecting road refused to receive the freight and advance the charges due and paid by the company sued. *Railroad Co. v. Stockard*, 11 Heiskell (Tenn.), 568. 1872.

56. — The defendant agreed with the plaintiffs to carry coals from U. to K. and to find cars, the Y. and B. Company undertaking to haul the cars to and fro between U. and Y., and the contract was founded on the basis that there should be no unreasonable detention of cars, whether empty or full, between Y. and U. *Held*, that the neglect and refusal by the Y. and B. Co., to haul between U. and Y., was an answer to an action by the plaintiff against the defendant for neglecting and refusing to carry from U. to K. *Jonassohn v. Great Northern R'y Co.*, 28 Eng. Law & Equity, 481. 1854.

57. Receipt. A receipt for goods "to be forwarded" to Birmingham, Ala., does not imply a contract to carry and deliver the goods at the place of destination, when it is shown that Birmingham, Ala., is beyond

the terminus of the line of the railroad executing the receipt. *Crawford v. Southern R. R. Association*, 51 Miss., 222. 1875.

58. — A railway company receipting for goods for carriage beyond its line is not bound to carry the goods beyond its own line unless an express agreement to that effect is made. *Detroit and Bay City R'y Co. v. McKenzie*, 9 Amer. & Eng. R. R. Cases (Mich.), 15, 1881; *Michigan Central R. Co. v. Myrick*, 9 ib., 25 (U. S. S. C.), 1888; *Detroit and Bay City R'y Co. v. McKenzie*, 43 Mich., 609, 1880; 21 Amer. R'y Rep., 157.

59. — But if it receipts for the goods to be carried to a point beyond its line for a definite sum named, and the consignor is charged a larger sum therefor, the receipting company is responsible to the consignor for the excess. *Detroit and Bay City R'y Co. v. McKenzie*, 43 Mich., 609, 1880; 21 Amer. R'y Rep., 157.

60. Return of goods. The plaintiff delivered in London, to the defendant, a parcel directed to the plaintiff's agent at Plymouth. The defendant's railway terminates at Bristol, from whence it forwarded the parcel to Plymouth by the South Devon Railway. The parcel was tendered by a servant of that company to the consignee at Plymouth, who refused to pay the amount demanded for carriage, whereupon the servant took the parcel away. The next day the consignee went to the office of the South Devon Railway and demanded the parcel and tendered the amount of carriage, when he was told that the parcel had been returned to London, but, though he made repeated applications at the office in London, the parcel never was delivered. The jury having found that the tender was made in a reasonable time and that the parcel was sent back to London before a reasonable time had elapsed, *held*, per Pollock, C. B., Martin, B., and Channell, B., that the defendant was responsible for the acts of the South Devon Company, and that the sending the parcel to London at the time it did, followed by the non-delivery of it to the plaintiff, upon or subsequent to the several applications, afforded sufficient evidence of a breach of duty by the defendant in not taking care of the parcel for the plaintiff, even supposing its duty as a carrier ended with the tender of the goods. *Crouch*

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v. Great Western R'y Co., 2 Hurlstone & Norman (Exchequer), 491. 1857.

61. Steamboats. A parcel was delivered at Penzance to the West Cornwall Railway Company, addressed to a person at Wolverhampton, "per first steamer from Hayle." The company's railway only extends from Penzance to Truro; but its practice was to send goods for Bristol, or places above it, to a sea-port called Hayle, and there deliver them to the steamboats; and to send parcels for Bristol or places above it to Truro, and there deliver them to other carriers, who carry them from Truro to Plymouth (for which distance there is no railway), and from Plymouth they are sent by railway to Wolverhampton. The company carried the parcel by its railway to Hayle, where it was delivered to a steamboat, by which it was conveyed to Bristol, and from thence by railway to Wolverhampton. The goods in the parcel having been damaged *after* the delivery to the steamboat,—*held*, that, under these circumstances, a jury might infer a contract by the company, as a common carrier, to carry the whole distance from Penzance to Wolverhampton; and, consequently, that it was liable for the goods. Also, that it is not *ultra vires* for the company to carry beyond its own line by sea or by coach. *Wilby v. West Cornwall R'y Co.*, 2 Hurlstone & Norman (Exchequer), 703. 1858.

62. Transportation companies. Where various companies form an association and unite in making a continuous line of their respective roads, and collect either in advance at the place of receiving or at the place of delivery the freight due for the entire route, subdividing among themselves, the receiving road becomes responsible for the default of any of the associated companies, and no special contract need be shown. *Phillips v. North Carolina R. R. Co.*, 78 N. C., 294, 1878; 16 Amer. R'y Rep., 206.

63. — Where a number of common carriers combine under a name, for the purpose of carrying freight for hire along the route of all, an action for conversion may be maintained against them jointly or severally; and to maintain an action against one, it is not necessary to prove that the goods were

lost while in his possession, nor to prove a special contract with him for their carriage. So held with reference to the "White Line." *Rice v. Indianapolis and St. Louis R. R. Co.*, 8 Mo. App., 27. 1876.

64. — A contract to carry fruit trees over the "White Line," by which the carrier's liability was limited to the end of that line, the line being an association of carriers, *held*, to exonerate the companies forming the line from any liability for freezing upon a railway beyond the terminus of the line. *Irwin v. N. Y. Central and Hudson River R. R. Co.*, 59 N. Y., 653. 1874.

65. — An association between carriers by which they, for mutual profit, carry goods in a continuous line through, for an agreed price, renders them jointly and severally liable for a loss occurring anywhere on the line. In such a case the word "partners" need not be used to designate the relationship. So held with reference to the association called the "Blue Line." *Wyman v. Chicago and Alton R. R. Co.*, 4 Mo. App., 35. 1877. See, also, *Schutter v. Adams Express Co.*, 5 ib., 316. 1878.

66. — Carriers doing business together, sharing profits and sending freight cars over one or the other of the combined lines, may make themselves jointly liable to the shipper. *Barrett v. Indianapolis and St. Louis R. R. Co.*, 9 Mo. App., 226. 1880. But see *Watkins v. Terre Haute and Indianapolis R. R. Co.*, 8 Mo. App., 570. 1880.

67. Warehousemen. The Michigan Central R. R. Co., under its charter, is liable only as warehouseman, and not as common carrier, for goods carried over its line to Detroit and there deposited in its warehouse, awaiting delivery to an intermediate consignee. *Michigan Central R. R. Co. v. Lantz*, 32 Mich., 502, 1875; 8 Amer. R'y Rep., 74.

68. Which carrier liable for loss. Where goods are shipped to be carried by successive carriers, the carrier in whose possession they are when destroyed or injured is liable as such to the owner or consignee for the loss. *Packard v. Taylor*, 35 Ark., 402. 1880.

69. — A parcel was delivered at Lancaster to the Lancaster and Preston Junction Railway Company, directed to a person at a place in Derbyshire. The person who brought it

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to the station offered to pay the carriage, but the book-keeper said it had better be paid by the person to whom it was directed, on the receipt of it. The Lancaster and Preston Junction Company was known to be proprietor of the line only as far as Preston, where the railway unites with the North Union line, and that afterwards with another, and so on into Derbyshire. The parcel having been lost *after* it was forwarded from Preston, *held*, that the Lancaster and Preston Railway company was liable for its loss. *Muschamp v. Lancaster and Preston Junction R'y Co.*, 8 Meeson & Welsby (Exchequer), 421, 1841; 2 Eng. R. R. & Canal Cases, 607.

70. — This decision is followed, and a carrier held liable for goods consigned beyond its line, the loss occurring beyond such line. If it is desired to avoid such responsibility, it should be limited by contract. *Mobile and Girard R. R. Co. v. Copeland*, 63 Ala., 219, 1879; also in *Watson v. Ambergate R'y Co.*, 3 Eng. Law & Equity, 497; 15 Jurist, 448, 1851.

71. — Where a carrier undertakes to deliver goods at a given point, and the goods are lost by a connecting carrier employed by the other carrier to complete the transit, the carrier with which the contract was made is liable for the loss. *Freeburg Coal Co. v. Union R'y and Transit Co.*, 10 Mo. App., 596, 1881.

72. — Common carriers may contract to carry and deliver goods at a point beyond their own lines, and in such case the first carrier will be responsible for the loss, wherever it may occur. The contract may be ascertained and determined by facts and circumstances, in the absence of an express agreement; but a railway company is not responsible for the non-delivery of freight beyond its own line, except by contract, express or implied. The receipt for goods to be forwarded to a place beyond the terminus of the line of the first carrier is not evidence of a contract to carry and deliver at the place of destination. *Crawford v. Southern R. R. Association*, 51 Miss., 222, 1875.

73. Where a railway company wrongfully shipped a lot of cotton from its depot in Arkansas, to Waterville, Maine, beyond the terminus of its road, and on the application of the agent purchasing the cotton gave

him a bill of lading containing a printed stipulation restricting its liability to its own line of road, naming the number of bales, and containing this entry, written in a blank: "To be forwarded from Waterville, Maine (where the cotton is now lying), at consignee's expense. All charges for transportation to that point, and necessary charges, to be paid by him,"—and the oral evidence showed it was to be transported to Putnam, Connecticut, it was held that the company was liable to the assignee of the bill of lading, the consignee, for the value of the cotton, on account of its non-delivery at Putnam. *St. Louis and Iron Mountain R. R. Co. v. Larned*, 103 Ill., 293, 1882; 6 Amer. & Eng. R. R. Cases, 436.

74. — Where a railway company received goods for carriage to a point beyond its own terminus, and the plaintiff alleges that it undertook to carry the whole distance by rail, the burden is upon him to prove such undertaking. In such case the burden is not upon the carrier to account for the loss, if he has delivered at his own terminus to a proper person. *Dixon v. Columbus and Indianapolis R. R. Co.*, 4 Bissell (U. S. C. C.), 137, 1868.

75. — In case of shipment of hay over connecting lines, the recovery could be only such damages as the defendant's misconduct caused; and the value at the place of destination could not properly be the test, except subject to a deduction of the freight for carrying it there from the place of delivery; and the price of sound hay could not be recovered without proof that sound hay had been delivered to defendant and injured while in its custody. *Marquette, Houghton and Ontonagon R. R. Co. v. Langton*, 32 Mich., 251, 1875.

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76. *Bill of lading limiting liability.* The issue of a bill of lading containing a limitation of liability several days after the receipt of the goods by the carrier, the bill of lading being made out with the knowledge of the loss of the goods, will not exonerate the carrier from its common law liability. *Wilde v. Merchants' Despatch Co.*, 47 Ia., 247, 1877.

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77. — Where a common carrier, upon the delivery of merchandise for transportation, issued to the consignor a shipping receipt which stated that the bill of lading would be issued upon application at a place designated therein, and that the merchandise would be transported subject to the conditions expressed in the bill of lading, *held*, that the bill of lading and not the shipping receipt embodied the contract of the parties, and that the consignee would be bound by the conditions expressed in such bill of lading. *Wilde v. Merchants' Despatch Co.*, 47 Ia., 272. 1877.

78. — A general stipulation or notice in a bill of lading will not limit the liability of a common carrier; an express contract is necessary for that purpose. An express contract will not protect a common carrier from the results of its own negligence in running its trains. *Georgia R. R. Co. v. Gann*, 68 Ga., 350. 1882.

79. **Burden of proof.** Plaintiff, in the first instance, is only required to prove the delivery and loss, and if defendant pleads an exemption under his contract, the burden is upon him to prove that the loss was occasioned by the cause excepted; but he is not required to go further and prove affirmatively that he was guilty of no negligence. Proof of that fact will rest upon the plaintiff. And such proof is made out by showing that the injury might have been avoided by the exercise of reasonable skill and due attention on the part of the carrier. *Read v. St. Louis, Kansas City and Northern R. R. Co.*, 60 Mo., 199, 1875; 9 Amer. R'y Rep., 201.

80. — A common carrier of goods cannot, by contract, exonerate himself from liability for loss or injury to goods happening through his negligence or that of his agents, nor limit his liability to injuries caused by *gross* negligence. Where there is a contract limiting the liability of a common carrier of goods, the burden is on the carrier, and not on the owners, to show from what cause a loss or injury occurs. *Shriver v. Sioux City and St. Paul R. R. Co.*, 24 Minn., 506. 1878.

81. **Change of cars.** Where a contract of affreightment is evidenced by a bill of lading which is partly printed and partly written, the contract is to be gathered from the whole instrument, and a stipulation that the

carrier will transport the merchandise "without transfer, in cars owned and controlled by the company," constitutes a part thereof, a breach of which, occasioning a loss of the goods by fire, does not entitle the carrier to the protection of another stipulation of the bill of lading that the carrier will not be responsible for such a loss. *Robinson v. Merchants' Despatch Co.*, 45 Ia., 470, 1877; *Smith v. Same*, 45 ib., 705, 1877; *Stewart v. Same*, 47 ib., 229. 1877.

82. **Conditions; power to impose.** In an action against a railway company for negligence in forwarding goods, whereby they lost a market, the declaration alleged that the defendant was a common carrier, and received the goods in question to be carried by it *as such common carrier* for hire and reward. Plea, traversing the averment that the defendant received the goods *as a common carrier*. It appeared in evidence that the defendant did not receive any goods to be carried by it, unless the consignor signed a paper containing various conditions, subject to which they were to be carried. The judge, holding that the conditions were reasonable, and the contract a special contract within the 17th and 18th Vict., c. 31, s. 7, and that consequently the defendant did not receive the goods to be carried by it *as a common carrier*, directed a nonsuit; *held*, that the nonsuit was right. *White v. Great Western R'y Co.*, 2 Common Bench, N. S., 7; 89 E. C. L., 7; 1857.

83. — A common carrier is liable to an action at law for refusing to receive goods for carriage except upon conditions limiting its common law liability. *Leonard v. American Express Co.*, 26 Upper Canada, Queen's Bench, 533. 1867.

84. — A common carrier is responsible to the full extent of his liability as such, notwithstanding any contract he may make with reference thereto; but one not a common carrier may make any lawful contract which the parties choose. *Piedmont Manufacturing Co. v. Columbia and Greenville R. R. Co.*, 19 So. Car., 353. 1882.

85. — The carrier must satisfactorily prove that a special contract was made under circumstances indicating fairness and good faith, and the burden is then thrown upon the shipper to show that the contract

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ought not for some good reason to be enforced against him. *Adams Express Co. v. Guthrie*, 9 Bush (Ky.), 78. 1872.

86. Connecting lines. Where the receipt on bill of lading of goods marked to New York recited that the goods were to be transported over the line of the defendant's road to a certain station, and there delivered, in good order, to another company, whose line was a part of the route to the place of destination, and that the liability of defendant, as a common carrier, should cease when the goods were so delivered at that station to the other company, and the shipper accepted such receipt with knowledge of its contents, it became a binding contract upon both parties. *Field v. Chicago and Rock Island R. R. Co.*, 71 Ill., 458. 1874.

87. — Where goods are received by a common carrier, marked for transportation to a place beyond its line, and the bill of lading limited the common law liability of the carrier to safe carriage over its own line, *held*, that the inhibition contained in ch. 114, § 82, R. S. 1874, does not apply to a case where the carrier is under no obligation at common law to undertake to carry goods beyond its own line. *Chicago and Northwestern R. R. Co. v. Church*, 12 Bradwell (Ill.), 17. 1882.

88. — Any condition limiting the liability of a railway company as a carrier must be a condition just and reasonable in the judgment of the court, and must be set out in a written (or printed) contract signed by or on behalf of the consignor of the goods. A condition that the risk should terminate on delivery to a connecting line, where goods were received to be carried beyond defendant's line, was held reasonable. *Aldridge v. Great Western R'y Co.*, 15 Common Bench, N. S., 582; 109 E. C. L., 582. 1864.

89. — The exemption from liability is available only where the carrier forwards the goods consigned to him in the manner and by the route with reference to which the contract is made. If he deviates from his route, or forwards the goods by different conveyances than those contemplated by his agreement, he becomes an insurer of the goods, and cannot avail himself of any exceptions made in his behalf in the contract. *Galveston, Houston, etc., R. R. Co. v. Alli-*

son, 12 Amer. & Eng. R. R. Cases (Tex.), 28. 1883.

90. — A common carrier which receives goods from a connecting line is not entitled to the benefit of any limitation upon its common law liability, contained in an express contract entered into between the latter and the consignor, in its own behalf and for its own protection only. *Bancroft v. Merchants' Despatch Co.*, 47 Ia., 262. 1877.

91. Failure to claim damages in time named in contract. The plaintiff delivered to a railway company eighteen packages to be carried on its line. He filled up and signed a receiving note describing the goods as "furniture." On the paper, under the head "Conditions," were these words: "No claim for deficiency, damage or detention will be allowed, unless made within three days after the delivery of the goods; nor for loss, unless made within seven days of the time they should have been delivered; and that the company will not be responsible for the loss or detention of any goods which may be untruly or incorrectly described in the receiving note." The plaintiff said "he was told to sign the paper, and did so. He might have seen the word 'Conditions,' but he did not read them, and did not know, and was not told what they were." One of the packages consisted of a sack of clothes, which was not delivered, but no claim was made until more than seven days from the time when the same should have been delivered. *Held*: First, that there was nothing to rebut the presumption arising from the signature of the paper by the plaintiff that he understood that the contract was subject to the conditions. Secondly, that the conditions were just and reasonable within the meaning of the 17 and 18 Vict., c. 81, s. 7; and, therefore, that the company had a defense to an action on the ground that the claim was not made within seven days, and that the bag of clothes was misdescribed. *Lewis v. Great Western R'y Co.*, 5 Hurlstone & Norman (Exchequer), 867. 1860.

92. Fire. When goods, which a common carrier has undertaken to transport, are lost in transit by fire, through its negligence, it is liable, even where its bill of lading provides that it shall be exempt from liability in case of loss by fire. *Scruggs v. Baltimore*

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and *Ohio R. R. Co.*, 18 Federal Reporter, 318. 1883.

93. — A railway company was exonerated from liability for three hogsheads of tobacco, destroyed by the burning of the depot at which they were received for shipment, by the contract, inserted in the bills of lading, that the company "shall not be liable for loss or damage . . . by fire or other casualty while in transit, or while in depots or landings at points of delivery," etc. *Held*, that the carrier was only responsible for ordinary care. *Louisville and Nashville R. R. Co. v. Brownlee*, 14 Bush (Ky.), 590. 1879.

94. — Although the shipping contract contains a clause relieving the carrier from liability for loss by fire, he is not thereby exempted from the use of proper care for the safety of the goods while in his possession to be forwarded. It is his duty to keep them, while in his hands awaiting reshipment, in a safe and proper place, and the burden of proof is on him to show that he has done so, although the fire originated without his fault, in adjacent property over which he had no control, and although he made all reasonable efforts after it originated to prevent it from extending to the goods destroyed. *Erie R'y Co. v. Lockwood*, 28 Ohio St., 358, 1876; 14 Amer. R'y Rep., 143.

95. Fish. An agreement to carry fish at a reduced rate is sufficient consideration to sustain a contract for a limitation of the carrier's common law liability. *Manchester, Sheffield and Lincolnshire R'y Co. v. Brown*, Law Reports, 8 Appeal Cases, 703. 1883.

96. — Where notices were delivered to plaintiff notifying him that fish would only be received for carriage without liability, and the plaintiff afterwards shipped fish on the defendant's railway, it was *held* that shipment after such notice would be subject to the limitations in the notice. *Walker v. York and North Midland R'y Co.*, 2 Ellis & Blackburn, 750; 75 E. C. L., 750, 1853; 22 Eng. Law & Equity, 315; 23 Law Jour. Rep., N. S., Q. B., 73; 18 Jurist, 143.

97. — delay. The plaintiff, a fish merchant, signed a contract by which, in consideration of the defendant, a railway company, carrying his fish at a rate one-fifth less than the ordinary rate, he agreed to free the

defendant from "all liability for loss or damage by delay in transit or from whatever cause arising." Owing to pressure of business the fish of the plaintiff and others was some hours late in starting, and reached London too late for the market; *held*, that as the defendant carried at alternative rates, the condition was just and reasonable, although it was absolute and contained no exception, and would in the absence of alternative rates have been unjust and unreasonable. *Brown v. Manchester, Sheffield and Lincolnshire R'y Co.*, Law Reports, 9 Queen's Bench Division, 230, 1882; 6 Amer. & Eng. R. R. Cases, 481.

98. Knowledge of shipper. A contract of affreightment made by the consignor for the consignee is binding upon the latter, and in the absence of fraud or mistake he will be conclusively presumed to know its stipulations. *Robinson v. Merchants' Despatch Co.*, 45 Ia., 470. 1877.

99. — A shipper is bound by the conditions indorsed upon the request note and shipping receipt, and referred to on the face thereof. And this, whether he has read or knows of the contents of such conditions or not. *Mayer v. Grand Trunk R'y Co.*, 31 Upper Canada, Common Pleas, 248. 1880.

100. — Where a common carrier inserts in the shipping receipt a condition that the company will not be liable for loss beyond a specified sum, being less than the value of the goods shipped, *held*, that such stipulation does not release the common carrier unless it appears that the shipper knew of, and assented to, the limitation. *Adams Express Co. v. Stettaners*, 61 Ill., 184. 1871.

101. Where a carrier limits its liability by contract, and is therefore only liable for negligence, the carrier is not bound to guard against an unusual or extraordinary danger. So *held* in case of a great fire occurring in the woods along the line of railway. *Pennsylvania R. R. Co. v. Fries*, 87 Pa. St., 234, 1878.

102. Lost goods. Plaintiffs shipped, under a contract "at owner's risk," by defendant's road at W., eighteen boxes of jewelry, to be carried to New York. The evidence tended to show that, owing to inefficient facilities or accumulation of freight, from three to six days more than the usual time

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was taken in transit. Also, that before delivery to the consignee, and while the boxes were in the possession of defendant, one of them was opened and a portion of its contents abstracted. The court charged the jury that they could not find a verdict for the plaintiffs, except upon the assumption that the property had been stolen or lost while in the defendant's possession, and that such loss must be found to be attributable exclusively to the negligence of defendant in delaying the transportation. *Held*, error. *Canfield v. Baltimore and Ohio R. R. Co.*, 93 N. Y., 532. 1883.

103. Negligence. A common carrier may, by contract, limit his common law liability, but he cannot contract for immunity from liability for his own negligence or misconduct. *Earnest v. Express Co.*, 1 Woods (U. S. C. C.), 573, 1873; *Rintoul v. New York Central and Hudson River R. R. Co.*, 17 Federal Reporter, 905, 1883; *Taylor v. Little Rock, Mississippi River and Texas R. R. Co.*, 39 Ark., 148, 1882; *Capehart v. Seaboard and Roanoke R. R. Co.*, 81 N. C., 438, 1879; *Mobile and Ohio R. R. Co. v. Weiner*, 49 Miss., 725, 1874; *Maslin v. Baltimore and Ohio R. R. Co.*, 14 West Va., 180, 1878; *Brown v. Adams Express Co.*, 15 ib., 812, 1879; *Va. and Tenn. R. R. Co. v. Sayers*, 26 Grattan (Va.), 328, 1875; *Louisville and Nashville R. R. Co. v. Brownlee*, 14 Bush (Ky.), 590, 1879.

104. — In the absence of any statutory restrictions a common carrier may limit its liability even against fraud, gross negligence or dishonesty of its servants. *Dodson v. Grand Trunk R'y Co.*, 2 Nova Scotia Decisions, 405, 1871; *Hamilton v. Grand Trunk R'y Co.*, 23 Upper Canada, Queen's Bench, 600, 1864; *Bates v. Great Western R'y Co.*, 24 ib., 544, 1865.

105. — evidence of negligence. Where plaintiff showed that his goods were injured while in defendant's possession, and that defendant, when applied to by him, gave no account of the injury except merely that it occurred while its agents were performing an act which, when performed with due care, does not ordinarily cause such an injury, *held*, that this was evidence from which the jury might infer negligence. *Kirst v. Milwaukee, Lake Shore and Western*

R'y Co., 46 Wis., 489, 1879; 21 Amer. R'y Rep., 394.

106. — gross negligence. In case against a railway company, charging it as a common carrier for the loss of a package entrusted to it to carry, subject to the terms of a special notice by the company not to be responsible for articles of certain descriptions, or of a certain value, unless entered and paid for accordingly,—the declaration alleged a loss arising from the gross negligence of the company and the felonious acts of its servants. *Held*, that the allegation of gross negligence and felony by servants of the company was surplusage. *Butt v. Great Western R'y Co.*, 11 Common Bench, 140; 73 E. C. L., 139, 1851; 7 Eng. Law & Equity, 443; 20 Law Journal Rep., N. S., C. P., 241.

107. Notice limiting liability. A common carrier cannot limit his common law responsibilities by any general notice, though knowledge of such general notice be brought home to the consignor before or at the time he applied to have his goods transported. *Brown v. Adams Express Co.*, 15 West Va., 812, 1879. The weight of authority in this country is in favor of the rule that the common carrier cannot, by public notices, although brought to the notice of the shipper, restrict his liability. *Mobile and Ohio R. R. Co. v. Weiner*, 49 Miss., 725, 1874.

108. — A carrier cannot discharge itself from liability by notice alone to the shipper. The shipper must assent to it to make it effectual; but it is otherwise in respect to those duties designed simply to insure good faith and fair dealing. There, a notice is sufficient. *Erie R'y Co. v. Wilcox*, 84 Ill., 239, 1876; 16 Amer. R'y Rep., 457.

109. — In general, notice given by a railway company would be valid in law for the purpose of limiting the common law liability of the company as a carrier. Such common law liability might be limited by such conditions as the court or judge should determine to be just and reasonable; but any condition so limiting the liability of the company must be embodied in a special contract, in writing, between the owner or person delivering the goods to the company, and signed by such owner or person. *Peek v. North Staffordshire R'y Co.*, 116 E. C. L., 1005; 9 Jurist, 914. 1863.

Contract Limiting Liability.

110. Owner's risk. The plaintiff, under a contract in writing signed by his agent, delivered to the defendant certain cheeses to be carried from L. to S. at "owner's risk." As the plaintiff knew, the defendant had two rates of carriage—a higher rate, when it took the ordinary liability of carriers, and a lower, when it was relieved of all liability except that arising from the wilful misconduct of its servants. In using the words "owner's risk" the plaintiff intended that the cheeses should be carried at the lower rate, and subject to the conditions restricting the defendant's liability. The defendant's employes packed the cheeses in such a manner that during their transit upon the defendant's railway they were damaged, but the defendant's servants did not know that damage would result from the mode in which the cheeses were packed. *Held*, that, as the defendant carried at alternative rates, the condition exempting it from liability when carrying at the lower rate was just and reasonable; and that the injury to the cheeses had not arisen from the wilful misconduct of its servants. *Lewis v. Great Western Ry Co.*, Law Reports, 3 Queen's Bench Division, 195, 1877; 28 Eng. (Moak), 173.

111. — coal oil. Where coal oil was carried at the "owner's risk," and was placed upon open cars and there delayed till it was destroyed by exposure to the sun and weather, *held*, that the loss did not result from a risk assumed by the owners, but arose from the wrongful act of placing the oil in open cars. *Grand Trunk Ry Co. v. Fitzgerald*, 5 Canada Supreme Court Reports, 204, 1881; *Same v. Same*, 4 Ontario Appeal Reports, 601, 1879.

112. — rate. Goods contained in several packages were delivered to a railway company at Chester, to be carried to Halifax, under a contract note which expressed that they were to be carried "at owner's risk." Several of the packages were delayed, through the negligence of the company, for, as the jury found, an unreasonable time, and their contents were, in consequence, damaged. *Held*, that the special terms of the contract did not absolve the company from responsibility for these consequences, notwithstanding that the goods were to be carried at a lower rate than the

ordinary rate. *D'Arc v. London and North Western Ry Co.*, Law Reports, 9 Common Pleas Cases, 325. 1874.

113. Place of contract. If a contract is valid under the laws of the state where it is made, it will be binding upon the consignee, who may be the resident of another state. *Robinson v. Merchants' Despatch Co.*, 45 Ia., 470. 1877.

114. Receipt. A clause in a receipt given to a shipper of goods limiting and restricting the carrier's liability, incident to its general employment, if understandingly assented to by the owner, will as effectually bind him as though he had signed it; but whether such restrictions have been assented to in a given case is always a matter of evidence. *Boscowitz v. Adams Express Co.*, 93 Ill., 523. 1879.

115. Special contract. Where the carrier's agent had sent the shipper's agents a printed notice of condition, stating that the company "would not be responsible for loss or injury to marbles uninsured," etc., and afterwards W., in behalf of the plaintiff's agents, wrote the company to forward the marbles "not insured," etc., *held*, that this was a special contract within s. 7 of 17 and 18 Vict., c. 81. *Peek v. North Staffordshire Railway Co.*, Ellis, Blackburn & Ellis, 958; 96 E. C. L., 956, 1858; *Same Case*, ib., 986.

116. Unreasonable limitations. The Railway and Canal Traffic Act, § 7, 1854 (17 and 18 Vict., c. 81), does not prevent a railway company from making a special contract as to the terms upon which it will carry goods, provided such contract be "just and reasonable," and signed by the party sending the goods. And it is for the court to say, upon the whole matters brought before them, whether or not the "condition" or "special contract" is just and reasonable. A condition that in the case of goods conveyed at special or mileage rate, the company will not be responsible for any loss or damage, *however caused*, is just and reasonable. *Simons v. Great Western Ry Co.*, 18 Common Bench, 805; 86 E. C. L., 804, 1856; 37 Eng. Law & Equity, 286.

117. — On the trial on the part of the plaintiff it was proved that, when asked by a clerk of the defendant, at the time the goods were delivered at the company's ware-

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house, to sign the paper, the plaintiff expressed his unwillingness to do so, inasmuch as he could not see to read it, whereupon the clerk said that it was of no consequence, and that the signature was a mere matter of form, and that the plaintiff, relying upon that assurance, signed the paper. *Held*, that, upon this evidence, the jury were warranted in finding that the goods were not delivered to the company to be carried under the special contract. *Same v. Same*, 2 Common Bench, N. S., 620; 89 E. C. L., 619. 1857.

118. Validity; contract to be performed in several states. A bill of lading, stipulating *inter alia* for exemption of the carrier from liability from losses by fire, was drawn in Hartford, Conn., where such exemption was lawful, and whence the merchandise was to be shipped to Des Moines, Iowa, in which state carriers were not permitted to limit their liability. The goods were transported to Chicago, Ill., where they were destroyed, without fault of the carrier. In an action against the latter by the consignee, it was held that the contract was valid, and the plaintiff could not recover. *Talbott v. Merchants' Despatch Co.*, 41 Ia., 247. 1875.

119. Value of packages. Where a common carrier gave a receipt for three separate and distinct bales of furs to be transported, containing a printed clause that the company should not be liable for any loss or damage, except as forwarder only, nor for loss or damage "of any box, package or thing," for over \$50, unless the just and true value thereof was therein inserted, it was held that the limitation as to the amount of the recovery was not to be applied to the three bales, but as to each one separately, notwithstanding they were all embraced in one receipt, and that the shipper might at least recover that sum for each package. *Boscowitz v. Adams Express Co.*, 93 Ill., 523. 1879.

III. DAMAGES.

1. Delay.

120. Acceptance of goods. Mere acceptance of a portion of the goods shipped by railway, on arrival at their destination, is not

a waiver of all claims for loss resulting from delay. *Georgia R. R. Co. v. Cole*, 68 Ga., 623. 1882.

121. Blockade of freight. Where the principal cause of delay in transporting grain by a railroad company was a great accumulation of loaded cars at all its stations for a great distance on its road, and the fact that the company had undertaken to carry more freights than it could manage successfully, it was held that, even if the plaintiffs and their agents were in some degree of fault in not receiving grain more promptly, it would not excuse the company for delay in transporting other grain shipped to plaintiffs. *Illinois Central R. R. Co. v. Cobb*, 64 Ill., 128. 1872.

122. — Where, at the time the contract of shipment was made, there was already an accumulation of business on the carrier's lines, which incapacitated it, or might reasonably be expected to incapacitate it, for transporting and delivering the flour within a reasonable time, and this was then known to the carrier, or might have been known by proper effort on its part, or if there were then reasonable grounds for a belief on the part of the carrier that such was the state of the case at the time, the carrier would be liable for the delay, although it was occasioned by such accumulation of business. In such case it is the carrier's duty to inform the shipper of the condition of its lines, so that he may exercise his right to select some other line for the transportation of his property; and if the carrier fails to do this, and takes the property in the face of threatened inability to transport it with requisite dispatch, it must answer for the consequences of the delay. *Helliwell v. Grand Trunk R'y Co.*, 7 Federal Reporter, 68; 10 Bissell (U. S. C. C.), 170. 1881.

123. — In case of a blockade of freight, the goods should be sent forward in the order as to time of their reception by a carrier. *Acheson v. N. Y. Central and Hudson River R. R. Co.*, 61 N. Y., 652. 1874.

124. Breaking of car. A railway company is liable for a delay occasioned by its car breaking upon the track of another company. *Livingston v. N. Y. Central and Hudson River R. R. Co.*, 5 Hun (N. Y.), 562. 1875.

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125. Chicago fire. Giving preference to relief goods sent to the sufferers of the Chicago fire was not such a discrimination against shippers of other freight as to make carriers liable as for negligence for not forwarding freight in the order in which it was received. All general rules must yield to a great public necessity. *Michigan Central R. R. Co. v. Burrows*, 33 Mich., 6. 1875.

126. Contract. The Grand Junction R'y Co. published a printed notice which was fixed up over the door of its station for the reception of goods in Liverpool, that all goods received after four o'clock P. M. would be forwarded on the next working day. Long after the publication of this notice, certain goods were brought to the station about half-past five P. M., to be forwarded to Birmingham by the railway. The person who brought them (a servant of the owner) saw the company's *weigher*, and asked "if there was time" (i. e.) for the goods to proceed that evening; he said there was, and the goods were placed by the company's porters on the trucks on which goods are carried upon the railway. The same person had on former occasions taken goods of the same kind to the station at a later hour, which were never refused for being too late, and which had been forwarded the same evening. *Held*, that upon these facts there was evidence to go to the jury of a special contract by the railway company to forward the goods in question on the same evening on which they were delivered. *Pickford v. Grand Junction R'y Co.*, 12 Meeson & Welsby (Exchequer), 766. 1844.

127. Contract to unload. Where a railway company refused to furnish cars for the transportation of grain to Cairo during the war, on account of the large accumulation of cars on its track at that point waiting to be unloaded, and finally furnished cars upon the promise of the shipper to unload the same, which was not done either by him or the consignee, but refused, it was held, in an action against the company to recover damages for delay in transporting the grain, the jury were justified in finding for the defendant. *Cobb v. Illinois Central R. R. Co.*, 88 Ill., 394, 1878; 21 Amer. R'y Rep., 317.

128. Damages. If a common carrier is chargeable with knowledge that the article carried is intended for market, and unreasonably delays its delivery, and there is a depreciation in the market value of the article at the place of consignment, between the time it ought to have been delivered and the time it was in fact delivered, such depreciation will, ordinarily, constitute the measure of damages. *Devereux, Receiver, etc., v. Buckley*, 34 Ohio St., 16, 1877; 21 Amer. R'y Rep., 72.

129. — The rule of damages for negligent delay in the transportation of goods by common carriers is the difference between the market value of the goods at the time they should have arrived at the place of delivery, and the time they did arrive there, with interest thereon, as damages, from that time. *Newell v. Smith*, 49 Vt., 255. 1877.

130. — If a carrier fails to carry grain within a reasonable time, and the price of grain declines in the market at the point to which it is consigned, the owner is entitled to recover the difference between the market price at that point when it should have arrived and the time it actually does arrive. *Illinois Central R. R. Co. v. Cobb*, 72 Ill., 148. 1874.

131. — In an action against a railroad company to recover damages for non-delivery of corn shipped by the plaintiff within a proper time, so that the corn, by reason of the delay in transportation, became damaged, and was therefore rejected on its arrival at the place of destination, by the party to whom it was shipped under a contract of purchase from the plaintiff, it appeared the plaintiff had resold to his vendor such portion of the corn as might be thus rejected, at the same price he had purchased it for; *held*, the measure of damages in the suit against the carrier was the contract price for which the plaintiff had sold the corn, less the amount received by him on his resale to his vendor. *Illinois Central R. R. Co. v. Cobb*, 64 Ill., 143. 1872.

132. — In an action of damages for delay in delivering goods, *held*, that although the goods at the time of delivery may have been valueless to the plaintiffs for the purposes for which they were bought, they could not recover for a total loss. The measure of

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plaintiffs' damages would be any necessary expenses incurred in obtaining the goods, together with the difference between the cost of the goods and what could have been realized for them at the time and place of destination, if the amount were less than cost. *Rankin v. Pacific R. R. Co.*, 55 Mo., 167. 1874.

133. — hotel expenses. A commercial traveler delivered a parcel of samples to a common carrier to be carried to A., but did not state the contents of the parcel, or the purpose for which it was required. By the negligence of the carrier the parcel was delayed, and the traveler spent three days at A., unemployed, waiting for it. In an action against the carrier for negligence, in which the hotel expenses of the traveler during the time he was waiting for the parcel were claimed as damages, *held*, that such damages were too remote, and could not be recovered. *Woodger v. Great Western R'y Co.*, Law Reports, 2 Common Pleas Cases, 318. 1867.

134. Evidence. Judgment for damages for delay reversed upon the facts of the case. *Hill v. Syracuse, Binghamton and N. Y. R. R. Co.*, 2 Hun (N. Y.), 114. 1874. See *Same v. Same*, 8 Hun (N. Y.), 296, 1876; and *Same v. Same*, 73 N. Y., 351, 1878.

135. — In an action against a common carrier, when unreasonable delay is complained of, and the loss of a market is claimed, it is not sufficient for the plaintiff to prove delay and damages, when it appears from his proofs that there was other delay not chargeable to the defendant; but some damage must be traced to the delay for which the defendant was in fault. *Detroit and Bay City R'y Co. v. McKenzie*, 48 Mich., 609, 1880; 21 Amer. R'y Rep., 157.

136. — A bill of lading bound the carriers to forward the goods to their destination with the usual dispatch. To show the usual time of transit, the shippers called a witness who testified thereto, but said he derived his information from a clerk in the freight office at the place of destination. *Held*, that fact being peculiarly within the knowledge of the carriers, that slight evidence thereof on the part of the shippers was sufficient, and that the testimony was competent. *Newell v. Smith*, 49 Vt., 255. 1877.

137. Failure to properly prepare goods for shipment. On the 19th of December, 1881, eighteen bales marked "Rags" were delivered by the plaintiffs in London to the defendant for conveyance to W., where, in the ordinary course, they should have been delivered within twenty-four hours. By mistake they were forwarded to another place, and did not reach the W. station until the 4th of January, 1882, when, finding them to have become heated (through being packed in a damp state), and therefore unfit for the manufacture of paper, the consignees rejected them; and ultimately the rags were found useless for any purpose, and were destroyed. There being an admitted breach of duty on the part of the defendant, and it being conceded that the rags would have sustained no injury if they had been packed dry, the county court judge gave a verdict for the plaintiffs, but for nominal damages only, on the ground that the loss was attributable to the plaintiffs' own act in packing the rags in a damp state, without informing the defendant that special care was necessary. Upon a motion to enter a verdict for the plaintiffs for the admitted value of the goods, *held*, that the ruling of the judge was correct. *Baldwin v. London, Chatham and Dover R'y Co.*, Law Reports, 9 Queen's Bench Division, 582, 1882; 9 Amer. & Eng. R. R. Cases, 175.

138. Machinery. When machinery is being shipped for a special purpose, notice of that fact should be given, in order to hold the carrier liable for special damages for delay. *Ruthven Woolen Co. v. Great Western R'y Co.*, 18 Upper Canada, Common Pleas, 316. 1868.

139. Mistake in name. Goods were shipped at Cairo, Ill., by the Ill. Central Railroad, via Chicago, consigned to the plaintiff, "Byron Sherman, No. 41 Warren street, New York," and were received from the intermediate railroad company by the defendant, a common carrier between East Albany and New York, with directions to deliver them to "Ryan Sherman, N. Y." Defendants transported the goods to New York and warehoused them, and made no effort to notify the nominal consignee, otherwise than by mailing a letter to "Ryan & Sherman, N. Y.," and although notified by plaintiff of his ownership in

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the goods, and of the marks on it and the route by which it had been shipped, as means to identify it, defendant's agents made no efforts to discover whether they had his goods in their possession. *Held*, that it was liable to plaintiff for the damages he had suffered by the delay in delivering the goods. *Sherman v. Hudson River R. R. Co.*, 5 Daly (N. Y.), 521. 1875.

140. Perishable goods. A railway company, on receiving perishable property for transportation and payment of freights, is bound to forward it immediately to its destination; if it has not the means of transportation it is its duty to refuse to receive the property. (§ 36, ch. 140, Laws of 1850.) *Tierney v. New York Central and Hudson River R. R. Co.*, 76 N. Y., 305, 1879; affirming *Same v. Same*, 10 Hun (N. Y.), 569. 1877.

141. — A common carrier cannot escape liability for loss occasioned by delay in transportation of goods by showing the delay to have been caused by the ordinary accidents of railroad traffic. If the carrier has made an express contract to deliver by a specific time, unavoidable accident will not excuse him; and in the absence of an express contract, he is bound to deliver in a reasonable time, according to the usual course of business, with all reasonable dispatch. *Chicago and Alton R. R. Co. v. Thrapp*, 5 Bradwell (Ill.), 502. 1879.

142. — A contract by a railway company to carry goods by a given train, which ordinarily arrives in London at a particular hour, does not amount to a warranty that it will so arrive, although the company's servants be informed that the object of the sender requires that it should so arrive. Meat was carried by the defendants for the plaintiffs under a consignment note on the back of which was printed the conditions upon which it was carried, one of which was as follows: "The company will not be responsible for any damage to any meat, on the ground of loss of market, provided the same be delivered within a reasonable time after the arrival thereof at the station from whence delivery is to be made." *Held*, a reasonable condition. *Lord v. Midland R'y Co.*, Law Reports, 2 Common Pleas Cases, 339. 1867.

143. Profits. Where goods were carried to be used as samples at an agricultural show, and they did not arrive until after the stipulated time, it was held that the carrier was liable for the loss of time and loss of profits occasioned by the delay. *Simpson v. London and North Western R'y Co.*, Law Reports, 1 Queen's Bench Division, 274. 1876.

144. — The plaintiff, a cap manufacturer at Cockermouth, bought cloth at Huddersfield for the purpose of making it up into caps, which he was in the habit of selling through the country by means of travelers. The cloth was delivered to the defendant on the 15th of March to be carried by its railway to Maryport; but, through the negligence of the company's servants, it was sent to Bull Gill station, and did not reach the plaintiff's hands until the 12th of April, which was too late for the plaintiff's purpose. In an action against the company for not delivering the cloth within a reasonable time, *held*, in accordance with the rule in *Hadley v. Baxendale*, 9 Exch., 341, that the plaintiff was entitled to recover as damages the amount of the diminution in value of the cloth by reason of the season for making up and selling the caps having passed, but not the loss of the anticipated profits, or the expenses of travelers despatched on journeys rendered fruitless by reason of the inability to execute their orders. *Wilson v. Lancashire and Yorkshire R'y Co.*, 9 Common Bench, N. S., 632; 99 E. C. L., 631. 1861.

145. — The plaintiff sent goods from Manchester by the defendants' railway to his commercial traveler at Cardiff; the delivery of the goods was, through the negligence of the defendants, delayed until after the traveler had left Cardiff, and the plaintiff, in consequence, lost the profits which he would have derived from a sale at Cardiff; *held*, that in the absence of notice to the defendants of the object for which the goods were sent, the plaintiff could not recover from them such profits as damages for the delay. *Great Western R'y Co. v. Redmayne*, Law Reports, 1 Common Pleas Cases, 329. 1866.

146. — The plaintiff having sent a quantity of hops, of more than 10*l.* value, by a

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railway company, the consignee having refused to receive them on account of their not being delivered in time, afterwards sent to the plaintiff a signed memorandum of the original contract; *held*, that in assessing the damages for negligence, the jury were not at liberty to take into account the loss of the bargain between the plaintiff and the consignee. *Simmons v. South Eastern R'y Co.*, 7 Hurlstone & Norman (Exchequer), American Reprint 1000. 7 Jurist, N. S., 849. 1861.

147. Strikes and mobs. Where delay in transit is caused by the refusal of the carrier's employes to do duty, it is liable for any damage resulting from such delay; but where the delay results solely from the lawless violence of men not in its employ, the carrier is not responsible, even though the men whose violence causes the delay may have been but a short time before in its employ. *Pittsburgh, Ft. Wayne and Chicago R. Co. v. Hazen*, 84 Ill., 36, 1876; 16 Amer. R'y Rep., 422.

148. — Where the employes of a railroad company suddenly refuse to work, and are discharged, and delay results from the failure of the company to promptly supply their places, the company is responsible for any damage caused by such delay; but where the places of the recusant employes are promptly supplied by other competent men, and the "strikers" then prevent the new employes from doing duty by lawless and irresistible violence, the company is not responsible for delay caused solely by such lawless violence. *Ib.*

149. — In a suit for damages resulting from delay in the transit of freight, it is competent for the carrier to show that the delay was caused solely by the violence of men who were not in its employment. *Ib.*

150. Reasonable time. A common carrier is bound by the common law to convey goods committed to him for that purpose within a reasonable time, and on failure is liable in damages. *Branch v. Wilmington and Weldon R. R. Co.*, 77 N. C., 347, 1877; *Cobb v. Illinois Central R. R. Co.*, 38 Ia., 601, 1874; *Hales v. London and North Western R'y Co.*, 4 Best & Smith, 66; 116 E. C. L., 66, 1868.

151. Refusal of connecting line to carry the goods. Where a common carrier ac-

cepts goods directed to a point beyond the termination of its line, consigned to the car of a connecting carrier, and the latter refuses to receive the goods, the former does not discharge its duty by storing the goods but must use reasonable diligence to notify the consignor or consignee of such interruption in the transit. *Lesinsky v. Great Western Dispatch Co.*, 10 Mo. App., 184. 1891.

152. Refusal to deliver until overcharge is paid; measure of damages. A party delivered to a railway company certain goods to carry from A. to B., paying the carriage, to be delivered to a party there. Part of the transit was effected by another railway company, which refused to deliver up the goods to the consignee without payment of an additional specified sum; but an action having been threatened against the contracting company, an offer was made to deliver them up without that payment. The action was, however, persevered in, the plaintiff declaring against the company as a carrier, with a count in trover for the conversion of the goods, subsequently to which they were given up in a damaged state. *Held*, that the additional sum demanded for the goods was not the measure of damage. The damages would not be limited to that sum. *Davis v. North Western R'y Co.*, 4 Hurlstone & Norman (Exchequer), 855. 1858.

153. Statutory penalty. Corporations, like all other persons, are subject to the police power of the state. Therefore, the statute (Laws 1874-75, ch. 240, § 2) which prescribes a forfeiture of \$25 per day for delay of local shipments beyond five days after the receipt of goods by a railroad company is constitutional. *Branch v. Wilmington and Weldon R. R. Co.*, 77 N. C., 347. 1877.

154. Transshipment. A common carrier whose contract contemplates a reshipment by other agencies than his own is not imperatively bound to accept the first opportunity that offers. The carrier, who is an insurer as to the ultimate delivery, is only bound to a delivery within a reasonable time, in the absence of any stipulation as to time, and is only bound to exercise reasonable diligence in procuring transshipment by other agencies. *Frank & Co. v. Memphis and Charleston R. R. Co.*, 52 Miss., 570. 1876.

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155. F. shipped cotton by railroad from Holly Springs to New Orleans, *via* Memphis, to be transhipped by steamboat. The railroad agent at Memphis contracted with the M. and St. L. Packet Co. for its shipment on the steamer Richmond, then descending the river. Before her arrival the steamer Magenta offered to carry the cotton, but was refused. When the Richmond arrived she refused to take the cotton on account of heavy load and low water. The cotton was forwarded by the first boat after the Richmond. Several days' delay was thus caused, and in the meantime cotton declined in price. Thereupon F. sued the railroad for damages. *Held*, that the railroad company was originally equally at liberty to contract with either boat, and nothing having occurred previous to the departure of the Magenta to induce an apprehension that it had made a mistake, and the shipment actually having been made by the first boat leaving after the Richmond, no liability can be imposed upon the company by reason of what transpired after the Magenta's departure. *Ib.*

156. Two companies using same line; liability of one for acts of the other. A common carrier of goods is not, in the absence of a special contract, bound to carry within any given time, but only within a time which is reasonable, looking at all the circumstances of the case; and he is not responsible for the consequences of delay arising from causes beyond his control. The defendant, a railway company, was prevented, by an unavoidable obstruction on their line, from carrying the plaintiff's goods within the usual (a reasonable) time. The obstruction was caused by an accident resulting solely from the negligence of another company, which had, under an agreement with the defendant, sanctioned by act of parliament, running powers over their line. *Held*, that the defendant was not liable to the plaintiff for damage to his goods caused by the delay. *Taylor v. Great Northern R'y Co.*, Law Reports, 1 Common Pleas Cases, 385. 1866.

157. — Where a railway company, in exercise of a statutory right, runs its trains over the line of another railway company and causes an obstruction, and thereby the latter company is prevented from delivering

certain goods within the ordinary time, such company will, nevertheless, have fulfilled a contract to deliver those goods within a reasonable time, if it be proved that it has used every exertion to clear the line, and has delivered as soon as was possible under the circumstances. *Great Northern R'y Co. v. Taylor*, 1 Harrison & Rutherford, Eng. Com. Pl., 471. 1866.

158. Urgency; notice. If there are special reasons why goods should be carried within a particular time, notice of the urgency should be given at the time the goods are delivered to the carrier. *Gee v. Lancashire and Yorkshire R'y Co.*, 6 Hurlstone & Norman (Exchequer), 211. 1860.

159. — As between vendor and vendee or shipper and carrier, where the article is desired for a special purpose, that fact should be communicated to the vendor or carrier, if it is made the foundation of special damages against them and is of a character likely to affect the action of the vendor or carrier. *Wabash, St. Louis and Pacific R'y Co. v. Lynch*, 12 Bradwell (Ill.), 365. 1883.

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160. Appraisal. Where two disinterested persons, on the oral request of both the owner and the railroad company, made a survey of damaged freight and reported on the same, but the effort thus made did not result in adjusting the dispute, and a suit was afterward brought to recover the damages, the report or finding of such disinterested persons was not admissible in evidence, at the instance of either party, over the objection of the other, even though made in writing, and even though it had long been the custom of the railroad company, and its custom at that place, to adjust such disputes in that manner. *Central R. Co. v. Rogers*, 66 Ga., 251. 1880.

161. Abandonment. Where goods are partially damaged the owner cannot abandon them, but may recover the difference in their value alone. *Dodge v. Windsor and Annapolis R'y Co.*, 2 Nova Scotia Decisions, 537. 1872.

162. Contract for sale of goods. For the breach of a contract to receive, transport

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and deliver grain, the measure of damages to be recovered against the carrier is the difference between the price of the grain fixed by plaintiff's contract of sale and its value at the place where it was offered for transportation, less the freight to destination. *Cobb v. Illinois Central R. R. Co.*, 38 Ia., 601. 1874.

163. Interest. In an action for damages for the loss of goods the plaintiff is entitled to interest on their value at six per cent. from the time when they ought to have been delivered. *Robinson v. Merchants' Despatch Co.*, 45 Ia., 470. 1877.

164. — The general rule as to the measure of damages for goods destroyed in transit is their value at their place of destination with interest from the date of the loss. *Erie R'y Co. v. Lockwood*, 28 Ohio St., 358, 1876; 14 Amer. R'y Rep., 143.

165. — Interest may be considered as an element of damages recoverable from a common carrier for breach of a contract to receive and transport freight. *Cobb v. Ill. Central R. R. Co.*, 38 Ia., 601. 1874.

166. Market value. The measure of damages in case of the failure of a carrier to deliver goods according to contract, and which are lost, is their market value at the time when and the place where they should have been delivered, and such value is purely a question of fact. *Chicago and Northwestern R'y Co. v. Dickinson*, 74 Ill., 249. 1874.

167. — In an action against a railway company for the non-delivery of drapery goods, the measure of damages is the price at which the goods can be obtained in the market, if there be one, at the place and time at which they ought to have been delivered; if not, the damages must be ascertained by taking into consideration, in addition to the cost price and the expense of transit, the reasonable profit of the importer. *O'Hanlan v. Great Western R'y Co.*, 6 Best & Smith, 484; 118 E. C. L., 483. 1865.

168. — The measure of damages in case of delay is the difference in their value at the time and place they ought to have been delivered and the time of their actual delivery; in fixing the time when delivery should have been made, where there is no charge of negligence in transportation, a reasonable time after arrival should be al-

lowed for delivery. *Sherman v. Hudson River R. R. Co.*, 64 N. Y., 254. 1876.

169. — household goods; value. Where household goods, more or less used, were transported by a railroad to a distant place and there converted, *held*, that the owner was a competent witness to the point of their value, as such goods have no established market price, and the rule that the market value at the place of conversion is the true measure of damages is, therefore, inapplicable. *Marsh v. Union Pacific R'y Co.*, 9 Federal Reporter, 873; 8 McCrary (U. S. C. C.), 286, 1882; 6 Amer. & Eng. R. R. Cases, 359.

170. — In case of loss of goods for which a carrier is liable, the general rule is that the measure of damages is the value of the goods at the point of destination; but the rule is more especially applicable to goods shipped for sale in the ordinary course of trade, and not to household goods and wearing apparel in use. In such cases the measure of damages is a matter of law to be decided by the court. *Denver, South Park and Pacific R. R. Co. v. Frame*, 6 Colo., 392. 1882.

171. Remote damages. As a general rule, the measure of damages in case of failure to deliver is the value of the goods at their place of destination, with compensation for the actual loss, which is the natural and proximate consequence of the act, and excluding remote or indirect losses. The loss sustained by the plaintiff in his general business does not come under this rule. *Baltimore and Ohio R. R. Co. v. Pumphrey*, 59 Md., 890, 1882; 9 Amer. & Eng. R. R. Cases, 331.

172. Statute; the carriers' act. The Carriers' Act, s. 1, enacts that no common carrier by land shall be liable for the loss of any articles of a certain description, *inter alia*, pictures, contained in any package delivered to be carried, when the value exceeds 10l., unless at the time of the delivery at the office or to the servant of the carrier, the nature and value be declared, and an increased charge paid. By s. 6 it is provided that nothing in the act shall extend or be construed to annul or in anywise affect any special contract between a common carrier and any other parties for the conveyance of goods.

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Held, that s. 6 applies only to contracts the provisions of which are inconsistent with the exemption claimed by the carrier under s. 1. That the fact of goods being received by a common carrier under a special contract does not deprive him of the protection of the act, unless the terms of the contract are such as to be inconsistent with the goods having been received by him in his capacity of a common carrier. *Baxendale v. Great Eastern R'y Co.*, Law Reports, 4 Queen's Bench Cases, 244. 1869.

IV, 'LOSSES BY FIRE.

1. *Liability as carriers.*

173. Chicago fire. Railway companies are bound to have all reasonable and necessary facilities and appliances for carrying on in a prompt, skilful and careful manner the business in which they are engaged, and for transporting without unreasonable delay the usual and ordinary kind of freight offered for transportation, or which might reasonably and ordinarily be expected; but they are not bound to be prepared for unusual and extraordinary contingencies, such as the great Chicago fire, which no ordinary prudence or foresight could reasonably foresee or anticipate. *Michigan Central R. R. Co. v. Burrows*, 33 Mich., 6. 1875.

174. — Where the common carrier received goods at Worcester, Mass., to transport to the consignees at Mattoon, Ill., and carried them by way of Chicago instead of the most usual and direct route, by way of Indianapolis, and while stored in Chicago awaiting a reshipment they were destroyed by the great fire in 1871, *held*, that the carrier was not excused from liability on the ground of inevitable accident, as there was no compulsion to take the goods through Chicago. *Merchants' Despatch Transportation Co. v. Kahn*, 76 Ill., 520, 1875; *Merchants' Despatch Transportation Co. v. Smith*, 76 Ill., 542, 1875.

175. Commencement of liability. Where goods are received by a carrier for shipment, to be forwarded in the usual course of business, the liability of a common carrier immediately attaches; and if they are lost by an

accidental fire while in the carrier's warehouse awaiting transportation, he is liable, unless his common law liability has been limited by an agreement with the shipper. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Barrett*, 36 Ohio St., 448, 1881; 3 Amer. & Eng. R. R. Cases, 256.

176. — But if the delivery is accompanied with instructions not to forward until further orders, or if anything remains to be done to the goods by the shipper before they are to be forwarded, such liability as a common carrier does not attach. *Ib.*

177. — When a common carrier receives goods for transportation and his liability is not limited by special contract, he is only excused from delivering them by the act of God, or the public enemy. His risk begins on the receipt of goods, although no receipt was given therefor. *Watson v. Memphis and Charleston R. R. Co.*, 9 Heiskell (Tenn.), 255, 1872; 19 Amer. R'y Rep., 256.

178. Connecting lines. At the Bath station of the Great Western R'y Co., goods were received for the purpose of being forwarded to Torquay. The line of that company ends at Bristol, at which place the line of the Bristol and Exeter Co. begins. The goods would have to be put on a third railway before reaching Torquay. The receipt note given at Bath was thus headed: "To the Great Western Railway Company: Receive the undermentioned goods on the conditions stated on the other side. To be sent to Torquay station, and delivered to R. C. Collins, consignee, or his agent." The Great Western Co. received the carriage money for the whole distance from Bath to Torquay. On the arrival of the goods at Bristol they were put on the line of the Bristol and Exeter Co., where they were destroyed by fire. An action was brought against this latter company to recover compensation for the loss. *Held*, that the contract was with the Great Western Co. alone, and that the Bristol and Exeter Co. was not liable. *Bristol and Exeter R'y Co. v. Collins*, 7 House of Lords Cases, 194. 1859.

179. — Where a lot of flour was shipped in Wisconsin, by the Mineral Point R. R. Co., to Warren, Illinois, thence by defendant's railroad to Chicago, and from Chicago by the Union Steamboat Co. to Buffalo, and

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from the last place to New York by the Erie Railroad, marked to "Foster, Gwyn & Co., New York, care of Union Steamboat Co., Chicago, Illinois," and the flour was received by the defendant at Warren, and transported to Chicago, and put in defendant's warehouse late on October 6, 1871, where it was destroyed by fire October 8, 1871, the boat company having no regular time for departure, *held*, that the defendant was liable to the owner for the loss; but that if Chicago had been the final destination of the flour, the defendant's liability as carrier would have ceased and that of warehouseman have attached. *Illinois Central R. R. Co. v. Mitchell*, 68 Ill., 471. 1878.

190. — The plaintiff delivered at the station of the G. W. R'y Co. at Bath, a van load of furniture to be conveyed to Torquay. He signed a receipt note which was headed: "Bath Station. To the G. W. R'y Co.: Receive the undermentioned goods on the conditions stated on the other side, to be sent to Torquay station and delivered to the plaintiff or his agent." One condition was that the company would not be answerable for loss or damage by fire. Another condition stated that the company would not be responsible for loss or damage to goods beyond the limits of its railway. The van was placed on a truck and conveyed to Bristol, where the Great Western line ends and the defendant's (the Bristol and Exeter line) begins. The same truck and guard proceeded with the van to Exeter, where the defendant's line ends, and is joined by the line of the South Devon Co., which runs to Torquay. Whilst the van and furniture were at the defendant's station at Exeter they were accidentally destroyed by fire. *Held*, in the exchequer chamber (reversing the judgment of the court of exchequer), that the G. W. R'y Co. received the goods to be carried on its line subject to the stipulation against loss by fire, and that it discharged itself by forwarding the goods to be carried by the defendant; and there being no evidence as to the terms on which the goods were to be carried on the defendant's line, it must be treated as having received them as a common carrier, and was consequently liable for their loss. *Collins v. Bristol and Exeter R'y Co.*, 1 Hurlstone &

Norman (Exchequer), 517, 1856; reversing *Same v. Same*, 86 Eng. Law & Equity, 482, 598, 1856.

181. — Goods were received at the Great Western R'y Co.'s station in Bath, to be forwarded to Torquay. At Bristol the goods were placed on the Bristol and Exeter Railway, and at Exeter they would have had to be placed on the South Devon line to reach Torquay. While on the Bristol and Exeter line they were destroyed by fire. The receipt note at Bath stated that the goods were received "to be sent to the Torquay station and delivered to R. C. Collins, consignee of the agent." *Held* (reversing the judgment of the exchequer chamber), that the contract was with the Great Western Company, and the Bristol and Exeter Company was not liable. *Bristol and Exeter R'y Co. v. Collins*, 5 Hurlstone & Norman (Exchequer), American Reprints, 969; 29 Law Journal, Exch., 41; 5 Jurist, N. S., 1367; 7 House of Lords Cases, 197. 1859.

182. **Contract.** Where the local agent of a railway company, carrying lumber, recognizes the obligation of the company to run the cars to the usual place of delivery, and agrees so to do, but, before the agreement has been carried out, the lumber is destroyed by fire, the company is liable. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Nash*, 48 Ind., 428. 1878.

183. **Contract limiting liability.** A contract was made to carry goods, the freight to be paid on delivery at the place to which the same was shipped. By the terms of the agreement, the carrier was released from claims for loss by fire. The property having been destroyed by fire while in transit, *held*, that the carrier could not recover any freight charges. *New York Central and Hudson River R. R. Co. v. Standard Oil Co.*, 20 Hun (N. Y.), 39, 1880; affirmed, *Same v. Same*, 87 N. Y., 486, 1882.

184. — Where a contract is made for carriage of goods, and the agent of the shipper, without consideration, releases the carrier from its common law liability, such release is of no validity. *Wiggins v. Erie R'y Co.*, 5 Hun (N. Y.), 185. 1875.

185. — A contract limiting the liability of a carrier will not free it from liability for

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negligence. The carriage of cotton upon open cars held to be a negligent act, rendering the company liable for loss by fire, notwithstanding the special contract. *New Orleans, St. Louis and Chicago R. R. Co. v. Faler*, 58 Miss., 911, 1875; 9 Amer. & Eng. R. R. Cases, 96.

186. — mob. The contract of shipment excused the carrier from loss by fire except in case of negligence. A mob destroyed the goods by fire at Pittsburgh. *Held*, in the absence of proof of negligence, that the carrier was not liable. *Wertheimer v. Pennsylvania R. R. Co.*, 17 Blatchford (U. S. C. C.), 421. 1880.

187. Cotton. Although the shipment of cotton in open flat cars may not be in itself such negligence as would make the carrier liable under all contingencies, yet, when such shipment is made, there is devolved on the carrier the duty to take additional precautions for the protection and safety of the cotton. *Insurance Co. of North America v. St. Louis, Iron Mountain and Southern R'y Co.*, 11 Federal Reporter, 380; 3 McCrary (U. S. C. C.), 233. 1892.

188. Delivery. A common carrier's liability does not terminate with the deposit of the goods at their destination, or with the delivery of them to a warehouseman, but continues for a time reasonably sufficient to enable a diligent consignee to examine and receive the goods. *Bell v. St. Louis, Iron Mountain and Southern R. R. Co.*, 6 Mo. App., 363. 1878.

189. Delivery to consignee. After the arrival of the goods they were placed on a platform at the depot for the convenience of delivery to consignees, and remained there for nearly two days; notice of their arrival was given the plaintiff, who paid the freight charges, with full knowledge of the place of deposit, but failed to remove them on account of his inability at the time to procure the services of city draymen for that purpose, and in the afternoon of the second day they were destroyed by fire, together with much of defendant's property. *Held*, that there was a delivery in law of the goods to the plaintiff consignee, which exonerated the defendant from liability as a warehouseman. *Chalk v. Charlotte, Columbia and Augusta R. R. Co.*, 85 N. C., 423, 1881; 9 Amer. & Eng. R. R. Cases, 106.

190. Goods delayed by failure to notify custom-house officers. Where a carrier received goods subject to duty, for transportation to Chicago, which, under the laws of congress and the regulations adopted thereunder, could only be delivered into a bonded warehouse, under the superintendence of some revenue officer, and that could only be done on written notice, which facts were known to the carrier, and the goods arrived at their destination, but the carrier neglected to notify the consignee or the proper revenue officer of their arrival until they were accidentally consumed by fire, it was held that the liability of the carrier, under the circumstances, did not cease upon the arrival of the goods at their destination and that of the warehouseman attach, and that the carrier was liable to the consignee for the loss. *Chicago and Northwestern R. R. Co. v. Sawyer*, 69 Ill., 285. 1873.

191. — Where goods were detained, awaiting the action of custom-house officers, and while so detained were damaged by fire, *held*, that the railway company was not liable as a common carrier for the loss. *Milligan v. Grand Trunk R'y Co.*, 17 Upper Canada, Common Pleas, 115. 1866.

192. Insurance company as assignee of claim. Where a common carrier undertakes to transport cotton for hire upon open flat cars, it is bound to take all needful precautions for the cotton's safety and protection. Where cotton in course of transportation by a common carrier was destroyed by fire in consequence of the carrier's gross negligence, and the owners assigned and transferred their interests in said cotton and their rights against said carrier to a fire insurance company, by which the cotton was insured, upon its indemnifying them for the loss sustained, *held*, that the insurance company was entitled, as against the carrier, to the value of the cotton at the time of the loss, with six per cent. interest from the day upon which the cotton would probably have been delivered to the owners if it had not been destroyed. *Insurance Co. of North America v. St. Louis, Iron Mountain and Southern R'y Co.*, 9 Federal Reporter, 811. 1882.

193. Marks of goods. When a bill of lading, given on the acceptance of goods by a carrier, shows they are to be forwarded to a

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particular place only, which is short of their place of destination, and the consignor has been a frequent shipper by the same line, and was in the habit of receiving like bills of lading, it will be presumed he was familiar with its contents, and knew the carrier was not under obligation to carry the goods to the place to which they were marked, and if promptly carried to the place specified in the contract, and there safely stored, and they are burned without fault on the part of the carrier, no recovery can be had of him for the loss. *Merchants' Despatch and Transportation Co. v. Moore*, 88 Ill., 186, 1878; 21 Amer. R'y Rep., 298.

194. — Goods were delivered to a carrier in New York for transportation, and the carrier's agent marked the destination, under the shipper's direction, to "Eckly, Iowa," and in consideration of reduced rates the shipper assented to release the carrier, and every other company over whose line the same might pass, from all liability for damage, delay, or loss of any kind, etc., and the goods safely arrived in Chicago, and were handed over to the Illinois Central to be carried to their destination. The latter company delayed forwarding them from the fact that there could be found no such station as Eckly, and telegraphed back for further directions, during which delay the goods, while safely stored, were burned, without actual negligence on the part of the company. It turned out that the goods were intended to be shipped to "Ackly, Iowa." *Held*, that neither of the lines of transportation was guilty of negligence, and that the shipper could not recover under his contract. *Erie R'y Co. v. Wilcox*, 84 Ill., 239, 1876; 16 Amer. R'y Rep., 457.

195. Presumption as to readiness of carrier to deliver goods. In the absence of proof to the contrary, the presumption is that goods are ready for delivery to a consignee at any time after they are received at the carrier's depot at their place of destination. *Lemke v. Chicago, Milwaukee and St. Paul R'y Co.*, 29 Wis., 449, 1876; 13 Amer. R'y Rep., 406.

196. Statute. The act of congress, March 3, 1851, limiting the liability of vessel owners for losses by fire, enforced and applied, although the vessel owner had formed an as-

sociation with railway companies for carrying goods into the interior. *Headrick v. Va. and Tenn. Air Line R'y Co.*, 48 Ga., 545, 1873.

197. Sunday law; fire; unloading on Sunday. The fact that the cars containing the merchandise were run and unloaded on Sunday, in alleged violation of the statute of Illinois, would not subject the carrier to liability if the merchandise was destroyed. *Wilde v. Merchants' Despatch Co.*, 47 Ia., 272, 1877.

198. When liability of carrier ends. The liability of a railway company as a common carrier of freight terminates, and its responsibility as a warehouseman commences, upon the arrival of the goods at the point of destination and deposit there in the warehouse of the company to await the convenience of the consignee. *Mohr v. Chicago and Northwestern R. R. Co.*, 40 Ia., 579, 1875.

199. — The extraordinary liability of a railroad company as carrier of goods extends not merely to the termination of the actual transit of the goods to the place of destination, but also until the consignee has a reasonable time thereafter to inspect the goods and remove them in the usual hours of business, and in the ordinary course of business. *Leavenworth, Lawrence and Galveston R. R. Co. v. Maris*, 16 Kans., 333, 1876.

200. — This reasonable time is not a time varying with the distance, convenience or necessities of the consignee, but is such time as would enable a person living in the vicinity of the place of delivery, in the usual course of business, and within the ordinary hours of business, to inspect the goods and take them away. *Id.*; *Pinney v. St. Paul and Pacific R. R. Co.*, 19 Minn., 251, 1872; 20 Amer. R'y Rep., 71.

201. — The liability of a common carrier by railway, as such, is not terminated until the goods are unloaded from the car and placed in store. It does not terminate on the arrival of the car containing the goods at the place of destination and the placing of such car inside the carrier's freight depot, and if the goods are destroyed by fire while so placed in the freight depot, the carrier will be liable. *Chicago and Northwestern R'y Co. v. Bensley*, 69 Ill., 630, 1873.

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2. *Liability as warehousemen.*

202. Reasonable time. Plaintiff's goods, shipped by defendant's railway to Watertown, were received at the Watertown depot at 5:30 P. M. of Saturday, and were destroyed by fire in the depot about noon of the following Tuesday. *Held*, that plaintiff had a reasonable time to remove the goods, and defendant was not liable as a carrier. *Lemke v. Chicago, Milwaukee and St. Paul R'y Co.*, 39 Wis., 449, 1876; 13 Amer. R'y Rep., 406.

203. — The fact that the consignee was absent from Watertown during most of the period between the arrival and destruction of the goods could not extend the time during which defendant held them as common carrier. *Ib.*

204. — A package of goods was delivered to the Great Western R'y Co. and another to the London and North Western R'y Co., for carriage to the station of the former company at W., both packages being addressed to the plaintiff, "to be left till called for." One of the packages arrived at W. on the 24th of March, the other on the 25th. On their arrival they were placed in the station warehouse to await their being called for. The defendants did not know the address of the plaintiff, who traveled about the country with drapery goods. The goods had not been called for when, on the morning of the 27th of March, a fire having accidentally broken out, the warehouse was burned down and the goods were consumed by fire. The plaintiff on the same day, after the fire, called for the goods, and, not receiving them, brought actions against the defendant companies, as common carriers, to recover their value. *Held*, that, after the interval of time which the plaintiff had suffered to elapse since the arrival of the goods, the liability of the defendants as common carriers in respect of the goods had ceased, and they had become mere warehousemen of them, and, consequently, that the actions were not maintainable in the absence of any evidence of negligence on the part of the defendants. *Chapman v. Great Western R'y Co.*, Law Reports, 5 Queen's Bench Division, 278, 1880; 29 Eng. (Moak), 290.

205. Statute. The goods of plaintiff were transported by the defendant on its railroad to their place of destination, unloaded, and placed in defendant's warehouse—the plaintiff having notice of their arrival. On the same night the goods were accidentally destroyed by fire, without fault or negligence of the defendant. *Held*, that under § 2120 of the Civil Code—as amended in 1874—the responsibility of the defendant was that of a *warehouseman*, and not that of a *common carrier*; and that it was not liable for the loss. *Hirshfield v. Central Pacific R. R. Co.*, 56 Cal., 484, 1880; 7 Amer. & Eng. R. R. Cases, 398.

206. Sunday. Where goods have reached their destination either in the night time or on Sunday, or where, for any other reason, the consignee is not ready to receive them on their arrival, and the carrier puts them in store or in the charge of competent and careful servants, ready to be delivered when called for, the carrier's liability as insurer ceases, and he will thereafter be liable only as warehouseman; and if the goods are destroyed by fire without fault on his part, he will not be responsible. *Rothschild v. Michigan Central R. R. Co.*, 69 Ill., 164. 1873.

207. — By the usage of railway companies no freight was delivered between 5:30 P. M. on Saturday night until the next Monday morning. All freight remaining undelivered at 5:30 P. M. Saturday was stored in the company's freight warehouse, ready for delivery when called for on the following Monday. *Held*, under the law of Massachusetts, that although the train containing the goods had arrived on Saturday at 3:30 P. M., and the consignee was in attendance to receive them, yet as it did not arrive in time for the delivery of the goods to the consignee before 5:30 P. M. of that day, the company's liability as a common carrier ceased upon a discharge of the goods from the cars to the company's freight warehouse. *Faulkner v. Hart*, 44 N. Y. Superior Ct., 471. 1879.

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208. Action for failure to deliver. An action against a common carrier for failure to deliver goods intrusted to it is properly

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brought in the name of the consignees alone, although they are prosecuting the suit for the benefit of another whom they hold liable for the value of the goods. *Mobile and Girard R. R. Co. v. Williams*, 54 Ala., 168. 1875.

209. — A consignor who delivers goods to a carrier may maintain an action of contract against him for their loss, if there is no relation between the carrier and the consignee other than that which results from the carrier's possession of the goods; and in such action can recover the full value of the goods, although it be the property of the consignee, if no action against the carrier has been commenced by the consignee; and will hold the proceeds in trust for the consignee's indemnity. *Finn v. Western R. R. Corp.*, 112 Mass., 524. 1873.

210. — **pleading.** If a complaint against a common carrier, for failure to transport and deliver property, shows that the property was bought of the consignor by the plaintiff; that the consignor delivered it to the carrier, and that the carrier executed a bill of lading to the plaintiff, but failed to deliver the goods, it is sufficient. *Ohio and Mississippi R'y Co. v. Yohe*, 51 Ind., 181. 1875.

211. — The legal presumption is that upon the delivery of goods by the consignor to a common carrier the title thereto vests in the consignee; and this presumption the carrier has a right to rely and act upon in the absence of express notice from the consignor that he retains the title; and in an action by the consignor against the carrier, for damages for the non-delivery of the goods to the consignee at the place stipulated in the contract, the complaint will be bad on demurrer if it does not allege that the plaintiff was the owner of such goods, or that such goods were named in the contract. *Pennsylvania Co. v. Holderman*, 1 Amer. & Eng. R. R. Cases (Ind.), 285. 1879.

212. **Act of God.** In case of injury to goods, the act of God cannot be set up as a defense by the carrier if guilty of previous misconduct or neglect by which the exposure, resulting in the loss, was occasioned. *Armentrout v. St. Louis, Kansas City and Northern R'y Co.*, 1 Mo. App., 158. 1876.

213. — A carrier, who undertakes to carry

goods over his own route, is not responsible for unavoidable delays, such as might be caused by the destruction of a railroad bridge by a flood, and if such delays occur while the goods are in transit, it is thereupon the duty of the carrier to exercise sound discretion and reasonable diligence in forwarding the goods to their destination. He is not bound to divert the goods from his own to another route over which he has no control, unless, in the exercise of such discretion and diligence, it appears that the change of route would have prevented the loss attendant upon delay. *American Express Co. v. Smith*, 33 Ohio St., 511. 1878.

214. — An action will lie against a common carrier for non-delivery of property, although the same has been partially injured by the act of God. The defense only goes in mitigation of damages in such case. *Houston and Tex. Central R'y Co. v. Harn*, 44 Tex., 628. 1876.

215. — When goods in the hands of a common carrier are placed in jeopardy by some *vis major*, he is bound to use actively and energetically such means to save them as prudent and skilful men engaged in that business might fairly be expected to use under like circumstances. It is error, therefore, to charge the jury that, in such case, the carrier is bound to use "all the diligence which human sagacity can suggest." *Nashville and Chattanooga R. R. Co. v. David*, 6 Heiskell (Tenn.), 261, 1871; 12 Amer. R'y Rep., 9.

216. — A carrier is not bound to provide against an unprecedented flood. *Nashville and Chattanooga R. R. Co. v. David*, 6 Heiskell (Tenn.), 261, 1871; *Same v. King*, ib., 269, 1871.

217. — It is for the jury to say whether there were such premonitions of danger as to awaken the apprehension of men of ordinary prudence. *Lamont v. Nashville and Chattanooga R. R. Co.*, 9 Heiskell (Tenn.), 58. 1871.

218. **Acts of public enemy.** The defendant, an express company in New York, received from the plaintiffs, April 10, 1861, certain goods to be sent to one C., at Rome, Ga., and gave a receipt specifying that they were to be sent to the defendant's agency nearest their destination. They arrived at

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Savannah, Ga., about the last of April, when they were taken possession of by an officer of the (so-called) Confederate government, and placed in a bonded warehouse, and subsequently sold for non-payment of duties levied on them, after C. had been notified that they would be sold unless he paid the duties. *Held*, that the defendant had been deprived of the goods by the acts of public enemies, and consequently was not liable to the plaintiffs for their value. *Hubbard v. Harnden Express Co.*, 10 R. I., 244. 1872.

219. Bill of exchange contained in parcel. On an action against a carrier for the loss of goods of less value than 10*l.*, contained in the same parcel with a bill of exchange, the defense was that the parcel contained a bill, order, notice, security for payment of money, or writing of value exceeding 10*l.*, and that no notice had been given of the contents, or increased rate of carriage paid or contracted for, though the carrier had publicly exhibited in his office a notice requiring such increased rate for articles within stat. 11 G. 4, and 1 W. 4, c. 68, s. 1. The jury found that the bill was incomplete, and was not, at the time of the delivery to the carrier, of any value. *Held*, that it was not a bill, order, note, security for payment of money, nor writing of any value, at the time of such delivery. *Stoesinger v. South Eastern R'y Co.*, 3 Ellis & Blackburn, 549; 77 E. C. L., 548. 1854.

220. Car thrown from track. Where a car containing oil was thrown from the track through the breaking of an axle, and, while remaining where it was left after the accident, two men came along, and, out of curiosity, drew a match across the car to test whether the freight was oil or whisky, and the oil ignited and an explosion occurred by which the oil was destroyed, it was held that, although the accident arose from a crack in the axle which it was "impracticable" to discover, if the agent of the company who had tested the axle had used reasonable care under the circumstances, and otherwise reasonable care had been used, the plaintiff was not entitled to recover. In this case the liability of the company was limited by contract. *Lucesco Oil Co. v. Pa. R. R. Co.*, 2 Pittsburgh, 477. 1863.

221. Change of destination. A debtor who ships cotton through a common carrier to his factor and creditor for sale and applicable to the debt, and sends the bill of lading, may afterwards change the shipment to another person without making the carrier liable to the first consignee. *Chaffe v. Mississippi and Tennessee R. R. Co.*, 59 Miss., 182, 1881; 9 Amer. & Eng. R. R. Cases, 426.

222. Chartered car. In the case of a chartered car, as in other cases of carriage of freight, the responsibility of the carrier begins with the delivery to it of the goods and ends with its delivery of them at its place of destination; and in this as in other bailments, after proof of loss, the burden is upon the carrier to show proper diligence; and in such carriage of freights, as in other modes, the presumption of law is against the carrier. *Central R. R. and Banking Co. v. Anderson*, 58 Ga., 393, 1877; 16 Amer. R'y Rep., 85.

223. Common law. The common law holds the common carrier liable for damage to, and loss of, goods committed to him for transportation, unless the damage or loss result from the act of God, which is limited to inevitable accident, or from the public enemy. His responsibility begins with the reception and terminates with the delivery of the property at the place of its destination. Subject to these limitations, his undertaking is absolute and unqualified; no palliation or excuse is admitted. He is an insurer of the faithful performance of his duty. *Mobile and Ohio R. R. Co. v. Weiner*, 49 Miss., 725. 1874.

224. — An action against a common carrier for the breach of his duty to carry safely goods delivered to him as such, to be carried for hire, whereby the goods are lost, is an action not of contract but of tort, in substance as well as in form; the duty being imposed upon him by the custom of the realm, and being distinct from and independent of his obligation under the contract of carriage, in respect of which latter he may also be sued in an action of contract. *Held*, therefore, that the plaintiff in an action against a common carrier for the breach of the duty in question, brought, in a superior court, to recover a sum not exceeding 20*l.*,

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is not deprived of his costs by stat. 19 and 20 Vict., c. 108, s. 30, if the defendant suffers judgment by default; for that the action is not one of contract within that section. *Tattan v. Great Western R'y Co.*, 2 Ellis & Ellis, 844; 105 E. C. L., 842. 1860.

225. Consignment note; delivery; goods shipped in care of the consignor. F. & Co., carriers, delivered to a railway company at its station goods for conveyance, addressed to the consignees. With such goods a consignment note was handed to the railway company, containing, in addition to the names and addresses of the consignees, the words "To the care of F. & Co." The railway company refused to recognize the latter words, and delivered the goods to the consignees by their agents or other carriers. *Held*, that the words "To the care of F. & Co." imported that the goods, on their arrival at the terminal stations, were to be given to F. & Co., or their agents, for delivery to the consignees; that as between the railway company and F. & Co., the latter were the consignors, and that the railway company accepted the goods upon the terms stated in the consignment note; and that the railway company were precluded by the consignment note from being at liberty to employ their own or other carriers to deliver the goods from their railway to the consignees, and should have delivered the same to F. & Co., or their agents. *Fishbourne v. Great Southern and Western R'y Co.*, 2 Neville & McNamara, 224. 1875.

226. Construction train. A. sued a railroad company for the loss of goods. The company pleaded that at the time the goods were transported it was not engaged in the carrying business, its road not being fully opened for traffic, and that its servants were not authorized to contract for their carriage. The evidence showed that the road was in process of construction; the company had no agent at the station where the goods were received, but it was in the habit of carrying for pay goods and passengers on flat cars in a construction train over the completed part of the road; that the conductor received the goods properly marked, and at the terminus they were delivered to a stranger by mistake, and thereby lost to the owner. *Held*, that the company was liable. *Little Rock,*

Mississippi River and Texas R'y Co. v. Glidewell, 39 Ark., 487. 1882.

227. Contract. A contract in writing by a carrier to transport merchandise for A. at a certain rate of freight, for a specified time, is a continuing offer, and is binding on the carrier whenever, during the time specified, A. tenders the goods; and the failure to carry the same, when so tendered, is a breach of the contract, for which an action can be maintained. *Harvey v. Connecticut and Passumpsic Rivers R. R. Co.*, 124 Mass., 421, 1878; 18 Amer. R'y Rep., 9.

228. — correspondence. To make a binding contract for carriage of merchandise, the offer and the acceptance must correspond in every particular. If the offer be by letter the acceptance must be communicated in some way, either actually or constructively, without unreasonable delay. Express notice of acceptance can only be dispensed with when it is apparently not contemplated, and some other act is equally clear and unequivocal. *Robinson v. St. Louis, Kansas City and Northern R'y Co.*, 75 Mo., 494, 1882; 11 Amer. & Eng. R. R. Cases, 31.

229. — damages. In an action against a common carrier for breach of an executory contract to transport goods, the measure of damages is the market value of the goods at the place to which they should have been carried, less their value at the place where the carrier agreed to receive them, and less freight; and the facts that the owner of the goods told the carrier, at the time of making the contract, that he did so because he wished to make contracts with third parties for the sale of goods to them, and that he did make such contracts afterwards, do not entitle him to recover the profits which he would have made but for the breach of the contract of carriage. *Harvey v. Connecticut and Passumpsic Rivers R. R. Co.*, 124 Mass., 421, 1878; 18 Amer. R'y Rep., 9.

230. — guaranty; rates. A memorandum of agreement was written in the following form: "Lead from B. to St. L. at 22½ per 100. All lead shipped by C. and R. to be forwarded by M. R., F. S. and G. R. R., at above rates, from January 1, 1873, to January 1, 1874, and above rates guaranteed for same time." *Held*, that the import of the memorandum was that the railroad company

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was to transport and C. and R. were to deliver to the company for transportation at twenty-two and one-half cents per one hundred pounds, all lead shipped by C. and R. within the year 1873 to St. L.; that C. and R. did not bind themselves to ship any lead; but they did bind themselves to ship over the road of this company any lead they should ship to St. L., and that this was sufficient consideration for the company's guaranty of rates. *Riggins v. Missouri River, Fort Scott and Gulf R. R. Co.*, 73 Mo., 598, 1881; 9 Amer. & Eng. R. R. Cases, 242.

231. — place of contract. Where goods are delivered to a carrier in Wisconsin, the contract to be performed there, the laws of that state will govern as to the construction of the contract and determine the extent of the carrier's undertaking. *Milwaukee and St. Paul R'y Co. v. Smith*, 74 Ill., 197. 1874.

232. — station agent. A depot agent, who receives and forwards freight, in the absence of special instructions made known to the public, can bind the company to receive and forward freight, and the contract may be made before the freight is actually tendered or delivered. *Watson v. Memphis and Charleston R. R. Co.*, 9 Heiskell (Tenn.), 255, 1873; 19 Amer. R'y Rep., 256.

233. Costs; connecting lines; damages. Where one carrier contracts to carry the entire distance and the goods are damaged, and the shipper sues the principal carrier for the damages and recovers the same, with costs, and the damages were recoverable against another carrier who had carried the goods part of the way, *held*, that the costs of the former suit could not be recovered. *Baxendale v. London, Chatham and Dover R'y Co.*, Law Reports, 10 Exchequer Cases, 35, 1874; 12 Eng. (Moak), 496.

234. Custom; course of dealing. In the absence of a special contract the course of dealing between the carrier and shipper becomes material. *Shelton v. Merchants' Dispatch Co.*, 59 N. Y., 258, 1874; reversing *Same v. Same*, 36 N. Y. Superior Ct., 527, 1873.

235. Damage by water. The plaintiff, a hop-grower in Kent, sent to London by the defendant's railway some pockets of hops consigned to a purchaser. The defendant kept the hops for some days on its premises

in an open van, whereby a small portion was stained by wet, and the purchaser rejected the whole, as he was entitled to do by the custom of the market. The plaintiff dried the stained hops and they were rendered as good as ever for actual use, but the staining had depreciated the market value of the bulk. The plaintiff sent the hops to a factor for sale, but at that time the market price of hops had considerably fallen from what it was at the time the hops ought to have been delivered. The defendant had no notice that the hops were sent to London for sale. *Held*: First, that the plaintiff was entitled to recover, as damages, the amount of the depreciation in the market value of the hops, and was not confined to the value of the portion actually damaged. Secondly, that he was entitled to recover, as damages, the difference between the market price on the day when the hops were sold and the day when they ought to have been delivered. *Collard v. South Eastern R'y Co.*, 7 Hurlstone & Norman (Exchequer), 79. 1861.

236. Delivery to carrier. The placing cotton on the wagon or car of a carrier, or near his boat or warehouse, is not a delivery, unless some regulation of the carrier or custom existing between the carriers and the public makes it otherwise, or notice is given to the carrier, or his agents or authorized servants. *Houston and Texas Central R'y Co. v. Hodde*, 42 Tex., 467. 1875.

237. — To render a common carrier liable for the loss of goods, there must have been an actual delivery of the goods to him, or a constructive delivery, with notice to him of an intention thereby to place them in his care and custody; merely placing them in such a position that he could easily have taken them, but without calling his attention to them, is not sufficient. The same rule equally applies as between the carrier and his agent when he seeks to hold the agent liable for the loss of goods. *O'Bannon v. Southern Express Co.*, 51 Ala., 481. 1874.

238. — evidence. In a suit against a common carrier for damage to cotton bales, and where the issue is whether the cotton bales were received or in effect delivered to defendant, and where the testimony on such point is conflicting, it is error in the court, in the charge to the jury, to call attention to

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evidence about which there could be no doubt, and instruct that such facts prove a delivery, and the consequent liability of defendant. *Houston and Texas Central R'y Co. v. Hodde*, 42 Tex., 487. 1875.

239. — payment of freight alone not sufficient evidence of delivery. In an action against a carrier for failure to deliver goods intrusted to it for delivery at a particular place, the testimony being conflicting as to whether the goods had ever been so received, and whether freight had been paid on them, a charge that "if the jury believed, from the evidence, that the carrier received freight on the goods in question, *that* was sufficient evidence that the defendant had the goods in possession at that time," is an invasion of the province of the jury, and necessarily erroneous. *Mobile and Girard R. R. Co. v. Williams*, 52 Ala., 278. 1875.

240. — place of business. A railway company does not "carry on business" (within the meaning of the 9th and 10th Vict., c. 95, s. 128) at a receiving-house or booking-office kept by an agent for the receipt and booking of parcels and packages for all the railways generally. *Minor v. London and North Western R'y Co.*, 1 Common Bench, N. S., 324; 87 E. C. L., 324. 1856.

241. — stolen goods. In an action against a railroad company for failure to deliver cotton received by it for transportation, etc., it is not liable for cotton stolen or lost after a deposit on a platform at a station-house, unless it be shown that the railroad company, or its agents, had notice of the deposit and received the cotton for transportation as a common carrier. In such an action it is a question of fact, to be determined (under appropriate instructions from the court) by the jury from all the evidence, whether or not there was a *delivery* to the carrier for transportation. *South Western R. R. Co. v. Webb*, 48 Ala., 585. 1872.

242. — vendor and vendee. Where goods are delivered by a vendor to a carrier to be carried to a certain place, with the added words, "for Messrs. — & Co.," these persons thus appearing to be the consignees of the goods, may demand them of the carrier at another place; and if on such demand, and on receiving payment for the carriage, the carrier (who has not received from the

vendor any special communication on the subject of the place of delivery) delivers them up to the consignees, the carrier will not be responsible to the vendor for any damages which may arise to the vendor from such delivery. *Cork Distilleries Co. v. Great Southern and Western R'y Co.*, Law Reports, 7 English & Irish Appeal Cases, 269, 1874; 10 Eng. (Moak.), 25.

243. Delivery to consignee. Common carriers are bound to deliver freight, consigned to them for transportation, at a place suitable and reasonable for the consignee to receive it; and whether any given place answers this requirement is a question for the jury, under proper instructions from the court. *Jewell v. Grand Trunk R'y Co.*, 55 N. H., 84, 1874; 11 Amer. R'y Rep., 496.

244. — The legal presumption is that, upon the delivery of goods to a carrier, the title thereto vests in the consignee, and this presumption the carrier has a right to rely upon, in the absence of express notice from the consignor that he retains the title; and in an action by the consignor against such carrier for damages for the non-delivery of the goods to the consignee, the complaint will be bad on demurrer if it does not allege that the plaintiff was the owner of such goods. *Pennsylvania Co. v. Holderman*, 69 Ind., 18. 1879.

245. — The plaintiff bought goods which were to be consigned to him at Liverpool from St. Helen's by the defendant's railway. On the 7th of July, 1873, the plaintiff received advice-notes from the defendant informing him that *three* parcels of goods had been received by it for his account, and that it held them subject to his order and to the payment of rent and charges. The plaintiff immediately instructed his broker to sell the whole. Early in August the plaintiff received invoices of the three parcels from his vendors, and paid for the whole by an acceptance which was duly honored. The goods were sold on the 21st of August, and the rent and charges on the *three* parcels were paid to the defendant by the broker; but it turned out that *two* parcels only had been delivered to the defendant (the third still remaining on the premises of the vendors), and the plaintiff was obliged to pay to his vendees 5*l.* 4*s.* 1*d.*, the difference between

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the price at which they had bought the third parcel and what they had to pay for other goods. The defendant's servants were aware on the 9th of July that they had never received the third parcel, but no notice of the mistake was given to the plaintiff until the 1st of September, after the goods had been resold and the charges paid. *Held*, in a special action for non-delivery of the third parcel, with a count in trover, that the defendant was not estopped from showing that the goods had never reached its hands; and consequently could neither be liable in trover nor for breach of contract in not delivering the goods. *Carr v. London and North Western R'y Co.*, Law Reports, 10 Common Pleas Cases, 307, 1875; 12 Eng. (Moak), 364.

246. — burden of proof. If a common carrier receives goods and contracts to deliver them to the consignee, the burden of showing such delivery is upon the carrier. *Wheeler v. St. Louis and South Eastern R'y Co.*, 3 Mo. App., 358. 1877.

247. — In an action against the carrier, when the loss or non delivery of the goods is alleged, the plaintiff must give some evidence in support of the allegation, notwithstanding its negative character; but slight evidence will be sufficient. *Chicago and Northwestern R'y Co. v. Dickinson*, 74 Ill., 249. 1874.

248. — cartage. If a railway company, receiving goods for transportation over its road, exacts the payment of cartage in advance of shipping, this will constitute an express contract to deliver at the consignee's place of business, and its liability will not cease until this is done. *Cahn v. Michigan Central R. R. Co.*, 71 Ill., 96. 1873.

249. — Where a railway company delivered goods arriving at its depot to a carter, to be delivered by him only when the consignee did not furnish his own teams, or give directions to the contrary, and the company was not interested in the cartage of the goods, *held*, that this did not establish a custom to deliver at the consignee's place of business. *Ib.*

250. — coal; delivery. A railway company carried coals to the station to which they were addressed and gave notice to the consignee of their arrival, upon which,

according to the usual course of practice between them and the consignee, it lay upon him to send for them and take them away; and he not having done so within a reasonable time, the carrier unloaded the coals and left them on the siding, where they were lost. *Held*, in an action for non-delivery, that defendant had performed its contract by a constructive delivery. *Bradshaw v. Irish North Western R'y Co.*, 7 Irish Reports, Common Law, 252. 1873.

251. — delivery to real owner. A common carrier may excuse a failure to deliver goods to the consignee, pursuant to a bill of lading, by showing that he has in fact delivered them to the real owner. But one who falsely represents himself to be the agent of another, for whom he proposes to buy, and thus obtains the vendor's assent to a sale, is not entitled to receive goods billed to his alleged principal. *Brunswick v. United States Express Co.*, 46 Ia., 677. 1877.

252. — neglect in exposure of goods. In the absence of any special contract it is negligence in a common carrier of goods to deliver the consigned goods by merely placing them on the bank of a river at the point of destination, in the absence of the consignee and not under the care of the agents of the carrier, the latter having agents at that point for the purpose of receiving and delivering goods. *Dresbach v. California Pacific R. R. Co.*, 57 Cal., 462, 1881; 3 Amer. & Eng. R. R. Cases, 281.

253. — non-delivery in pursuance of instructions. The plaintiff having sold wheat by sample, to be delivered to the purchaser at his mill, sent it by the defendant's railway. On the arrival of the wheat at a station two miles from the mill, the defendant kept it there in consequence of instructions given to it by the consignee, that wheat arriving for him at the station should not be forwarded to the mill without his written order. The plaintiff had no knowledge of these instructions. The consignee examined the wheat at the station, but refused to accept it, and whilst it remained there it became deteriorated in quality and value. *Held*, that the consignor had no right of action against the defendant for not delivering the wheat at the mill, as the non-

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delivery was by order of the consignee. *London and North Western R'y Co. v. Bartlett*, 7 Hurlstone & Norman (Exchequer), 400. 1861.

254. — unknown consignee. It is the duty of a carrier to deliver or offer to deliver goods to the consignee within a reasonable time. Where the consignee is unknown, a reasonable and diligent effort to find and notify him of the arrival is a condition precedent to a right to warehouse the goods. If such effort be not made, the carrier is liable for the damages resulting from its neglect. *Sherman v. Hudson River R. R. Co.*, 64 N. Y., 254. 1876.

255. Delivery to second carrier. The plaintiff delivered at Bristol to the defendant certain goods, and took from it a receipt note, which stated that the goods were received to be conveyed by the company as below, and on the conditions stated on the other side. Then followed a statement that "Bristol" was the station from which, and "Paddington" the station to which, the goods were to be carried, and that the plaintiff's address was at "Brompton." One of the conditions stated that goods addressed to consignees resident beyond the immediate vicinity of the company's goods stations would be forwarded by public carrier or otherwise as opportunity might offer; but that the delivery of the goods by the company would be considered as complete, and the responsibility of the company cease, when such carriers received the goods; and that the company would not be responsible for loss or damage to goods beyond the limits of its railway. The goods in question were safely conveyed by the defendant to its London terminus at Paddington, and there given over to a person specially appointed by it for the collection and delivery of goods; and, through the negligence of his servant, were damaged on their delivery at the plaintiff's house at Brompton. The defendant made one entire charge for the carriage from Bristol to Brompton. *Held*, that the defendant was not liable for the damage; and consequently a declaration which stated that it, as a common carrier, received the goods to be carried from Bristol to Brompton could not be supported. *Fowles v. Great Western R'y Co.*, 7 Welsby, Hurlstone & Gordon (Ex-

chequer), 699, 1852; 16 Eng. Law & Equity, 581; 22 Law Jour. Rep., N. S., Exch., 76.

256. Delivery to wrong person. A carrier is liable for goods lost by misdelivery, whether the misdelivery occurs by mistake or by fraud or imposition practiced upon it. *Little Rock, Mississippi River and Texas R'y Co. v. Glidewell*, 39 Ark., 487, 1882; *Scheu v. Erie R'y Co.*, 10 Hun (N. Y.), 498, 1877; *Houston and Texas Central R'y Co. v. Adams*, 49 Tex., 748, 1878.

257. — If goods are sent by a common carrier to be delivered to A., the carrier has no right to deliver them at the store of B., although A. has guaranteed the rent of the store, and has been compelled to pay it. *Mahon v. Blake*, 125 Mass., 477. 1878.

258. — bill of lading. A. B., representing himself as C. D., of P., bought goods of the plaintiff; the goods were marked for C. D. and delivered to the defendant, who carried them to P. A. B., who was known to the defendant by his true name, applied for them as the property of C. D., and the defendant delivered them to him on his receipt, but without his producing a bill of lading which the defendant had given to the plaintiff, promising to deliver the goods to C. D. or order. There was no C. D. in P. *Held*, that the defendant was not liable to the plaintiff for delivering the goods to A. B. *Dunbar v. Boston and Providence R. R. Corp.*, 110 Mass., 26. 1872.

259. — Where two persons of the same name resided at St. C., and goods were ordered by one of them by mail, and were shipped upon the known credit of the other, the former being a recent comer; and the goods were delivered to the person ordering the goods, who produced the bill of lading, *held*, that the carrier was not at fault. *Bush v. St. Louis, Kansas City and Northern R'y Co.*, 3 Mo. App., 62. 1876.

260. — damages. In an action against a common carrier for the conversion of goods delivered to a person unauthorized to receive them, who pays the freight upon them, the measure of damages is the market value of the goods, less the freight, with interest from the date of the conversion. *Forbes v. Boston and Lowell R. R. Co.*, 133 Mass., 154, 1882; 9 Amer. & Eng. R. R. Cases, 76.

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261. — The plaintiff, a provision dealer at Morlaix, sent three hundred and fourteen casks of butter by the defendant's railway, marked A., and addressed "to order at Brewer's Quay." The defendant concluding, from the fact of having been in the habit of carrying butters similarly marked, consigned to Messrs. A. & A., factors in London, that these butters were intended for them, and having received directions from A. & A. to send all butters coming to them from Morlaix to Hibernia wharf, delivered one hundred and fifty-four of the casks at that place,—the remaining one hundred and sixty having, by accident, got to Brewer's Quay. C. & Co., the holders of the bill of lading, had received directions not to let A. & A. have the butters unless they accepted certain drafts at sight, which they declined to do; and when C. & Co. applied to the defendant for information as to the one hundred and fifty-four casks, they were referred to A. & A., and defendant took no further notice of the transaction. A. & A. afterwards sold the butters at the fair market price of the day, and rendered account-sales to the plaintiff; but, before the money was handed over, they suspended payment. *Held*, that the defendant was liable to the plaintiff for this misdelivery, notwithstanding he had so far adopted the acts of A. & A. as to endeavor to obtain from them the proceeds of the sale; and that the proper measure of damages was the net amount for which the butters had been sold. *Sanquer v. London and South Western R'y Co.*, 16 Common Bench, 163; 81 E. C. L., 162, 1855; 32 Eng. Law & Equity, 338.

262. — degree of care required. Common carriers deliver property at their peril; for, if delivery be to a wrong person, they will be responsible to the rightful owner. It is their duty, therefore, in all cases to be diligent in their efforts to secure a delivery to the person entitled, and they will be protected in refusing delivery, until reasonable evidence is furnished them that the party claiming is the party entitled, so long as they act in good faith and solely with a view to proper delivery; but it is their duty in all cases to be diligent in their efforts to secure a delivery to the person entitled. *Baltimore and Ohio R. R. Co. v. Pumphrey*, 59 Md.,

390, 1882; 9 Amer. & Eng. R. R. Cases, 331.

263. — misdirection. Where a box improperly directed was delivered to a carrier for transportation, and was safely carried to its destination, and there, after having been securely kept for two months, and due diligence exercised to ascertain the consignee, was delivered, by reason of the improper direction, to the wrong person, the company was not liable for the loss. *Lake Shore and Michigan Southern R'y Co. v. Hodapp*, 83 Pa. St., 23, 1876; 16 Amer. R'y Rep., 167.

264. — unauthorized person. In an action against a carrier of goods, where it is claimed that he delivered them to a person not authorized to receive them, no greater degree of proof of authority in the person to whom they were delivered to receive them is required than for any other issue in a civil action. *Wilcox v. Chicago, Milwaukee and St. Paul R. R. Co.*, 24 Minn., 269. 1877.

265. — The defense to an action by a consignor against the carrier for the conversion of certain sewing machines, which had been consigned to K. at M., was in substance that K. did not live at M., and did not expect to be there to receive the machines; that it was understood between plaintiff and defendant that on arrival at M. they were to be delivered to B. & S., who were plaintiff's agents, and dealt in sewing machines of plaintiff's manufacture at M., and that they were so delivered. Among the evidence offered by defendant was testimony tending to show that B. & S. had obtained the machines by representing to defendant's agents that they were intended for them. For the plaintiff the court instructed the jury, in substance, that defendant was bound to deliver the machines to K., and that the mere fact that B. & S. had made such representations, and had thus obtained the machines, was no defense, if the representations were untrue in fact; and further instructed that the fact that K. was not, and did not intend to be, at M., did not of itself justify defendant in delivering the machines to B. & S. For defendant the court instructed, in substance, that if they found that the understanding alleged in the answer existed, their verdict should be for defendant. *Held*, that these instructions, taken together, put the case

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fairly before the jury. *Wilson Sewing Machine Co. v. Louisville & Nashville R. R. Co.*, 71 Mo., 203. 1879.

266. — ratification. A common carrier's unauthorized delivery of goods may be ratified by the consignee. *Converse v. Boston and Maine R. R. Co.*, 58 N. H., 521. 1879.

267. — The plaintiffs contracted to furnish C. a certain quantity of slate, to be delivered at F., which they subsequently delivered to the defendant to be transported to F., directed to themselves. On their arrival they were delivered to C. by the defendant's agent. The plaintiffs thereupon brought suit against C. to collect pay for the slate. C. gave them an order on D., and they gave C. a receipted bill of the slate and allowed him to use them. The order was not accepted or paid; and the suit was entered and continued to the third term. Four months after the suit was brought against C., the plaintiffs brought this suit. *Held*, that the delivery to C. was ratified, and that the plaintiffs could not recover of the defendant. *Ib.*

268. — violation of orders. The defendant received goods for transportation, accompanied by a manifest containing the instructions: "Order A. B. & Co., notify C." It delivered the same to C. without the order of A. B. & Co., who were the plaintiffs. *Held*, that defendant was liable for the loss incurred by the plaintiffs by such delivery. *Wright v. Northern Central R'y Co.*, 8 Philadelphia, 19. 1871.

269. — If goods are shipped by the owner by rail to his own address, and the agent of the railway company delivers the same to an unauthorized person, who advances the freight only, trover will lie against the carrier, although he may afterwards make arrangements whereby to get the goods. *Indianapolis and St. Louis R. R. Co. v. Vanduzen*, 81 Ill., 143. 1876.

270. — A carrier received goods for shipment to a point beyond its line. The goods were consigned to the shipper's own order, and the agent at the place of delivery was notified not to deliver the goods without payment. For a violation of this direction the company delivering the goods was held responsible. *Leslie v. Canada Central R'y*

Co., 44 Upper Canada, Queen's Bench, 21. 1878.

271. — The plaintiff contracted to sell to W. a car-load of corn, to be paid for in cash before delivery, and which defendant received "for account" of plaintiff, and subject to his order. W. had previously paid part of the purchase price only, and had not acquired title or right to the possession. Defendant delivered the corn to W., without plaintiff's consent, before payment of the balance. *Held* to be a conversion of the corn; but that defendant was entitled to allege and prove, in mitigation of damages, that subsequent to the conversion W. had paid and settled with plaintiff for the corn. *Jellett v. St. Paul, Minneapolis and Manitoba R'y Co.*, 30 Minn., 265. 1883.

272. Delivery order. A railway company issued two delivery orders for the same grain, both orders being in the same form, and there was nothing in the orders to show that they related to the same consignment. Advances were made upon both orders by third parties and loss sustained thereby. *Held*, that the defendant was liable for the damages. *Coventry v. Great Eastern R'y Co.*, Law Reports, 11 Queen's Bench Division, 776. 1883.

273. Evidence. The court refused to disturb a verdict for damages upon a contract of affreightment, upon the evidence. *Indianapolis, Peru and Chicago R'y Co. v. Crane*, 55 Ind., 430, 1876; *Ohio and Mississippi R'y Co. v. Vickery*, *ib.*, 509, 1876.

274. — Judgment against a railway company for loss of grain reversed on the evidence. *Denver, South Park and Pacific R. Co. v. Harp*, 6 Colo., 420. 1882.

275. — Where the evidence disclosed that an express company received the goods of the plaintiff at Savannah, for the purpose of transportation to Atlanta, and that the same were not transported, it was error in the court to award a non-suit. *Cohen v. Southern Express Co.*, 53 Ga., 120. 1874.

276. — acids. In an action to recover for the loss of the greater part of a shipment of carboys, part containing nitric acid and the others containing sulphuric acid, the former being of much the greater value, the proof was unsatisfactory as to the proportion of each shipped; but there was proof tending

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to show that the car contained the acids in the usual proportions to be mixed in the manufacture of nitro-glycerine. The court, at the request of the defendant, instructed the jury that "the legal presumption is that, the burden of proof being on the plaintiff, all the said acids so lost and not proven to have been nitric, and most valuable, must have been sulphuric, and of the least value." *Held*, that the instruction was erroneous. There is no legal presumption in such a case, but it is purely a question of fact, from the evidence. *Lake Shore Nitro-Glycerine Co. v. Illinois Central R. R. Co.*, 75 Ill., 394. 1874.

277. — bill of lading. A bill of lading is *prima facie* evidence of the receipt by the carrier of the articles enumerated in it, and of the terms of the contract of carriage. *Little Rock and Ft. Smith R. R. Co. v. Hall*, 32 Ark., 669. 1878.

278. — books of carrier. In a suit against a railroad company for loss of goods shipped over its line, it was competent for the defendant to prove by the agent of a connecting road, delivery in good order to it; and although the witness may never have seen the goods, he may testify from the books of his company, the entries having been made by him in the usual order of business, and the books having been proved to be accurate. *Schaeffer v. Ga. R. R. Co.*, 66 Ga., 39. 1880.

279. — burden of proof. When goods are delivered by a common carrier in a damaged or injured condition, the *onus* is on him to show that they were received by him in that condition, or that the injury occurred without fault on his part, by the act of God or a public enemy. *Montgomery and West Point R. R. Co. v. Moore*, 51 Ala., 394. 1874.

280. — The burden is on the shipper to show that goods have been abstracted while in the carrier's possession. *Canfield v. Baltimore and Ohio R. R. Co.*, 75 N. Y., 144, 1878; reversing 43 N. Y. Superior Ct., 562, 1877.

281. — In an action against a common carrier for loss of goods, alleged to have occurred by the negligence of the carrier, the burden of proof as to the delivery of the goods is on the plaintiff. *Canfield v. Baltimore and Ohio R. R. Co.*, 46 N. Y. Superior Ct., 238. 1880.

282. — Where goods have been damaged in the hands of a carrier, he has the burden

to show that the damage was occasioned by a cause which exempts him from liability, and when he has done this the owner then must show, to render the carrier liable, that the damage might have been avoided by the exercise of reasonable skill and attention. *Mitchell v. United States Express Co.*, 46 Ia., 214. 1877.

283. — In an action against a carrier for failing to deliver goods shipped, the plaintiff is not bound to show non-delivery by a preponderance of testimony. Slight evidence of that fact will be sufficient to shift the burden of proof upon the carrier. *Chicago and Northwestern R'y Co. v. Dickinson*, 74 Ill., 249. 1874.

284. — Goods are *prima facie* presumed to have been received by a carrier in good order for shipment, and if they were not so, it is for the carrier to show it. *Breed v. Mitchell*, 48 Ga., 533. 1873.

285. — consignment note; parol evidence. The plaintiff signed a consignment note which stated that certain goods were delivered by him to the defendant, to be carried to N., but the charge for carriage was not inserted. Oral evidence was given that the defendant's agreement with the plaintiff before the note was signed was to carry to K., a greater distance; that the plaintiff did not read the note; and that the sum to be charged, and which was paid, was for the carriage to K. *Held*, that the note was not conclusive of the contract and that the evidence was properly received, as proving a contract additional to, and not at variance with, the agreement in writing. *Malpas v. London and Southwestern R'y Co.*, 1 Harrison & Rutherford, Eng. Com. Pl., 237. 1866.

286. — contract. Plaintiff shipped goods to Indianapolis by defendant's line, who gave this receipt: "Received, Philadelphia, etc., of (plaintiff), the following articles, to be carried and delivered upon the terms, etc., on the back of this receipt." "Marked F., Indianapolis, for J. Furniss, care of S. F. Gray, agent" of defendant. One of the terms was, that packages should be marked with consignee's name, etc. The manifest corresponded with the receipt. There was evidence that by direction of Welsh, an agent at Philadelphia, the name of Furniss was not in fact on the box, and that he

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would order Gray not to deliver till directed. The receipt was filled in by plaintiff's clerk and signed by defendant's clerk. Gray delivered the goods to Furniss, who failed without paying. In an action for negligence the court charged: "The contract depends entirely on the verbal arrangement, of which you are judges." *Held* to be error; the contract was to be ascertained by the jury from both receipt and verbal arrangement. *Union R. R. and Transportation Co. v. Riegel*, 73 Pa. St., 72. 1873.

287. — course of dealing. Evidence of a party's course of dealing is always admissible evidence against him when relevant to any fact to be ascertained by the jury. It may be shown in an action against a carrier, for failure to deliver goods for which it produces the consignee's receipt, that its course of dealing was to demand payment of freight and a receipt for the goods before delivering them. *Mobile and Girard R. R. Co. v. Williams*, 54 Ala., 168. 1875.

288. — declarations of agent. In an action against a railway company for the loss of property intrusted to it for carriage, statements made, orally or in letters, to the plaintiff by the defendant's freight agent, to whom the property was delivered, relating to the investigation of the loss, and showing that the property had been in the defendant's possession, are admissible in evidence against the defendant. *Green v. Boston and Lowell R. R. Co.*, 128 Mass., 221. 1880.

289. — larceny. Evidence that other persons had cotton stolen from their bales at the depot where it was shipped is not admissible to show that the company or its agents stole the plaintiff's cotton, though such cotton was stolen during the months when plaintiff's was shipped, and by employees of the company, the issue being the loss of the cotton in weight by evaporation or by the fault of the carrier. *Central R. R. Co. v. Brunson*, 63 Ga., 504. 1879.

290. — opinion of witness. Where a witness in a suit against a railroad company for failing to deliver a shipment of grain in proper time disclaimed all personal knowledge of the time the grain was shipped, and did not pretend to possess any peculiar knowledge as to the management of the defendant's road, or the running of the trains,

held, that it was not proper to permit the witness to give his opinion whether it would have been possible or probable, in the ordinary course of business, for the grain to have been placed under the control of the consignee by a given day. *Chicago and Northwestern R'y Co. v. Ingersoll*, 65 Ill., 399. 1872.

291. — title. In a suit by a consignee against a carrier for the conversion of a part of a car-load of grain in bulk, it is proper for the plaintiff, upon the question of title, to prove that he had paid for the entire car-load. *Peebles v. Boston and Albany R. R. Co.*, 112 Mass., 498. 1873.

292. — weight. Where a lot of paper and paper bags was shipped to the plaintiff by railroad, and upon its receipt it was weighed upon scales not marked, but which were proven to be correct, and the paper was found deficient in quantity, as described in the railroad receipt, it was not error to admit the evidence of the weighing, notwithstanding the failure to procure the marking of the scales. *Southwestern R. R. Co. v. Cohen*, 49 Ga., 627. 1873.

293. Felony of employees. In an action against a carrier for loss of the plaintiff's goods, upon an issue that the loss arose from the felonious acts of the defendant's employees, it is sufficient to prove facts which render it more probable that the felony was committed by some one or other of the defendant's servants than by any one not in its employment; and it is unnecessary to give such evidence as would suffice to convict any particular servant. *Vaughton v. London and North Western R'y Co.*, Law Reports, 9 Exchequer Cases, 93; 8 Moak, 535. 1874.

294. — But mere opportunity to commit the felony does not make out a *prima facie* case. *McQueen v. Great Western R'y Co.*, Law Reports, 10 Queen's Bench Cases, 569. 1875.

295. — It was proved that the goods in respect of which the action was brought consisted of articles of jewelry, etc., contained in a tin box, which was inclosed in a deal box fastened with a padlock; that the box was brought to the company's station at Worthing by a servant of a person in whose house the plaintiffs had lodged, to be forwarded to the plaintiffs in London; and

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that, when the box was delivered to the plaintiffs there by a porter of the company. it was found that the outer box had been opened, and the tin box and its contents abstracted from it. *Held*, no evidence for the jury of a felony by the company's servants. *Metcalf v. London, Brighton and South Coast R'y Co.*, 4 Common Bench, N. S., 307; 93 E. C. L., 307. 1858.

296. — A bale of silk was delivered at a country station to be delivered to the plaintiff in London. It arrived at the London terminus of the company, and was then placed by the company's servants in a van of C. & H., who were employed by the company to deliver all goods arriving at that terminus. The van was under the charge of J., a porter of C. & H., and by him and others the bale was stolen. The company was in the habit of sending a delivery ticket with each parcel, which ticket was headed with the company's name, and signed C. & H., and gave a list of porters, including J., and stating that any servant of the company taking more than therein stated would be dismissed. *Held*, that J. was a servant in the employ of the company, within section 8 of the Carriers' Act. *Machu v. London and South Western R'y Co.*, 5 Eng. R. R. & Canal Cases, 302. 1848.

297. Where a common carrier enters into a sub-contract with other parties with respect to goods which he has undertaken to carry, the servants employed by the latter are "servants in the employ" of the carrier, within the true meaning of the eighth section of the Carriers' Act (11 Geo. 4, and 1 Will. 4, c. 68). *Machu v. London and Southwestern R'y Co.*, 2 Welsby, Hurlstone & Gordon (Exchequer), 415. 1848. So held where a porter committed a larceny of the goods delivered to him. *Ib.*

298. — evidence of larceny. A parcel was delivered to a porter of a railway company at the station, to be forwarded from Gloucester to London, after the way-bill and the guard's parcel-book had been made up. The parcel was placed by the porter in the usual receptacle, a locked box in the baggage van, and entered by him on the way-bill; but the fact of his having so placed it in the box was not communicated to the guard. After several intermediate

stoppages the train reached London, when the parcel was missed; *held*, no evidence for the jury of the parcel having been stolen by a servant of the company. *Great Northern R'y Co. v. Rimell*, 18 Common Bench, 575; 86 E. C. L., 573; 37 Eng. Law & Equity, 245. 1856.

299. — In cases within the carrier's notice the carrier is not liable for the felonious acts of his servants, without gross negligence on his part; but felony by his servants is alone a good answer to a defense by him under the Carriers' Act (1 W. 4, c. 68). *Butt v. The Great Western Railway Company*, 11 Com. B. Rep., 140, explained. A mere suspicion that the loss arose from felony by the carrier's servants is not sufficient; it must be proved. *Great Western R'y Co. v. Rimell*, 27 Law Journal, Common Pleas, 201; 95 E. C. L., 917. 1857.

300. — estoppel. To an action for the loss of pictures by plaintiff to be carried by defendants, a railway company, defendants pleaded the Carriers' Act (1 Wm. 4, c. 68), and plaintiff replied that the loss arose from the felonious acts of defendants' servants. The pictures were loaded in a van in the defendants' yard ready to be sent to their destination, when a man represented himself to be C., a driver in the employ of M., who carried for defendants, and defendants' delivery clerk gave the man a pass which enabled him to drive the van out of the yard, and so to steal the pictures. There was a man named C. in M.'s employ, but he was not the guilty person. The court having power to draw inferences of fact, *held*, that the defendants were not estopped from denying that the thief was their servant. *Way v. Great Eastern R'y Co.*, Law Reports, 1 Queen's Bench Division, 692, 1876; 18 Eng. (Moak), 126.

301. Flag station; no depot. A railroad company is not required by law to keep a warehouse or depot at every station along the line of its road, and may lawfully stipulate, either expressly or by implication, that it will assume no liability as a warehouseman at a "flag station," where it has no depot nor agent; and when the consignee is fully advised, at the time of shipment, that the company has no depot nor agent at such station, and it is not shown that the exi-

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gencies of its business required that it should have an agent or depot at that place, the liability of the company as a common carrier terminates with the safe delivery of the goods on the side track at that point, and it assumes no liability as a warehouseman. *South and North Alabama R. R. Co. v. Wood*, 66 Ala., 167, 1880; 9 Amer. & Eng. R. R. Cases, 419.

302. Goods returned to point from which they were shipped; non-payment of freight. The plaintiff delivered, in London, to the defendant a parcel addressed to the plaintiff's agent at Plymouth. The defendant's line terminated at Bristol, from whence it forwarded the parcel to Plymouth by the South Devon Railway, and shortly before noon, on the day of its arrival, a porter tendered it to the plaintiff's agent, who refused to pay the sum charged for its carriage, whereupon the porter took it away, saying that it would be returned to London; and it was accordingly sent back to London at eight o'clock in the morning of the following day. About two hours afterwards the plaintiff's agent tendered, at the office of the South Devon Railway, the amount of the carriage, and demanded the parcel, when he was told that it had been that morning returned to London. The parcel remained in the custody of the defendant, at its office in London, and it did not appear that the plaintiff had applied for it there. The jury found that the parcel was sent back to London unreasonably soon; and that the demand of the parcel and tender of the charge for the carriage was made within a reasonable time after the parcel had been refused. *Held*, in the exchequer chamber (affirming the judgment of the court of exchequer), that, under these circumstances, the defendant was liable for a breach of duty, even supposing its duty as a carrier ended with the tender of the parcel. Per Cockburn, C. J., Crompton, J., Williams, J., and Willes, J.; Crowder, J., *dissentiente*; Wightman, J., doubtful. *Great Western R'y Co. v. Crouch*, 3 Hurlstone & Norman (Exchequer), 183. 1858.

303. Insufficiency of cars. It is the business of common carriers to have vehicles suitable for the transportation of the freight shipped, and they are responsible for losses

occurring in consequence of defects in this regard. But the carrier is the judge of the sufficiency of his carriages in the first instance. *Sloan & Co. v. St. Louis. Kansas City and Northern R. R. Co.*, 58 Mo., 220. 1874.

304. — A railway company held not liable for standards placed upon flat cars to insure the safe transportation of hay, the standards having been erected by the shipper voluntarily and without any contract with the company. *Id.*

305. Locked cars; custom of company. In a suit against a railroad company for loss of potatoes in a car loaded by the plaintiff, but the keys thereof retained by agents of the company, it is not error to exclude from the jury evidence that it was the custom of the company not to be responsible for the conduct of its agents who held the keys, particularly if there was no notice of such custom brought home to the plaintiff. *Central R. R. and Banking Co. v. Anderson*, 58 Ga., 393, 1877; 16 Amer. R'y Rep., 85.

306. Machinery. A carrier of freight is, as against the acts of the shipper, bound to the exercise of reasonable care and diligence only. Thus, where plaintiff loaded heavy machinery upon a platform car, and blocked its wheels with insufficient blocking, insecurely nailed, by reason whereof the machinery, while being transported by defendant, broke from its fastenings without fault of defendant in the running of the train or in maintenance of the track, and was injured, it was held that defendant was not liable therefor, although its yard-master and forwarder of freight cars saw the fastenings and noticed their insufficiency before the injury was done. *Ross v. Troy and Boston R. R. Co.*, 49 Vt., 364. 1877.

307. — pleadings. The pleadings in an action for loss of machinery considered, and the sufficiency of the description of the machinery in the declaration determined. *Williams v. Baltimore and Ohio R. R. Co.*, 9 West Va., 33. 1876.

308. Military control of railway. Where a person desirous of shipping a large quantity of corn over a railroad to Cairo, stored the same in the warehouse, and on promises of the railroad company to be transported

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as soon as cars could be procured for the purpose, but the company never received or receipted for the same, and was unable to forward the same, for want of cars, and for the reason that the road was controlled by the military authorities of the United States, who refused to give permits to ship the same, and in consequence of which the grain was injured by exposure, etc., *held* that, under the circumstances, the company was not liable to the owner of the grain for the delay. *Illinois Central R. R. Co. v. Hornberger*, 77 Ill., 457. 1875.

309. — An agreement by a railway agent to furnish cars, at a future day, in which to transport grain, and to receive and ship the same, will not estop the company from showing its right to refuse to receive the grain, owing to the military control of its road by the officers of the army of the United States. *Phelps v. Illinois Central R. R. Co.*, 94 Ill., 548. 1880.

310. — The fact that the government, through the military, during the late civil war, required a railroad company to give preference to government freights, and for that purpose exercised more or less the right of determining for what persons shipments should be made, but did not control the movement of trains, when the company held itself out as a common carrier and run its regular trains, carrying private as well as government freights, with and without permits, and received shipments, giving bills of lading therefor, will furnish no excuse to the company as a carrier for not delivering according to its legal obligation within a reasonable time. Such military control might have justified the carrier in refusing freights, but, having received them, did not excuse the delay in transportation. *Illinois Central R. R. Co. v. Cobb*, 64 Ill., 128, 1872; *Phelps v. Illinois Central R. R. Co.*, 94 Ill., 548. 1880.

311. Marks; mistake. Where goods are, by mistake, directed to a point which has no existence in fact, the carrier is not bound to undertake their transportation; but if it does so it becomes liable as a common carrier until the delivery of the goods, even though, as a matter of fact, they may be left at some station along its line. *O'Rourke v. Chicago, Burlington and Quincy R. R. Co.*, 44 Ia., 526. 1876.

312. — When the negligence of the party asking damages is known to the defendant, the latter is liable for the consequences of the act causing the injury or loss, notwithstanding the contributory negligence of the defendant. *Ib.*

313. — Through the mistake of the consignors in misdirecting a package shipped through an express company, it was carried to the wrong place, where, without the fault of the company, it was destroyed by fire. *Held*, that the company was not liable. *Southern Express Co. v. Kaufman*, 12 Heiskell (Tenn.), 161. 1873.

314. Mistake in shipment; conversion. The plaintiff contracted with the Red Line Transit Co., composed of several railway companies, including the defendant, to forward from Delevan, Ohio, to East Boston, Mass., a car-load of corn, intended for Springvale, Me. By mistake, either of the shipper or of the railway clerk, it was way-billed for Springvale, N. H.; and by another mistake, made by the agent of the transportation company at Toledo, Ohio, the word Springfield was substituted for Springvale in the way-bill. Instead of delivering the corn to the plaintiff upon its arrival at East Boston, it was sent to West Andover, N. H., the nearest point by rail to Springfield, N. H. It was thence returned to East Boston, where plaintiff claimed to receive it upon tender of the freight charges from Delevan to East Boston; but the defendant demanded payment for its carriage to Springfield and back to East Boston, and declined to deliver it unless this was paid; and upon the plaintiff's refusal to comply with this demand, the defendant sold the corn at auction. *Held*, that the defendant was liable, in an action of trover, for its value. *Jones v. Boston and Albany R. R. Co.*, 63 Me., 188. 1874.

315. Notice of arrival. Where goods are carried by rail, the final carrier transporting the goods to their destination, in the absence of special agreement or custom to the contrary, is not required to notify the consignee of the arrival of the goods at their destination, if he resides at the distance of eighteen miles from the place of delivery. But if such consignee has an agent residing at the place of delivery, known to the carrier, such agent is entitled to notice of the

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arrival of the goods, and has a reasonable time thereafter to remove them. *Pinney v. St. Paul and Pacific R. R. Co.*, 19 Minn., 251, 1872; 20 Amer. R'y Rep., 71.

316. — A railway company which delivers goods at its freight depot at the point of destination on time need not notify the consignee of their arrival. *Eaton v. St. Louis, Iron Mountain and Southern R'y Co.*, 12 Mo. App., 386. 1882.

317. — The preponderance of the authorities hold that a carrier is not required to give special notice of the arrival of goods at their destination. *South and North Alabama R. R. Co. v. Wood*, 9 Amer. & Eng. R. R. Cases (Ala.), 419. 1881.

318. Packing. A condition that the company will not be accountable for the loss, detention or damage of any package insufficiently or improperly packed, held unjust and unreasonable. *Simons v. Great Western Railway Co.*, 37 Eng. Law & Equity, 286. 1856.

319. — Though an owner who improperly packs goods for transportation by a common carrier cannot recover for injuries to the goods to which the improper packing contributes, he may recover for injuries happening independently of the defect in packing. *Shriver v. Sioux City and St. Paul R. R. Co.*, 24 Minn., 506. 1878.

320. — evidence. A witness accustomed to packing marble slabs for transportation may be asked whether, in his opinion, a certain mode of packing for transportation was proper. *Ib.*

321. Perishable goods. Where a carrier is transporting perishable property, and a delay is occasioned by unavoidable accident, and he makes all reasonable efforts to forward the property, but fails to do so in time to have it reach its destination before becoming totally lost, under such circumstances he is justified in selling it for the best price which can be obtained, exercising a sound discretion. *American Express Co. v. Smith*, 33 Ohio St., 511. 1878.

322. — contract limiting liability. The plaintiff shipped by defendant's railroad, on the 4th of March, perishable property liable to be destroyed by freezing. At the time of shipment he executed a release to defendant from liability for loss or "damage to perish-

able property of all kinds occasioned by delays from any cause or change of weather, or loss or injury by fire or water, heat or cold." Held, that the defendant was relieved from liability for a loss by freezing occasioned by the negligence of defendant's servants. *Nicholas v. New York Central and Hudson River R. R. Co.*, 6 Thompson & Cook, N. Y. Supreme Ct., 606; 4 Hun (N. Y.), 327. 1875.

323. — A contract excusing a carrier for delay in transportation of fruit trees from any cause, held not to excuse delay caused by the carrier's negligence. *Nicholas v. N. Y. Central and Hudson River R. R. Co.*, 89 N. Y., 370, 1882; 9 Amer. & Eng. R. R. Cases, 103.

324. — apples; freezing. The freezing of apples while being carried by a subsequent carrier is not so direct and natural a result of unreasonable delay by the first carrier as to make such first carrier liable therefor by reason of such delay. *Michigan Central R. Co. v. Burrows*, 33 Mich., 6. 1875.

325. — Proof of negligent delay by a subsequent carrier, and that without it the injury would have been avoided, is a complete answer to an action seeking to hold the first carrier responsible by reason of its delay for the injury to fruit by freezing while in custody of such subsequent carrier. *Ib.*

326. — boiled cider. A verdict against defendant for loss of cider sustained, the evidence failing to sustain the defense that the cider had fermented. *Green v. Indianapolis and St. Louis R. R. Co.*, 56 Mo., 556. 1874.

327. — cabbages; freezing. A quantity of cabbages were received from the plaintiff, by the defendant, at East Albany, for transportation to New York, on the 6th and 7th of January. They were in the car, ready for the freight train, at 10:40 P. M.; from which place freight trains were accustomed to leave for New York every few hours, the running time being, ordinarily, about eleven hours. The car was left at East Albany a considerable time, although several other trains were sent over the road in the meantime; and it did not reach New York until 10th or 13th of January, when the cabbages were frozen and nearly destroyed. Held, that the judge properly instructed the jury

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that the property having been delivered to, and accepted by, the defendant as perishable, it became its duty to forward it by the first train; unless there was such a pressure and accumulation of freight of a similar kind, which had previously arrived, as to prevent such immediate action. *Held*, also, that if there had been no accumulation of freight for transportation, beyond the ordinary capacity of the road, all of it should have been forwarded in the order of its arrival; but if any delays were necessary, by reason of unusual accumulation, the perishable property should be forwarded, in preference to that which was not perishable. *Tierney v. N. Y. Central and Hudson River R. R. Co.*, 67 Barbour (N. Y.), 538. 1877.

328. — fish; contract limiting liability. An agreement to carry fish at a rate of one-fifth less than the usual rate, in consideration of a condition on the part of the shipper to release the carrier from all damages from delay or other causes, *held* to be an unreasonable condition under the Railway and Canal Traffic Act of 1854. *Brown v. Manchester, Sheffield, etc., R. R. Co.*, Law Reports, 10 Queen's Bench Division, 250. 1882.

329. — A railway company gave public notice that fish would only be conveyed on its line by special agreement, and by particular trains; and that the sender should sign the following conditions: "The company shall not be responsible, under any circumstances, for loss of market, or for other loss or injury arising from delay or detention of train, exposure to weather, stowage, or from any cause whatever other than gross neglect or fraud." *Held*, in the exchequer chamber (affirming the judgment of the court of exchequer), that the conditions were just and reasonable, within the meaning of the 17th and 18th Vict., c. 31, s. 7. *Beal v. South Devon R'y Co.*, 3 Hurlstone & Coltman (Exchequer), 337, 1864; *Same v. Same*, 5 Hurlstone & Norman (Exchequer), 875, 1860.

330. — A contract for special rates in the carriage of fish, in consideration of which the liability of the carrier was limited, is a good defense in case of delay caused by an unexpected press of business. *McConnachie*

v. Great North of Scotland R'y Co., 3 Scotch Session Cases, 4th series, 79. 1875.

331. — A railway company had two rates for the carriage of goods — one, the ordinary or higher rate, when it undertook the ordinary liability of the carrier, the other, a reduced rate, when the sender relieved it from all liability for loss, damage or delay, except upon proof that such loss, damage or delay arose from wilful misconduct on the part of its servants. *Held* — the higher rate not being shown to be prohibitive or excessive — that the alternative afforded to the public was just and reasonable, and, therefore, that a contract founded upon the latter branch of it was valid. *Gallagher v. Great Western R'y Co.*, 8 Irish Reports, Common Law, 326. 1874.

332. — fruit trees. When parties ship fruit trees to a point to their own address, as consignees, the carrier, neither at common law nor by statute, is authorized to place the trees in the hands of a stranger, with directions to him to sell enough of them to pay the charges of transportation, and if he does he will be liable in trover to the owners. *Indianapolis and St. Louis R. R. Co. v. Vanduzen*, 81 Ill., 143. 1876.

333. — Where fruit trees, shipped on a railroad, were frozen while en route, the freezing was held to be the act of God, for which the company was not liable, unless caused by unnecessary delay in transporting them, or their careless exposure to the cold, and the burden was held to be on the owner to show such careless exposure. And if frozen while remaining in the cars at the terminus of the route, instead of being placed in the warehouse, the company was not held responsible on that account if the cars afforded a better shelter than the warehouse. *Vail v. Pacific R. R. Co.*, 63 Mo., 230, 1876; 20 Amer. R'y Rep., 420.

334. — If fruit trees and shrubbery are killed in the cold, in the hands of an intermediate carrier, by reason of negligence or unreasonable delay, or if, by such delay in transportation or in delivery to the next carrier in the line, the latter cannot, by reasonable efforts, transport and deliver before they are destroyed by cold weather, the former carrier will be liable for the loss.

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Michigan Central R. R. Co. v. Curtis, 80 Ill., 324. 1875.

335. — Where the trees were destroyed by frost before reaching their destination, and this was caused by delay of transportation to Chicago, where they were to pass into the hands of another line, the fact that the company's buildings in Chicago were destroyed by fire will not furnish a sufficient excuse for the delay, where it appears that other shipments, made afterwards, went through in time, and were delivered to the other line. *Ib.*

336. — potatoes; freezing. Delay in carriage, by reason of which potatoes became frozen, was held to render a common carrier liable. Such freezing is not deemed the act of God. *McGraw v. Baltimore and Ohio R. R. Co.*, 18 West Va., 361, 1881; 9 Amer. & Eng. R. R. Cases, 188.

337. — The defendant contracted to transport a quantity of potatoes from Batavia, N. Y., to Philadelphia. The potatoes were in good order when shipped. The cars containing them arrived at G., a place within three miles of the place of delivery, within the usual time, but were left on the track at G. for at least fourteen days, before being taken to the city; and during that period the potatoes were frozen. It appeared that the company employed by the defendant to aid in the transportation and delivery of this freight had no warehouses in Philadelphia for storing freight temporarily, with a view to hasten and facilitate delivery; and that there was, at the time, a great accumulation of freight, both at that place and at G. *Held* that, upon the evidence, it was a fair question for the jury to say whether or not due diligence was used by the defendant in delivering the freight. *Held*, also, that if the potatoes were frozen at G., after a reasonable time for delivery had elapsed, the defendant was chargeable with the loss. That nothing short of a calamity would justify the holding of the cars at G. for so long a time. *Monell v. Northern Central R. R. Co.*, 67 Barbour (N. Y.), 581. 1877.

338. Pictures. The plaintiff sent upon a truck by the defendant's line a wagon with wooden sides, but without a top, in which he packed, amongst other things, paintings ex-

ceeding the value of £10, which were so placed in the wagon that it could be seen that they were paintings, but their exact character could not be seen. In an action for injury to the paintings, *held*, that the wagon with its contents was a "parcel or package" within the Carriers' Act, s. 1, and that, the goods not having been declared, the plaintiff could not recover. *Whittle v. Lancashire and Yorkshire R'y Co.*, 8 Eng. (Moak), 513; Law Reports, 9 Exchequer, 67. 1874.

339. — carriage beyond point of destination; value not declared by owner. The plaintiff took a ticket from York to Darlington by the defendant's railway. Before starting on the journey he handed two water-color drawings (which were tied together face to face, so that it could be seen that they were pictures of some kind) to the guard, asked him to take care of them, and saw them labeled for Darlington. The pictures were above the value of 10*l.*; but the plaintiff made no declaration of the value. When the train arrived at Darlington he got out, took a fresh ticket for Barnard Castle, and told the porter to see that the drawings were taken out and put in the train by which he was starting. The drawings, however, were not taken out, but were carried on to Durham, and when they were recovered by the plaintiff had sustained considerable injury. *Held*, by the queen's bench division, that the plaintiff was not entitled to recover for the damage to the drawings. By Blackburn and Field, JJ., on the ground that the defendant was protected by the Carriers' Act, which applied to the case of goods negligently carried beyond the point of destination. By Quain, J., on the ground that the Carriers' Act did not apply to the case and that the company must be considered as bailee of the pictures beyond Darlington, but that there was no evidence of negligence to make it liable. *Held*, by the court of appeal, affirming the judgment of the queen's bench division, that the construction put by Blackburn and Field, JJ., on the Carriers' Act was correct. *Morritt v. North Eastern R'y Co.*, Law Reports. 1 Queen's Bench Division, 802, 1876; 16 Eng. (Moak), 858.

340. — This clause in a contract, "Specie,

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drafts, bank-bills, and other articles of great intrinsic or representative value, will only be taken upon a representation of their value, and by a special agreement assented to by the superintendent," does not apply to a family portrait, contained in a wooden case. *Green v. Boston and Lowell R. R. Co.*, 128 Mass., 221. 1880.

341. — In an action for the loss of a case containing a portrait of the plaintiff's father, intrusted to the defendant for carriage, the measure of damages is the actual value of the portrait to the plaintiff, and not the market value; and evidence that he had no other portrait of his father is admissible. *Ib.*

342. Place of delivery. A contract to carry goods and deliver them to the consignee at N. cannot be made to bind the carrier to deliver them at A., because the goods were addressed to the consignee at A., nor because the consignee was described as being at A. *Wheeler v. St. Louis and South Eastern R'y Co.*, 3 Mo. App., 358. 1877.

343. — custom. Where it is alleged in the complaint against a railway company, on a contract of shipment, and proved on the trial, that it had been the custom of the company to deliver cars loaded with lumber for the plaintiff, at or near the plaintiff's place of business, it is to be presumed that the contract of shipment was made with reference to such custom or usage, and that the company was bound to deliver the cars at the usual place. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Nash*, 43 Ind., 423. 1873.

344. Receipt for goods. A railroad receipt for goods "in apparent good order" does not relieve the consignor from proof of their condition at the time of delivery. *Chicago and Alton R. R. Co. v. Benjamin*, 63 Ill., 233, 1872; 7 Amer. R'y Rep., 392.

345. — A carrier is not estopped by a receipt reciting the condition of goods, and may show that the goods were in a damaged condition. *Monell v. Northern Central R'y Co.*, 16 Hun (N. Y.), 585. 1879.

346. — mistake; connecting lines. The owner of a lot of flour shipped the same to Chicago, to be carried from there by the Northern Transportation Co. to Ogdensburg, N. Y., and thence by rail to Barton's Land-

ing, Vt., paying the freight to Chicago, taking the carrier's receipt. The clerk of the transportation company receipted for the same to the company with whom the contract was made, upon the representation that the flour had arrived at the warehouse of defendant, and that the freight had been prepaid, but testified that the flour was never in fact received. It seems that, owing to a mistake in marking the direction of the car containing the flour, the same was received by another warehouse company, whose house was near that of defendant. It was contended, under those circumstances, the defendant was not liable for the loss, but that the owner's remedy was against the first carrier for the mistake in marking the car, which led to the loss. *Held*, that, while the first carrier was guilty of negligence, the defendant was also guilty of negligence in giving the receipt without first ascertaining that the flour had arrived at its warehouse, for which it was liable to the owner; and that the question of ultimate liability was one to be settled by the two companies themselves. *Northern Transportation Co. v. McClary*, 66 Ill., 233. 1872.

347. Refrigerator cars. A common carrier running a refrigerator car is not, in the absence of an express contract to carry by the refrigerator car, liable for damages to an article carried by it. *Wetzell v. Chicago and Alton R. R. Co.*, 12 Mo. App., 599. 1883.

348. Refusal to receive goods. A railway company, carrying on business as a common carrier for hire, refused to receive certain goods tendered to it for carriage as such, unless the sender of the goods would sign a condition by which the company was not to be answerable "for the loss, detention, or damage of any package insufficiently or improperly packed, marked, directed, or described." *Held*, an unjust and unreasonable condition, both at common law and under the Railway and Canal Traffic Act (17 and 18 Vict., c. 31). *Garton v. Bristol and Exeter R'y Co.*, 1 Best & Smith, 112; 101 E. C. L., 112. 1861.

349. — A railway company refusing to carry cedar lumber for the plaintiff was held liable for the damages occasioned by such refusal. *Rutherford v. Grand Trunk R'y Co.*, 20 Lower Canada Jurist, 11. 1875.

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350. — The eighty-sixth section of the Railways Clauses Consolidation Act is an enabling provision; and if a company act as a carrier, it is not bound to carry all kinds of goods from and to every station on the line; it may limit its business as a carrier from and to the two termini, and to a particular description of goods. But if it profess to carry goods from one station to another, it is bound to carry all goods tendered to it for that purpose, if it have sufficient conveniences. *Johnson v. Midland R'y Co.*, 6 Eng. R. R. & Canal Cases, 61, 1849; *Johnson v. Midland R'y Co.*, 4 Welsby, Hurlstone & Gordon (Exchequer), 367, 1849.

351. — The fact that a list of tolls is posted at all the stations is not evidence that the company is bound to carry goods in bulk from all such stations. *Oxlade v. North Eastern R'y Co.*, 99 E. C. L., 896; 3 Law Times, N. S., 671. 1861.

352. — **damages; spoiling grain.** In an action against a railway company for damages for refusing to receive and carry grain properly stored for transportation, it is proper for the plaintiff to show that, because of such refusal, his grain became heated and spoiled, notwithstanding the fact that the damage resulted from something inherent in the nature of the grain itself. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Morton*, 61 Ind., 539. 1878.

353. — **pleading.** In an action against a railway company by a grain shipper, the complaint alleged that the defendant, while operating a certain railroad running from a certain place, through the plaintiff's place of business, to another point, publicly held itself out as a common carrier for hire along such railroad; that it was the duty of the defendant to provide the usual and necessary means for carrying grain along such line from plaintiff's place of business, which was a station on such railroad; that the plaintiff, at a certain time, had purchased a certain quantity of grain for shipment on defendant's line, but that the defendant, though often requested so to do, failed to furnish the means necessary for transportation, and refused to receive and transport such grain. *Held*, on demurrer, that the complaint states a cause of action arising *ex delicto*, and not *ex contractu*. *Ib.*

354. — A declaration in case against a common carrier for refusing to carry goods averred that the plaintiff "was ready and willing and then offered to pay to the defendant such sum of money as the defendant was legally entitled to receive for the receipt, carriage and conveyance of the said parcel." *Held*, on special demurrer, that the averment was sufficient, and that it was not necessary to aver an actual tender of money for the carriage. *Pickford v. Grand Junction R'y Co.*, 8 Meeson & Welsby (Exchequer), 872. 1841.

355. **Seizure on legal process.** When goods delivered to a common carrier for transportation were seized by legal process and taken out of his possession by the sheriff, and the carrier forthwith gave notice to the consignor and consignee, and they made no reply and took no further notice of the proceedings, *held*, that the carrier had a right to presume that they had abandoned the property, as subject to the legal process which had seized it. *Savannah, Griffin, etc., R. R. Co. v. Wilcox*, 48 Ga., 482, 1878; 11 Amer. R'y Rep., 375.

356. — The liability of a common carrier ceases if the goods are taken from his possession by legal process. *Ib.*

357. — However the law may be elsewhere, the rule of the supreme court of the United States is, that seizure under legal process is a defense to the carrier in an action for non-delivery. But the mere seizure under valid process is not enough to excuse the carrier, for he must give immediate notice to the consignee; failing in this, he becomes liable as in any other case of delivery to another person than his own bailee, and assumes the burden of showing that the party seizing the goods under the process has the paramount title, unless he can show that the consignee had actual knowledge from other sources in due time. *Robinson v. Memphis and Charleston R. R. Co.*, 16 Federal Reporter, 57. 1888.

358. — **replevin.** A railway company is released from liability for not carrying and delivering goods, when, without any act, fault or connivance on its part, they are seized, by virtue of legal process, and taken out of the possession of the company. *Ohio*

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and *Mississippi R'y Co. v. Yohe*, 51 Ind., 181. 1875.

359. — In such case the carrier should give immediate notice to the parties interested. *Ib.*

360. Strikes and mob. The sudden and wrongful refusal of its employes to work will not excuse a railway company for failure to transport freight in the usual time. *Read v. St. Louis, Kansas City and Northern R. R. Co.*, 60 Mo., 199, 1875; 9 Amer. R'y Rep., 201.

361. — **mob.** An exception in a bill of lading, exempting a common carrier from liability for "loss or damage on any article or property whatever, by fire or casualty, while in transit, or while in depots or places of transshipment," is applicable to goods forcibly taken from the carrier, while in transit, and burned by a lawless mob, where such carrier was not guilty of any negligence by which the efficiency of the exception was in any way impaired. *Hall v. Pennsylvania R. R. Co.*, 1 Federal Reporter, 226. 1880.

362. Tender of goods for carriage. Goods which are ready, at a place where the carrier may receive them, may be tendered for transportation to an agent authorized to receive or reject them, without regard to the place where the tender is made. *Cobb v. Ill. Central R. R. Co.*, 38 Ia., 601. 1874.

363. Termination of liability. The liability of a railway company as a common carrier does not extend over the whole time of the existence of its lien for freight. *Spears v. Spartanburg, etc., R. R. Co.*, 11 So. Car., 158. 1878.

364. — A railway company does not retain its character as a common carrier until notice of the arrival of goods is given to the consignee, and he has a reasonable time thereafter to remove them. *Ib.*

365. — The liability of a carrier in the shipment of lumber, coal, or the like, will terminate, in the absence of a contract providing otherwise, when the loaded car is placed where such articles are usually unloaded, or when the car is delivered at some safe and convenient place designated by the consignee and notice of such delivery has been given. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Nash*, 43 Ind., 423. 1873.

366. Title to goods carried. A common carrier, to whom goods are delivered for carriage, cannot, of his own motion, set up title in another, as a reason for not delivering the goods to the shipper or his consignee. *Rosenfield v. Express Co.*, 1 Woods (U. S. C. C.), 131. 1871.

367. — The rule that while property is in transit a consignor may change the consignee, or otherwise direct a disposition of the property according to his will, does not apply to cases where such property is consigned to one who has advanced money with which to purchase the property consigned, in pursuance of an original agreement to so consign it. In such a case the delivery to the carrier amounts to a delivery to the consignee, and from the time of such delivery the right of the consignee becomes vested. *Nelson v. Chicago, Burlington and Quincy R. R. Co.*, 2 Bradwell (Ill.), 180. 1878.

368. — A carrier cannot dispute the title of the consignor, where the party delivering the property to the carrier is bound to make the shipment or has become responsible to the carrier for his charges. *Illinois Central R. R. Co. v. Schwartz*, 11 Bradwell (Ill.), 482. 1882.

369. Trespasser; right of owner. A carrier who receives goods to carry from one not authorized to deliver them to him is a trespasser, and may be sued in trover for the goods, as any other illegal taker may be; but if a suit be brought against him as a carrier, charging him with having taken the goods under a contract with the plaintiff's agent, and with neglect of duty under the obligations of that contract, and there be no count for a wrongful taking or conversion, the plaintiff can only recover for a breach of duty under the contract as made with his agent. *Southern Express Co. v. Palmer*, 48 Ga., 85. 1873.

370. Trover and conversion by carrier. The plaintiffs intrusted goods to the Y. & N. M. R'y Co., to be conveyed from H. to N. The goods arrived at N., the defendant's station, by the A. Railway, belonging to an intermediate company. The plaintiffs demanded them of the defendant, offering to pay any charges or lien, but the defendant refused to deliver them

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up, upon the ground that, by an agreement with the A. Company, the latter had no right to bring such goods to the defendant's station, and insisted upon their being taken back to the A. line. *Held*, that the defendant was liable in trover for the goods; that the detention of them by the defendant, after a demand made upon its station-master, was sufficient evidence of a conversion; and that the plaintiffs were entitled to have their goods, though brought by mistake or without right on the premises of the defendant. *Rooke v. Midland R'y Co.*, 14 Eng. Law & Equity, 175; 16 Jurist, 1069. 1852.

371. — A common carrier by railroad, who delivers goods intrusted to him for carriage, without production of the bill of lading describing the goods, is liable in trover for their value to a *bona fide* holder of such bill, taken for value, before the delivery of the goods at destination. *First National Bank of Peoria v. Northern R. R. Co.*, 58 N. H., 208. 1877.

372. Underbilling; conversion; connecting lines. A consignor sent by an association of railway companies, of which the defendant was one, a car-load of oats weighing twenty-three thousand six hundred and sixty-seven pounds, to be forwarded to a point beyond the line of the defendant's road, and received from the transit company a bill of lading, which he sent to the consignee, in which the oats were stated to weigh twenty thousand pounds; the consignee paid the consignor for the full contents of the car. In an action by the consignee against the defendant for the conversion of that portion of the grain removed, the freight agent of the defendant testified that he removed, on behalf of the defendant, the excess of oats above twenty thousand pounds at the end of the defendant's line. *Held*, that the testimony was competent on the question of conversion. *Held*, also, that a request to the court to charge that, if the consignor informed the transit company that the oats weighed twenty thousand pounds, knowing that they weighed more, so that they might be carried as twenty thousand pounds only, and if the consignee knew that the oats were "underbilled," and suffered them to come on without notifying the defendant, intending to

take them without paying freight on the excess, unless demanded, there was no delivery of the excess of oats, and the plaintiff could not maintain his action, although the consignee bought the grain deliverable on the cars, was rightly refused. *Wiggin v. Boston and Albany R. R. Co.*, 120 Mass., 201. 1876.

373. Undue preference; charge of collecting goods. A railway company charged certain rates for the conveyance of goods on its line from P. to B., the charge including that of collecting and delivering the goods to and from the stations at P. and B. The company, which had formerly allowed a deduction in respect of goods delivered and received at the P. and B. stations (as the expense of carting to and from such stations was thereby saved to the company), discontinued making such allowance, in order to induce persons who sent goods by the railway to employ the company to collect and deliver such goods, and to exclude common carriers from competing in this with the company; *held*, that, though no profit was made by collecting and delivering the goods, the system of charge was an undue prejudice to those persons who did not wish to have their goods collected and delivered for them by the company. *Garton v. Great Western R'y Co.*, 1 Neville & McNamara, 214. 1859.

374. Usage. In a case where the shipper must be deemed to know the usage of the carrier in delivering freight at the place of destination, and the law of that place in respect to it, and the inference from the evidence is in conformity with the view that the original contract called for, and the shipper contemplated a delivery in accordance with the usage and law prevailing at that place, the facts are not of a character to appeal very strongly to the courts of this state to give the parties a remedy in conflict with the law of that place, as defined by its courts. *Faulkner v. Hart*, 44 N. Y. Superior Ct., 471. 1879.

375. Valuation; declaration of value; carriers' act. The plaintiff delivered to the defendants, who were carriers for hire from London to Rome, a trunk to be sent by rail from London to Liverpool, and thence shipped by steamer for Italy. Owing to

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the defendant's negligence, the trunk was put on board a vessel bound for New York, where it arrived, and a long time elapsed before it was restored to the plaintiff. The trunk contained articles within the Carriers' Act, the value of which exceeded £10. The plaintiff was obliged to replace at enhanced prices the articles within the Carriers' Act contained in the trunk. *Held*, that the plaintiff could not recover from the defendants damages either for the temporary loss of the articles within the Carriers' Act or for being obliged to replace them at enhanced prices, a carrier being protected by the statute, not only as to a loss, but also as to all consequences flowing from it. *Millen v. Brasch*, 9 Amer. & Eng. R. R. Cases (Eng. Q. B. D.), 326. 1882.

376. — concealment. From considerations of public policy, common carriers are made liable under the statute (R. S., art. 278), and under the decisions of the courts of Texas, as at common law, for all losses not occasioned by the act of God or the public enemy; and any exceptions or special contract seeking to vary that liability are invalid. But if the shipper practices a fraud on the carrier, by fraudulently concealing, either through his acts or omissions, the value of the article shipped, the carrier is discharged. *Houston and Texas Central R. R. Co. v. Burke*, 55 Tex., 323, 1881; 9 Amer. & Eng. R. R. Cases, 59.

377. — Where a shipper delivered to a carrier for transportation a bundle having the appearance of bedding only, but which in fact contained inside the bedding valuable clothing, such as a silk dress, a shawl and furs, of the value of \$200, which fact was not disclosed, and thereby shipped them at a low rate of freight, it was held that this was such an imposition and fraud practiced upon the carrier as to release him from liability for loss, except as to what might properly be termed bedding. *Chicago and Alton R. R. Co. v. Shea*, 66 Ill., 471. 1873.

378. — value; increased charges of valued goods. Where a carrier receives goods of the description mentioned in the 11 Geo. 4 and 1 Wm. 4, c. 68, and the person delivering the same has declared their value and nature, he is not bound to tender, but the carrier must demand, the increased charge

mentioned on the notice affixed in his office, warehouse, or receiving house, whether the goods are there delivered, or to a servant sent to fetch them; and if no such demand is made, the carrier is liable for the loss of or injury to the goods, although the increased charge has not been paid. *Behrens v. Great Northern R'y Co.*, 6 Hurlstone & Norman (Exchequer), 366, 1861; *Great Northern R'y Co. v. Behrens*, 7 Hurlstone & Norman (Exchequer), 950, 1862.

379. Value; express packages. A common carrier is liable for the loss of a box or parcel, however valuable, though ignorant of its contents, unless he make a special acceptance. If the owner of goods to be carried is guilty of fraud in misrepresenting or concealing their value, he cannot hold the carrier liable. An express company having been compelled to pay for the lost goods, may compel the railway company whose neglect produced the loss to pay the damages. *Little v. Boston and Maine R. R. Co.*, 66 Me., 239. 1876.

380. Warehouseman. Where goods are left in a railway depot to await further orders before shipment, the carrier is only liable as a warehouseman. *O'Neill v. N. Y. Central and Hudson River R. R. Co.*, 60 N. Y., 138, 1875; reversing *Same v. Same*, 3 Thompson & Cook (N. Y. Supreme Ct.), 399. 1874.

381. — Carriers, after a refusal of the goods at the consignee's address, are involuntary bailees, and are only bound to act with reasonable care and caution with respect to the goods. *Heugh v. London and Great Western R'y Co.*, Law Reports, 5 Exchequer Cases, 51. 1870.

382. — A railway company which has carried freight, and afterward placed it in its warehouse, and, knowing the consignee, has given him no notice to remove it, is bound, so long as it keeps it, to keep it with ordinary care. *Lane v. Boston and Albany R. R. Co.*, 112 Mass., 455. 1873.

383. — A railway company having carried merchandise to its destination, having unloaded it and given notice to the consignee of its arrival, is not liable as a common carrier, but at most as a warehouseman, for a damage happening to it after the lapse of a reasonable time for its removal. *Stowe v.*

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New York, Boston and Providence R. R. Co., 113 Mass., 521. 1873.

384. — In an action against a railway company for the non-delivery of goods lost from its depot after transportation, evidence offered by the defendant that other freight of the same kind was always cared for by it in the same manner, and that none had been lost before, is immaterial. *Lane v. Boston and Albany R. R. Co.*, 112 Mass., 455. 1873.

385. — Flax was shipped by defendant's railway to N. On arrival notice was sent to plaintiff that it had arrived and "it would be held by the company as a warehouseman at owner's risk." The company had no warehouse, and after receiving a part of the flax the remainder was left at the station for over two months and was damaged by the rain. Held, that the advice note was a contract and defendant was liable for negligence. *Mitchell v. Lancashire and Yorkshire R'y Co.*, Law Reports, 10 Queen's Bench Cases, 256. 1875.

386. In an action against a railway company liable as a warehouseman for the custody of goods, it appearing that the merchandise when damaged was not stored in the freight house, but exposed in the open air, evidence on the part of the company as to the sufficiency of the freight house for the business usually done at that station, and as to the contents of the freight house at the time of the damage, is admissible upon the question of the care used by the corporation in the custody of the goods. *Stowe v. New York, Boston and Providence R. R. Co.*, 113 Mass., 521. 1873.

387. Wagon; open car; wind. Plaintiffs, wishing to send a wagon from Janesville to Chicago by defendant's road, determined not to have it taken apart so as to be carried in a box car, but to ship it upon an open platform car by a night train which left Janesville at 9:15 P. M. When their agent contracted for the car, he was told by defendant's agent that if he got the wagon to the freight depot before 5 P. M., they would help him load it; but if later, he would find his car by the freight house. He reached the depot late, but met two of the defendant's workmen going away, who went back and aided him in loading the wagon, he himself taking the entire charge and responsibility of

such loading, and of securing the wagon to the car, and using such appliances as he thought proper for the latter purpose, without control of any one. The wind blew very hard a sufficiently long time before the train left to enable plaintiffs to countermand their order for sending the wagon by that train, or to have it further secured. On the way to Chicago, the wagon (which was a covered one) was blown from the car. In an action for the damages, held, that the facts above stated do not support a finding that defendant was guilty of negligence in attempting to carry the wagon to Chicago without further securing it; and a judgment against the company is reversed. *Milwaukee v. Chicago and Northwestern R'y Co.*, 87 Wis., 190. 1875.

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388. Coal. There is no obligation on a railway company, whether at common law or under the Railway Traffic Act, 1854, to carry goods otherwise than according to its profession. Therefore, it is competent to it to restrict its coal traffic to the carriage of coals for *colliery owners*, from the pit's mouth to stations where such colliery owners have cells or depots appropriated to them for the reception and sale of their coals, and to decline to carry coals from station to station, or for *coal merchants*, — such an arrangement being essential to the regulation of the large traffic in that article, and the company not being "common carriers" of coal. *Oxlade v. North Eastern R'y Co.*, 15 Common Bench, N. S., 680; 109 E. C. L., 679. 1864.

389. — Held, that the carriage of cannel coal and splint coal by the railway company at unequal rates per ton per mile was an undue prejudice to the complainants. Held, also, that if by reason of the gradients or otherwise the cost of conveyance of the coal to the railway company on the one branch was different from the cost on the other, a proportionate difference might be made by the railway company in the mileage rate. *Nitshill, etc., Coal Co. v. Caledonian R'y Co.*, 2 Neville & McNamara, 89. 1874.

390. Control of goods in transit. After delivery of goods to a railway company,

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and receipt of the bill of lading therefor, the consignor loses all right of control over them, except the legal right of stoppage *in transitu*. *Armentrout v. St. Louis, Kansas City and Northern R'y Co.*, 1 Mo. App., 158. 1876.

391. Cotton. A railway company contracting to carry cotton upon open cars should use all means and appliances to prevent the cotton from taking fire. *Chicago, St. Louis and New Orleans R. R. Co. v. Moss*, 60 Miss., 1003. 1883.

392. Freight charges; failure to deliver goods. Where a carrier is bound by its contract to unload goods at a certain place, the charges for carriage are not earned until the goods are so unloaded; and in case of loss by fire before being unloaded, such charges cannot be recovered. *New York Central and Hudson River R. R. Co. v. Standard Oil Co.*, 27 Hun (N. Y.), 39. 1880. See *Same v. Same*, 6 Amer. & Eng. R. R. Cases, 353. 1882.

393. — A contract exempting the carrier from damages for loss by fire does not in such case affect the rights of the parties as to payment of freight charges. *Ib.*

394. Law of place; presumption as to law of other states. Under the laws of Alabama, railroad companies are common carriers, and subject to all the liabilities of such carriers. Where suit is brought in this state against a common carrier for failure to deliver freight received for transportation (under contract made and to be performed wholly in another state), it will be presumed, in the absence of proof to the contrary, that the common law as to common carriers prevailed in the state where such contract was entered into and was to be performed. *South Western R. R. Co. v. Webb*, 48 Ala., 585. 1872.

395. Lien for freight charges. The terms of a contract by a railway company for carrying coal, held to amount to a waiver of a carrier's lien, so that the company giving credit to the owners of the coal, and taking their notes for the freight charges, had no right to rescind the contract and assert such lien until the note was dishonored, before which time the title of an assignee in bankruptcy of said owners intervened. *Sicard v. Buffalo, N. Y. and Philadelphia R. R. Co.*, 15 Blatchford (U. S. C. C.), 525. 1879.

396. — advances. Where a carrier has advanced the charges of an antecedent carrier, who transported the goods under an independent contract, he becomes subrogated to the rights of the latter, and may recover such advances, although he fails to perform his own contract; and the fact that his bill of lading is for transportation and delivery upon payment of freights and charges does not deprive him of such right. *Western Transportation Co. v. Hoyt*, 69 N. Y., 230. 1877.

397. — connecting lines. A shipper shipped goods from Roselle, Ill., a station on the Chicago and Pacific Railroad, to Girard, Kans. An agent of that road received the goods at Roselle, took from the shipper what he said would pay the freight charges through, and gave him a receipt upon which was indorsed, "freight charges paid through to Girard." The Mo. R., Ft. Scott and Gulf Railroad received the goods at Kansas City, without any knowledge or notice of the action of the agent at Roselle, or of the receipt given by him, and carried them over its road to Girard. Only a portion of its charges therefor were paid. The agent at Roselle had no authority from the Gulf road, nor did he pretend to have any. No agreement or arrangement of any kind existed between the two roads in reference to the shipments of freight or contracts therefor. Held, that the Gulf road had a lien upon the goods for its unpaid charges. *Wolf v. Hough*, 22 Kans., 659. 1879.

398. — non-payment of freight charges; sale of goods for charges. By s. 166 of the South Western Railway Act, 4 and 5 W. 4, c. lxxxviii, the tolls authorized by the act were to be paid to such persons, at such places on or near the railway, and in such manner as the directors should, by notice to be annexed to the list of tolls, appoint; and, in case of refusal or neglect, *on demand*, to pay such tolls, *the person to whom the tolls ought to have been paid* is empowered to seize the goods for or in respect of which such tolls ought to have been paid, or any other goods belonging to the party which shall pass on or along the railway, and detain the same until payment of the tolls and charges, and, if the goods are not redeemed within five days, the same shall be *appraised*

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and sold, and such tolls and charges satisfied thereout as the law directs in cases of distress for rent. *Held*, that where the company seized and sold without complying with these several conditions, no demand of the tolls having been made; and the seizure not having been made by "the person to whom the tolls ought to have been paid," and the sale having taken place without an appraisalment, they became trespassers *ab initio*. *North v. London and South Western R'y Co.*, 14 Common Bench, N. S., 182; 108 E. C. L., 181. 1868.

399. — overcharge. A common carrier has a lien on the goods transported by him for the freight due for the whole route, and may retain the goods until the freight is paid; but the payment of the freight, and the delivery of the goods, are concomitant or concurrent acts; and if the consignee is ready and willing to pay the freight due on having the goods delivered to him, and the carrier refuses to deliver them unless he will pay more than is due, the consignee may maintain detinue for the goods, or trover for their conversion, without making a formal tender, or paying the money into court. *Long v. Mobile and Montgomery R. R. Co.*, 51 Ala., 512. 1874.

400. — sale of goods for freight charges. Where goods are delivered by a common carrier at their place of destination, and are not taken out of his custody by the consignee within sixty days, if they are of a perishable character (or ninety days, if not perishable), they may be advertised and sold by him for non-payment of freight and charges, "after thirty days' notice" (Rev. Code, §§ 1884-85); and he is not required to wait until the expiration of the sixty or ninety days, as the case may be, before advertising the sale (Brickell, J., dissenting). *Western R. R. Co. v. Rembert*, 50 Ala., 25. 1878.

401. — waiver. If a common carrier, or other bailee, when goods are demanded of him by the true owner, refuses to deliver them except to the consignee, or to the person holding the receipt given for transportation, but asserts no lien for storage paid by him, he cannot afterwards set up that claim to defeat an action by the owner, but must be held to have waived it. *Leigh Brothers*

v. Mobile and Ohio R. R. Co., 58 Ala., 165. 1877.

402. Oil; tanks belonging to shipper. The defendant was one of the companies forming a continuous and connecting line of railroads from Titusville to Boston, engaged in the business of transporting oil and other freight from the former to the latter place. By an arrangement between such companies cars loaded with freight were run from each terminus over the whole length of the line. The plaintiffs, being shippers of oil at Titusville, provided and furnished wooden tanks of their own, suitable for holding oil to be transported over the continuous line; and, by an arrangement between them and one of the companies, such tanks were placed on platform cars belonging to that company, and fastened thereto, for safety, but they were to remain the property of the plaintiffs. Cars with tanks thereon, filled with oil belonging to the plaintiffs, were run between T. and B. After the tanks were emptied of their contents at B., the cars, with the empty tanks thereon, were, by the same line, returned to T. The carriers furnished the plaintiffs with a bill of lading for each shipment of oil, specifying the quantity of oil, but no mention was made of the tanks themselves. No bill of lading was furnished on the return of the empty tanks, nor was any consideration paid for the transportation of such empty tanks, independent of that paid for the transportation of the oil from T. to B.; nor was any special arrangement made as to the return transportation. Two of the tanks, filled with oil, owned and shipped by the plaintiffs to B., while being carried on that part of the line owned and operated by the defendant, were with their contents burned and destroyed. *Held*, that the general business of the defendant was that of a common carrier; and if it was, in fact, or in a legal sense, transporting, for hire, the tanks destroyed, then the plaintiffs' claim against it, for the value of the tanks, was established. That under the arrangement made by the plaintiffs with the railroad companies, the latter assumed, as to the tanks, the unrestricted liabilities of a common carrier. *Spears v. Lake Shore and Michigan Southern R. R. Co.*, 67 Barbour (N. Y.), 518. 1876.

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403. Owner may recover though he is not the shipper. Where negligence is shown, the owner may recover damages against the carrier though he is not the shipper. The action does not sound in contract. *Harvey v. Terre Haute and Indianapolis R. R. Co.*, 6 Mo. App., 585. 1879.

404. Ownership of goods; husband and wife. Special property in goods may, under the code, enable a party to sue in his own name as in replevin or trover. Where the entire property is in the consignor, he is the proper party to sue; where the entire property is in the consignee, the latter sues; when both are interested, one as general, the other as special owner, either may sue. A recovery in such action, properly instituted, will be a bar to any subsequent action against the same defendant at the suit of another party having either a general or special property in the goods. The husband may sue for the household goods of his wife. *Denver, South Park and Pacific R. R. Co. v. Frame*, 6 Colo., 382. 1882.

405. Partnership; violation of the statute by shipper. In an action brought to recover damages for injuries to a carriage, transported by defendant from Buffalo to New York, the plaintiff was non-suited on the ground that he carried on business under the name of Wood Bros., although no other person was interested therein. By the bill of lading the carriage, which was marked "Wood Bros.," was to be delivered in New York "to the party entitled to the same." Held that, as the plaintiff was in fact the owner of the carriage, he was entitled to claim the same at New York, and that the fact that he was carrying on business in a manner forbidden by the laws of the state, did not relieve the defendant from fulfilling the contract of carriage it had entered into with him. *Wood v. Erie R'y Co.*, 9 Hun (N. Y.), 648, 1877; *Wood v. Erie R'y Co.*, 72 N. Y., 196, 1878.

406. Packed parcels; rates. A railway company cannot impose the full rate upon packed parcels, which it might charge if said parcels were shipped separately. *Camblon v. Philadelphia and Reading R. R. Co.*, 9 Philadelphia (U. S. C. C.), 411. 1873.

407. Payment of freight; rescission of contract; recovery of freight paid. Where,

by the terms of a contract for the sale of grain, the purchaser was to pay the freight thereon, and did so pay it, but refused to receive the grain, and the contract was rescinded, it was held that he could not recover the amount paid for freight from the carrier. *Jack v. Des Moines and Fort Dodge R. R. Co.*, 53 Ia., 399. 1880.

408. Rates; small packages. A railway company was empowered by the s. 175 of its act of incorporation (6 and 7 W. 4, c. cvi) to charge certain tonnage rates, and (by ss. 177 and 179) to provide locomotives or other power for the carriage and conveyance of passengers, cattle, goods, etc., and to make reasonable charges for such carriage and conveyance, in addition to the tonnage rates. By s. 182 it was provided that the company might, "from time to time, make such orders for fixing the sum to be charged by it in respect of *small parcels*, not exceeding 1 cwt. each, as to it should seem proper." And by s. 186 it was further provided that "the aforesaid rates and tolls to be taken by virtue of the act should at all times be charged *equally and after the same rate per ton* throughout the whole of the said railway, in respect of the same description of articles, matters or things," and that "no reduction or advance in the said rates and tolls should either directly or indirectly be made partially or in favor of or against any particular person or company." Under the powers given to it by s. 182, the company framed a scale of charges for the carriage of parcels not exceeding 1 cwt. each, which charges were higher than the tonnage rates warranted by s. 175, but which included a reasonable charge for the use of its carriages and locomotive power under ss. 177 and 179. Under this scale, where a number of separate parcels (each weighing less than 1 cwt., but exceeding 1 cwt. if taken in the aggregate) were brought to the railway by the same person, and containing the same article, and *all directed to the same person* at their place of destination, the company charged the tonnage or lower rate allowed by s. 175; but if similar parcels were brought, *addressed to several different persons*, they were charged the higher or parcels rate. Under a special case setting out these facts, *held*, that there was nothing to induce the court (or which

Delay.

ought to induce a jury) to infer that the charges so made were unreasonable, regard being had to the additional trouble incurred by the company. *Baxendale v. Eastern Counties Ry Co.*, 4 Common Bench, N. S., 68; 98 E. C. L., 61. 1858.

409. Statute of frauds. A. agreed verbally to buy of B. all the whalebone he could procure at a certain price, to be sent by a particular railway, A. agreeing to pay the carriage. Some whalebone, to an amount exceeding 10*l.*, having been delivered at the railway station by B., consigned to A., and having been duly invoiced to him, was lost in the transit. B. then wrote requesting A. to make a claim against the company. *Held*, that there having been no acceptance and receipt of the goods within the s. 17 of the statute of frauds, A., the consignee, was not entitled to sue the railway company for the loss. *Coombs v. Bristol and Exeter Ry Co.*, 3 Hurlstone & Norman (Exchequer), 510. 1858.

410. Verdict. A verdict in a doubtful case upheld on the evidence. *Central R. R. Co. v. Ferguson*, 68 Ga., 83. 1879.

CARRIAGE OF PASSENGERS.

See BAGGAGE; INJURY TO PASSENGERS.

[The various matters connected with the carriage of passengers will be found distributed under the various appropriate heads in this digest.]

1. Delay. A tradesman took a ticket to go by railway from London to Hull. On arriving at Grimsby he found no train ready to take him to Hull the same night, as it should have been according to the published time-bill. He slept at Grimsby, and in the morning paid 1*s.* 4*d.* fare to Hull. In consequence of the delay he failed to keep appointments with his customers, and was detained many days. *Held*, that though he would have been entitled to have performed the contract at the expense of the railway company, yet not having done so, that he was not entitled to recover anything more than nominal damages in addition to the 1*s.* 4*d.*, and perhaps the cost of his bed, etc., at Grimsby. *Hamlin v. Great Northern Ry Co.*, 1 Hurlstone & Norman (Exchequer), 408, 1856; 38 Eng. Law & Equity, 335.

2. — G. purchased of the M. and C. R. R. Co. a ticket entitling him to passage on the train from S. to C. He was at the depot at train time, as indicated by the schedule. The train ran sixty yards beyond the platform, halted only a moment, not long enough to afford time to get aboard. A freight train arrived at eight A. M., same day, and conveyed him to C. No damages were proved except disappointment, delay and inconvenience. The jury found a verdict for \$1,500 for plaintiff. *Held*, that this verdict was excessive; that punitive damages will not be allowed in the absence of any circumstances of malice, oppression, insult, personal injury, damages to business, mental or physical suffering, although something more than actual damages may be awarded against common carriers, by way of punishment for neglect of duty and protection to the public. *Memphis and Charleston R. R. Co. v. Green*, 52 Miss., 779. 1875.

3. — error in time tables. The G. N. Ry Co., whose line communicated with the line of the N. E. Ry Co. at M., had arrangements by which its trains starting from P. at 7 P. M., and going to M., there met a train of the N. E. Company running from M. to H., by which passengers from P. to H. were forwarded. The G. N. Company published monthly time tables, which stated, in the usual way, that the 7 P. M. train from P. carried to H. At the end of the month, after the G. N. time tables for the ensuing month were prepared in this form and printed, but before they were published, the N. E. Company discontinued the train from N. to H. The G. N. made no alteration in its time tables already printed, but published and circulated them after it knew that there was no such train. Plaintiff, having seen one of the time tables, made his arrangements, on the faith of it, to go from P. to H. by the 7 P. M. train; he came to P. in time, went to the station, and then, for the first time, learned that he could go no further than M. by that train. He was delayed in his journey, and sustained damage, for which he sued the G. N. Company. *Held*, by the whole court, Lord Campbell, C. J., Wightman and Crompton, JJ., that he was entitled to recover on the ground that the circulation of the time tables amounted to a representa-

Failure to Carry Passengers — Free Passes.

tion on the part of the defendant that there was a train, which was false to the knowledge of those making it, and calculated to induce the plaintiff to act as he did. *Denton v. Great Northern R'y Co.*, 5 Ellis & Blackburn, 860; 85 E. C. L., 860, 1856; 34 Eng. Law & Equity, 154.

4. — **excursion tickets.** Excursion tickets were issued by the G. N. R'y Co. at B. to convey passengers to L. and back, by any train advertised for that purpose, within the following fourteen days. B. was not on the line of the G. N. R'y Co., but on that of the S. Y. R'y Co., which joined the other line at D. Two trains a day (morning and evening) were then advertised for the conveyance back from L., in pursuance of the notice on the ticket, but B. was not mentioned in the advertisement as one of the stations at which either of those trains would stop, although D. was so mentioned. H., who had taken one of the tickets at B., and had been conveyed to L., returned within the fourteen days by one of the evening trains, and, on arriving at D. the next morning, found that there was no train for B. on that day. He posted to B., and sued the company for the expense of so doing. *Held*, that he was entitled to recover. *Hawcroft v. Great Northern R'y Co.*, 8 Eng. Law & Equity, 362; 16 Jurist, 196. 1852.

5. — **special train.** The failure to make connection through delay of a train will not authorize a passenger to hire a special train and charge the expenses thereof to the carrier, in a case where there is no business or engagement rendering such act especially necessary. *Le Blanche v. London and North Western R'y Co.*, Law Reports, 1 Common Pleas Division, 286, 1876; 17 Eng. (Moak), 248.

6. — **ticket.** The mere taking of a ticket for a journey by-railway does not amount to a contract on the part of the railway company, or impose upon it a duty, to have a train ready to start at the time at which the passenger is led to expect it. *Hurst v. Great Western R'y Co.*, 19 Common Bench, N. S., 310; 115 E. C. L., 310. 1865.

7. **Failure to carry passengers.** It is the duty of those in charge of a train, on approaching a station where such trains stop upon being flagged so to do, to be on the

alert, and look out for such signal, and stop when it is given. *Morse v. Duncan*, 8 Amer. & Eng. R. R. Cases (U. S. C. C.), 374. 1882.

8. **Failure to run train.** A railroad company, which fails to run a train according to its published schedule, unless prevented by some valid reason, is liable to a person sustaining injury from such failure, for the damages actually sustained by him as the direct and necessary result thereof. *Savannah, Skidaway, etc., R. R. Co. v. Bonaud*, 58 Ga., 180. 1877.

9. **Failure to stop at station.** Where a person who had purchased a ticket for passage to a certain station, by his own fault or mistake got upon a train which, by the rules of the company, did not stop at that station, he could not recover damages of the company for the refusal and failure of the conductor to stop the train and let him off at such station. *Ohio and Mississippi R'y Co. v. Applewhite*, 52 Ind., 540, 1876; *Beauchamp v. International and Great Northern R'y Co.*, 56 Tex., 239, 1882; 9 Amer. & Eng. R. R. Cases, 307.

10. — A railway company is not required to stop a train and allow a passenger to get off, except at a regular station or stopping place. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Nuzum*, 50 Ind., 141, 1875; 9 Amer. R'y Rep., 396.

11. — **jumping from car.** T. went aboard the cars and paid fare to Boguichitto. The train did not stop, but ran past two miles to a water tank. T. demanded that the train should return. The conductor was courteous and polite, and submitted the option to T. to leave the train at the tank or ride to the next station and return to Boguichitto free of charge. T. accepted the latter alternative. *Held*, that this was a compulsory choice. The train upon which he returned ran beyond the station and landed him about one hundred and fifty yards beyond, and he voluntarily jumped off without injury. On the trial, the counsel for defendant demurred to the testimony, and the court sustained the demurrer. *Held*, that this was error. *Thompson v. New Orleans, Jackson, etc., R. R. Co.*, 50 Miss., 315. 1874.

12. **Free passes.** Public policy requires that common carriers should exercise the same extreme care in carrying passengers

Constitutional Law — Failure to Erect.

free as in carrying them for hire. (See INJURY TO PASSENGERS.) *Flint and Pere Marquette R'y Co. v. Weir*, 87 Mich., 111. 1877.

13. Rates. The W. Company by its original act was authorized to charge reasonable rates for the conveyance of passengers. By a subsequent act the company was empowered to extend its line and to charge a lump sum for carrying passengers over that extension. A third and later act allowed the W. Company to amalgamate with another company, provided that it reduced its charges to the same scale as that of the other company. That scale was one penny a mile for each third-class passenger. The plaintiff traveled over the line of the W. Company with a third-class ticket, and was charged as his fare at more than the rate of one penny a mile. In the course of his journey he traveled over the extension. The W. Company also charged the plaintiff with the government duty. *Held*, that the W. Company was not entitled to charge the plaintiff more than one penny per mile, but that it was entitled to charge him with the government duty. *Brown v. Great Western R'y Co.*, Law Reports, 9 Queen's Bench Division, 744, 1882; 9 Amer. & Eng. R. R. Cases, 271.

14. Sunday contract. A complaint charged, in substance, that the plaintiff, with about eighty other residents of M., desired to attend certain religious ceremonies at W. on a certain Sunday; that through their agent they individually contracted with defendant to carry them from M. to W. and back on that day by a special train, which was to leave W. on its return to M. at 5:30 P. M.; that the party was carried to W., but defendant did not have cars ready to bring them back at the appointed time, but failed and refused to furnish any means of bringing them back, by reason whereof plaintiff was greatly injured in bodily health, suffered great pain and anxiety of mind, lost much time from business, and was subjected to indignities and insults from the employees of the company. A second count, similar to the first in other respects, alleged that the agent of plaintiff and others agreed on their behalf with defendant to pay a certain sum for the special train for the party. *Held*, that the action was upon special contract,

and not for a tort. No action could be sustained against the defendant for a breach of its general duty as carrier upon the facts alleged, defendant being under no obligation to carry any person on its road on Sunday. The action being on contract, the court erred in refusing to charge that plaintiff could not recover for disappointment of mind, sense of wrong, or injury to his feelings. *Walsh v. Chicago, Milwaukee and St. Paul R'y Co.*, 42 Wis., 23, 1877; 15 Amer. R'y Rep., 71.

15. Train breaking or running off the track is prima facie negligence. Where an accident happens to a passenger in a carriage, on a line of railway, either by the carriage breaking down or running off the rails, that is *prima facie* evidence for the jury of negligence on the part of the railway company, and the court will not grant a rule to set aside the verdict or for a non-suit. *Dawson v. Manchester R'y Co.*, 7 Hurlstone & Norman (Exchequer), American Reprint, 1037; 5 Law Times, N. S., 632. 1862.

CATTLE.

See CARRIAGE OF LIVE STOCK; INJURY TO DOMESTIC ANIMALS.

CATTLE-GUARDS.

See INJURY TO DOMESTIC ANIMALS.

1. Constitutional law. A railway company exercising its powers subject to the provisions of the present constitution of Ohio, and required by the act of 1874 (71 Ohio L. 85), passed since its incorporation, to construct and maintain cattle-guards at places on its road where public highways are or may be constructed across its track, is not entitled to compensation for making or maintaining such cattle-guards. *Lake Shore and Michigan Southern R'y Co. v. Sharpe*, 7 Amer. & Eng. R. R. Cases (Ohio), 543, 1882; *Railway Co. v. Sharpe*, 38 Ohio St., 150, 1882.

2. Failure to erect; damages. In an action for damages for injuries caused to growing crops in consequence of a failure to construct cattle-guards, the measure of recovery is the market value of the crops when matured, less the expense of fitting

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them for the market from the time of the injury, and diminished by whatever the value of the portion saved, if any, may be. *Smith v. Chicago, Clinton and Dubuque R. Co.*, 38 Ia., 518. 1874.

3. — Where the owner had applied to different persons connected with the railroad to have cattle-guards put in, and had reason to expect they would be, he was justified in planting his crops in the unprotected field. *Ib.*

4. — Where an action is brought before a justice of the peace against a railway company for neglecting to make proper cattle-guards on the railroad when it entered and left fenced land, whereby stock entered upon the premises of plaintiff and committed damages to his growing crops, *held*, the action is one against the railway company for damages resulting from omission of positive duty required of it by the statute, and not an action for trespass on real estate. *Held*, further, that in such an action the plaintiff has the right to include in his claim for damages the value of his services in driving out and herding the stock to prevent further and additional damages to the crops. *St. Louis and San Francisco R'y Co. v. Sharp*, 27 Kans., 134, 1882; *Same v. Edwards*, *ib.*, 137; *Smith v. Chicago, Clinton and Dubuque R. Co.*, 38 Ia., 518, 1874.

5. — Land belonging to one party was inclosed in common with that of another, at a time a railway was constructed through it, and subsequently a division fence was erected, and the company notified to construct a cattle-guard thereat, which it failed to do. *Held*, that the company was liable for injury done to the crops upon the land by cattle which entered it from the railway, and that the measure of damages was the actual value of the crops destroyed. *Donald v. St. Louis, Kansas City and Northern R'y Co.*, 44 Ia., 157. 1876.

6. Leased lines. Where a railway company omits to make sufficient cattle-guards where the track enters and leaves an unfenced field, *held*, that the company is liable to the owner of the field for damages resulting therefrom; and this liability is not avoided by the fact that, after constructing its road, the company leased the same to another railway company. *St. Louis, Wichita*

and Western R'y Co. v. Curl, 28 Kans., 622, 1882; 11 Amer. & Eng. R. R. Cases, 458.

7. Sufficiency. In an action for an injury to a horse, caused by the defective construction of a railway, the testimony of an expert that, in his opinion, a cattle-guard or barrier was necessary at a particular point, is incompetent. *Amstein v. Gardner*, 134 Mass., 4. 1883.

8. — In an action for damages resulting from defective cattle-guards, where the evidence showed that the defendant put in cattle-guards which were possibly sufficient, and that afterwards they were broken and rendered almost useless, *held*, that the court below did not err in refusing to give an instruction to the jury which embodied the following proposition: "Unless the jury believe from the evidence that said railway company did so fail to put in proper cattle-guards at such places, then they will find for the defendant." *St. Louis and San Francisco R'y Co. v. Edwards*, 26 Kans., 72, 1881; 7 Amer. & Eng. R. R. Cases, 547.

CELLAR.

1. Drain. In a suit for an injury to a drain leading from the plaintiff's cellar, the fact that the drain imperfectly accomplished the purposes for which it was constructed cannot justify the injury to it; nor may such injury be justified by a license from a third party on whose land the drain is in part constructed. *Ohio and Mississippi R'y Co. v. Hemberger*, 43 Ind., 462. 1873.

2. Injury. It is not necessary that one whose cellar drain has been injured by a railway construction should give notice of the injury to the party that committed the injury before commencing suit to recover damages. *Ib.*

CERTIFICATES OF INDEBTEDNESS.

1. Eastern Railroad Co. A secured creditor of the Eastern R. R. Co. is not entitled, after the lapse of four years from the enactment of the Stat. of 1876, ch. 236, and five years from the time to which, by the terms of the statute, the claims against the company were to be made up as cash, to present

Appeal — New Trial.

his claim for adjustment and to receive certificates of indebtedness therefor, he having in the mean time received interest on his debt at a greater rate than he would have received under such certificates. *Hamor v. Eastern R. R. Co.*, 133 Mass., 315. 1882.

CERTIORARI.

See EMINENT DOMAIN: HIGHWAY.

1. Appeal. Where counsel have been misled by counsel on the other side of the cause, as to the time for taking an appeal, a writ of *certiorari* will issue upon a proper showing. *Parker v. Wilmington and Weldon R. R. Co.*, 84 N. C., 118. 1881.

2. — *Certiorari* proceedings cannot be used in lieu of an appeal or writ of error in an action at law. *Seates v. Chicago and Northwestern R'y Co.*, 104 Ill., 93. 1882.

3. Common law writ. A statute prescribing that the determination of an inferior tribunal shall be final and conclusive is a bar as well to a review by a common law *certiorari* as by appeal. *People ex rel. v. Betts*, 55 N. Y., 600. 1874.

4. Eminent domain. *Certiorari* will lie to review proceedings to condemn land when void for want of jurisdiction; though it should not be favored where there is any other adequate remedy. *Dunlap v. Toledo, Ann Arbor and Grand Trunk R. R. Co.*, 46 Mich., 190. 1881.

5. — A writ of *certiorari* removing condemnation proceedings to the supreme court was not retained by the court where the questions raised were such as could be raised by *certiorari* or appeal after the inquest of damages, and the retention of the writ was likely to do injury by delaying the proceedings. *Detroit Western Transit Junction R'y Co. v. Backus*, 48 Mich., 582. 1882.

6. Injury to domestic animals. Where a judgment for damages for killing stock is set aside on *certiorari* the cause should be remanded for a new trial. *Mitchell v. Western and Atlantic R. R. Co.*, 66 Ga., 242. 1880.

7. Proceedings. Where the proceedings on an application for the writ of *certiorari* are not returned to the next term of the superior court, unless such court convenes within twenty days after the issuing of the

writ, the *certiorari* should be dismissed. *Southwestern R. R. Co. v. Baldwin*, 57 Ga., 150. 1876.

8. Served. If a writ of *certiorari* is not served on or before its return day, it loses vitality and ceases to operate, and cannot be revived by rule of court taken after such return day. *State v. Comm'rs of New Brunswick*, 37 N. J. Law, 394. 1875.

CHAMPERTY.

1. Assignment of part of judgment. Where an administratrix paid an attorney for services rendered in an action commenced by her decedent, by the assignment to him of a portion of the judgment recovered, in accordance with a contract made with the attorney by the decedent, it was held that the assignment would not be rendered invalid by the fact that such contract was champertous and void. *Ross v. Chicago, Rock Island and Pacific R. R. Co.*, 55 Ia., 691. 1881.

2. — A champertous contract between the plaintiff and his attorney in an action for damages is no ground for the abatement of the action. *Allison v. Chicago and Northwestern R'y Co.*, 42 Ia., 274. 1875.

3. — compromise. A compromise by the plaintiff with defendant, whereby a judgment was released, was held to discharge a portion of the judgment assigned under a champertous contract to the plaintiff's attorneys. *Atchison, Topeka and Santa Fe R. R. Co. v. Johnson*, 29 Kans., 218, 1883; 11 Amer. & Eng. R. R. Cases, 1. See, also, *Coughlin v. N. Y. Central and Hudson River R. R. Co.*, 71 N. Y., 443. 1877.

CHANCERY.

1. New trial. A bill of exceptions is unknown to chancery practice, and cannot be reserved to the rulings of the chancellor on the trial of an issue of fact before him by a jury; the only remedy for erroneous rulings, whether the issue is tried at law or before the chancellor, is an application to the chancery court for a new trial. *Barnett v. Montgomery and Eufaula R. R. Co.*, 51 Ala., 555. 1874.

Georgia Statutes — Amendment.

CHANGE BILLS.

1. Georgia statutes. Under the statutes of Georgia the W. & A. R. R. Co. was authorized to issue "change bills," redeemable in current bank notes when presented in amounts of \$5 and over, pledging the property of the company and the faith of the state for their redemption. *Held*, that the company may be sued on these bills notwithstanding the fact that the state is the sole owner of the property of the company. *Western and Atlantic R. R. Co. v. Taylor*, 6 Heiskell (Tenn.), 408. 1871.

2. — These bills not being issued solely on the faith and credit of the state are not bills of credit within the meaning of the federal constitution. *Ib.*

3. — The bills, being lawful in Georgia, may be enforced in Tennessee. *Ib.*

CHANGE OF LINE.

1. Damages to private citizen; abandonment of line. In an action by a private citizen to recover damages from a railroad company sustained in the depreciation of his property by such company's discontinuance of its old route for the passage of its *through* trains, and its construction of a new route for that purpose, *held*, not competent for the citizen to raise the question that such acts of the company were in violation of its charter; such question could only be raised in an action brought by the state. *Kinealy v. St. Louis, Kansas City and Northern R'y Co.*, 69 Mo., 658, 1879. See, also, *Martindale v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 60 ib., 508. 1875.

CHANGE OF VENUE.

See VENUE.

CHARTER.

See BRIDGES; CONSTITUTIONAL LAW; DIRECTORS; EMINENT DOMAIN; INJUNCTIONS.

1. Amendment. The provision that a corporation "shall have perpetual succession" does not plainly express an intent not to reserve power to amend or repeal the charter.

Notwithstanding such a provision in the charter of a company, the legislature has constitutional power to pass an act amending the charter, provided such amendment did not affect its title to, or right of enjoyment of, some property right that had previously vested. *Cumberland and Ohio R. R. Co. v. Barren County Court*, 10 Bush (Ky.), 604. 1874.

2. — All charters and grants of or to corporations, etc., shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed. Act of February 14, 1856. *Ib.*

3. — A charter being a contract, when the original charter provided that no amendment should be made except on the unanimous petition of the president and directors, and any amendment so recommended to be unanimously accepted by the president and directors, an amendment accepted and adopted by the president and directors unanimously will be valid as a substantial compliance with the condition, although not recommended by the unanimous petition of the president and directors, that provision being merely directory. *Deaderick v. Wilson*, 8 Baxter (Tenn.), 108. 1874.

4. — The power to alter or repeal the charters of corporations does not affect their rights in their property other than the franchises; but such rights remain inviolable. *Attorney General v. R. R. Companies*, 35 Wis., 425. 1874.

5. — A reserved power of amending and repealing the charter of a corporation is a legislative power. *Ashuelot R. R. Co. v. Elliot*, 58 N. H., 451. 1878.

6. — The reservation of the right of alteration and repeal in the charter of a corporation has none of the characteristics of a mere power, which, when once exercised, is exhausted. Its effect is on the legislative grant itself, to prevent its becoming, what it otherwise might become, a contract with the state. An act containing such provision confers a mere privilege, subject at any time to be withdrawn or modified at the will of the legislature. *State v. Comm'r of Railroad Taxation*, 37 N. J. Law, 228. 1874.

7. — The manner of amending articles of incorporation under the statutes of New York, considered. *New York, Lake Erie and*

Amendment.

Western R'y Co., In re, 25 Hun (N. Y.), 556. 1881.

8. — An amendment to the charter of the Union Passenger R. R. Co., construed. *West Philadelphia R. R. Co. v. Union Passenger R. R. Co.*, 9 Philadelphia, 495. 1872.

9. — acceptance of amendments. Where the charter of a railway company provides that it "shall have all the rights, powers, etc., etc., contained in the N. and C. R. R. Co., and amendments thereto," an acceptance of the charter binds it to all the amendments of the charter of the N. and C. R. R. Co. No action specially accepting the amendments was required. *Mulloy v. Nashville and Decatur R. R. Co.*, 8 Lea (Tenn.), 427. 1881.

10. — amendment to supplement to charter. A statute of a state, which declares that all charters of corporations granted after its passage may be altered, amended or repealed by the legislature, does not necessarily apply to supplements to an existing charter which were enacted subsequently to the statute. *New Jersey v. Yard*, 95 U. S., 104. 1877.

11. — constitutional law. The provision of the Wisconsin constitution, that railroad charters "may be altered or repealed by the legislature at any time after their passage," underlies all the grants of rights and franchises to the Northwestern Railway Company, and all its stock and securities were taken and are held subject to this paramount condition, of which in law all holders had notice. *Peik v. Chicago and Northwestern R. R. Co.*, 6 Bissell (U. S. C. C.), 177. 1874.

12. — It is sufficient if the title of an act amending a charter fairly give notice of its subject so as reasonably to lead to an inquiry into the body of the bill. *State Line and Juniata R. R. Co.'s Appeal*, 77 Pa. St., 429. 1875.

13. — A law imposing upon railroad companies a liability for consequential damages caused by the construction of their works applies to corporations which received their charters before the passage of the law, such legislation having relation to remedies only, and not being within the constitutional prohibition as to laws impairing the obligation of contracts. *Duncan v. Pa. R. R. Co.*, 13 Philadelphia, 68. 1879.

14. — eminent domain. Provisions in the charter of a railroad company regulating the manner of taking land for the use of the road are not in the nature of a contract, but may be altered by subsequent legislation. *Miss. R'y Co. v. McDonald*, 12 Heiskell (Tenn.), 54. 1873.

15. — injunction will not restrain application to amend. An agreement between two companies for an application to parliament for the necessary powers to enable one company to work the line of the other is innocent, and equity will not interfere to prevent a company from putting its seal to such an agreement. *Winch v. Birkenhead R'y Co.*, 13 Eng. Law & Equity, 506; 16 Jurist, 1035. 1852.

16. — injunction; application for amendment; restraint of such application; jurisdiction. A railway company agreed to purchase the land of a land owner, and had a clause to that effect inserted in its act, whereupon he withdrew his opposition to the act. The company afterwards applied to parliament for an act to enable it to abandon the branch which affected the land in question, and to repeal the clause. *Held*, that the court would not restrain the company from making the application. The court has power to restrain an application to parliament, but it is difficult to conceive a case in which it will be done. *Steele v. North Metropolitan R'y Co.*, Law Reports, 2 Chancery Appeal Cases, 237. 1867.

17. — mortgage of franchise. A mortgage of a railway and its franchises, made by permission of the legislature, does not confer on the mortgagee any greater rights than the mortgagor had, nor affect the power of the legislature to alter the franchises. *Attorney General v. R. R. Companies*, 35 Wis., 425. 1874.

18. — statute. It seems that the reservation to the legislature, in the act of February 19, 1849, regulating railway companies, to alter or amend any charter granted under said act, was only intended to enable the legislature to act without the consent and against the will of the corporation; but where the alteration is made on the suggestion of the company, the legislature has nothing to do with the case. *Cross v. Peach Bottom R'y*

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Co., 90 Pa. St., 392, 1879; 1 Amer. & Eng. R. R. Cases, 366.

19. — stock subscriptions. When, at the time of subscribing stock in a corporation, there are existing laws by which the charter of the body politic may be fundamentally changed, such subscription must be presumed to have been made with a view to such laws, and to changes which may possibly be made conformably to them. And in such case a majority of the stockholders may adopt such changes against the will of a minority. *Mowrey v. Indianapolis and Cincinnati R. R. Co.*, 4 Bissell (U. S. C. C.), 78. 1866.

20. Articles of incorporation. Defendant subscribed to articles of association for the purpose of organizing a railway corporation, under the provisions of the general railroad act of 1850 (ch. 140, Laws of 1850); at the time of signing the names of the directors were left in blank. *Held*, that the instrument was incomplete and inoperative as against defendant; that there was no implied consent upon his part to the insertion of the names of any persons as directors, and that by the insertion of such names without his consent the instrument was not made binding upon him. *Dutchess and Columbia R. R. Co. v. Mabbett*, 58 N. Y., 397, 1874; 7 Amer. R'y Rep., 339.

21. Assignment of corporate rights. The franchises to build or own and manage a railroad, and to take tolls thereon, are not necessarily corporate rights and may be assigned; but the franchise to form or to be a corporation and act in a corporate capacity is legislative, and not the subject of sale or transfer, except by some positive provision of statute law pointing out the mode of transfer. *Ragan v. Aiken*, 9 Lea (Tenn.), 609. 1882; 9 Amer. & Eng. R. R. Cases, 201.

22. Beginning of construction of railway; lease. A corporation, authorized to build a railway upon certain streets and over a certain route designated in its charter, leased to another corporation the right to use, maintain and operate a railroad upon a portion of such route, upon tracks to be laid down by the second company, with all the rights and franchises of the first-mentioned company, reserving to the former company the right to use the tracks to be laid upon a

portion of such route upon paying a certain price therefor. The second company thereafter built and operated a road upon the route described in the lease. *Held*, that the acts of the second company in so doing were not such a beginning of the construction of its road by the first as was required by § 2 of ch. 775 of 1867, in order to preserve its corporate existence. *Brooklyn, Winfield and Newtown R'y Co., In re*, 19 Hun (N. Y.), 314; 81 N. Y., 69. 1880.

23. Branch lines. A railroad company, having a power to build branches, may, under that power, build a line commencing near one of its termini, and running in the same general direction with the main line, so as to form practically an extension of the main line. *Atlantic and Pacific R. R. Co. v. City of St. Louis*, 66 Mo., 228. 1877.

24. — A railroad company was authorized, by its charter, to build a main line and branches, and was required to complete its road within seventeen years from the date of the charter. *Held*, that this limitation did not apply to the building of branch roads, at least so as to prevent the company from building a branch road over a right of way acquired before the expiration of that period. *Ib.*

25. Cannot be collaterally assailed. The charter of a railway company cannot be attacked collaterally for bad faith in obtaining it. *Garrett v. Dillsburg and Mechanicsburg R. R. Co.*, 78 Pa. St., 465, 1875; *Aurora and Cincinnati R. R. Co. v. City of Lawrenceburgh*, 56 Ind., 80, 1877; 18 Amer. R'y Rep., 136.

26. Compensation for procuring charter. Where a number of persons, unincorporated, but associated for a common object, intending to procure a charter, authorize acts to be done in furtherance of their object by one of their number, with the understanding that he should be paid if such acts were necessary to the organization and its objects, and are accepted by the corporation and the benefits enjoyed, they must be compensated for. *Bell's Gap R. R. Co. v. Christy*, 79 Pa. St., 54. 1875.

27. Condition; when conditions subsequent. The charter of a railroad company conferred corporate powers in terms importing an immediate grant, with a proviso

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“that said persons shall commence operations upon its road within two years after the passage of the act, and complete the same within five years.” *Held*, that the requirements of the proviso were not conditions precedent to a corporate existence. *Cheraw and Chester R. R. Co. v. White*, 14 So. Car., 51. 1880.

28. Constitutional law. The charter of a private corporation may vest rights in the corporators and stockholders which no subsequent legislation can impair or diminish. *Covington v. Covington and Cincinnati Bridge Co.*, 10 Bush (Ky.), 69. 1873.

29. — A charter granted by the legislature and accepted by a railroad corporation constitutes a contract between the state and the corporation, the obligation of which cannot be impaired by a state constitution subsequently adopted. *Scotland County v. Missouri, Iowa and Nebraska R'y Co.*, 65 Mo., 123. 1877.

30. — The act of 1878 (ch. 206, Laws of 1878), purporting to amend the act of 1874 (ch. 575, Laws of 1874), in relation to the Brooklyn, Winfield and Newtown R'y Co., by extending the time in which the company is required to finish and put in operation its road to five years from the passage of the act, is in violation of the constitutional provision prohibiting the legislature from passing “a private or local bill . . . granting to any corporation . . . the right to lay down railroad tracks” (Const., art. 3, § 18), and is void. *Brooklyn, Winfield and Newtown R. R. Co., In re*, 75 N. Y., 335. 1878.

31. — The charter of the Morris Canal and Banking Co. is irrevocable, and created a contract which is incapable of alteration or repeal by the legislature, except by mutual consent, and is, therefore, unaffected by the constitution of 1844, which forbids the taking of property by private corporations for public use, without compensation first made. The company's charter, and the powers and privileges therein granted, continue, notwithstanding the change of policy adopted by the constitution of 1844. *Lehigh Valley R. R. Co. v. McFarlan*, 31 N. J. Eq., 706. See, also, *Same v. Same*, ib., 730. 1879.

32. — *Alabama.* The act to constitute the purchasers of any railroad, etc., a body politic and corporate, having been enacted

since article 13 of the constitution of 1868 became operative, and it, and similar provisions in the present constitution providing that the general laws, under which corporations may be formed, may be amended, altered or repealed, corporations thus formed are subject to legislative control. *Mobile and Montgomery R. R. Co. v. Steiner*, 61 Ala., 559. 1878.

33. — *title of act.* An act incorporating a railroad company need not express in its title any of the powers, rights, privileges or immunities which the charter is intended to confer. The charter of a private corporation is a contract as between the state and the corporation; and the stipulations, terms and conditions of a contract are to be looked for in the body of the instrument, not in the title or caption. *Goldsmith v. Rome R. R. Co.*, 62 Ga., 473. 1879.

34. — The charter of a railway company will not be subject to the constitutional objection of embracing more than one subject from the fact that it authorizes the construction, etc., of one or more extensions of the principal line, in different directions. The charter of the Peoria and Hannibal R'y Co. is not obnoxious to this objection, as the extensions authorized are not regarded as independent and distinct lines from the main road. *Ross v. Chicago, Burlington and Quincy R. R. Co.*, 77 Ill., 127. 1875.

35. Construction. The court will not construe the compulsory powers of a railway company so as to extend them beyond the express words or absolutely necessary implication of the act; it being the duty of the company to take care that the public understand, before the act is passed, the extent of the compulsory powers which it requires. *Lamb v. North London R'y Co.*, Law Reports, 4 Chancery Appeal Cases, 522. 1869.

36. — No rule is better settled than that charters of incorporation are to be strictly construed against the corporators. *New Orleans and Carrollton R. R. Co. v. New Orleans*, 34 La. An., 429. 1882.

37. Construction; enabling, not obligatory. Statutes authorizing the building of railways are enabling, not obligatory acts. *Scottish North Eastern R'y Co. v. Stewart*, 3 McQueen, House of Lords, Scotch App., 382. 1859.

Construction of Various Charters.

38. — The promoters of an act of parliament for authority to make a line of railway, pending their bill in parliament, entered into an agreement with a landholder through whose lands the projected railway was to pass, relative to the mode in which the railway should be constructed on his lands. The promoters agreed to certain stipulations on consideration of the landholder withholding his opposition to the bill. The act of parliament was obtained, but a second act becoming necessary, a second agreement was entered into between the company and the landholder. As in the first agreement, the consideration on the one hand was the withholding of opposition, while on the other hand the company "undertook and agreed" to construct the railway on the landholder's estates in a specified manner. The act was obtained empowering the company to construct the railway within a certain time. Part only of the line was constructed, but not that part of it which it was intended should pass through the landholder's property, and to which the agreements referred. The landholder was not a shareholder. In an action at his instance to compel completion of the line, *held*, that acts of parliament empowering a company to execute a line of railway are not of the nature of a contract with the public imposing a binding obligation on the company to execute the line, and which one of the public could enforce; that the partial execution of the line did not give the landholder a right to compel completion of the whole of it; that agreements having reference to the *mode* of constructing a railway on a landholder's estate are not available to him as a means of compelling completion of the line where the company's statutes contain no imperative obligation on it to do so. *Blantyre v. Caledonian and Dumbartonshire R'y Co.*, 16 Scotch Session Cases, 2d series, 90. 1853.

39. — **conflicting grants.** A railway company having acquired a legal right to and possession of land, and constructed its railway over the same under the provisions of its act, another railway company, to whom the legislature had given power to purchase the same land for the purposes of its undertaking, was restrained by injunction from exercising such power pending the

trial of the legal question of the effect of such conflicting powers. *Manchester, Sheffield and Lincolnshire R. R. Co. v. Great Northern R. R. Co.*, 9 Hare (Eng. Ch.), 284. 1851.

40. — **term railway includes branches.** The term "railway" in the act incorporating a railway company, used in a clause conferring certain rights upon a proprietor through whose lands the line was to pass, *held* to apply not only to the main line, but to branches subsequently constructed. *Wauchope v. North British R'y Co.*, 2 Stuart, Milne & Peddie, House of Lords, Scotch App., 155. 1853.

41. **Construction of various charters.** The charter of the Philadelphia and Reading R. R. Co. construed. *Gowen's Appeal*, 1 Amer. & Eng. R. R. Cases (Pa.), 437. 1881.

42. — The charter of the Baltimore and Drum Point R. R. Co. examined, and a portion of it held invalid; that part, as approved by the governor, being materially variant from the same as it passed the legislature. *Berry v. Baltimore and Drum Point R. R. Co.*, 41 Md. 446, 1874; 7 Amer. R'y Rep., 399.

43. — While in one sense the Washington Branch began at the Relay House, nine miles from Baltimore (the road between that point and Baltimore having before been constructed, and in actual operation as a part of the main line of the Baltimore and Ohio R. R. Co., then extending west toward the Ohio), it was obvious from the acts of assembly that the contract of the defendant related to and embraced also that portion of the road between the Relay House and Baltimore; and the one-fifth of the passenger fares secured to the state was one-fifth upon the whole road between Baltimore and Washington. *Baltimore and Ohio R. R. Co. v. State*, 45 Md., 596. 1876.

44. — The charter of the Dixon and Quincy R. R. Co. construed. *Town of Abington v. Cabeen*, 106 Ill., 200. 1883.

45. — **Philadelphia City R'y Co.** The act incorporating the defendant, authorizing it to extend its road at any time, repeals sec. 19 of the act of 1849, as far as it applies to defendant. *West End R'y Co. v. Philadelphia City R'y Co.*, 10 Philadelphia, 75. 1873.

Miscellaneous.

46. Contract to make no resistance to obtaining charter. An agreement to purchase certain lands of the plaintiff had been entered into by the proprietors of an intended railway company, and thereupon the plaintiff withdrew his opposition to their proposed bill in parliament. The promoters of a competing railway company, who also proposed to pass through the plaintiff's lands, and to which he was likewise opposed, petitioned parliament for a bill, and, under the sanction of a committee of the house of commons, the merits of the respective lines were referred to arbitration. The two companies agreed that the successful should adopt the engagements of the rejected company, and to this agreement the plaintiff, by his agent, assented. The award of the arbitrators, being in favor of the second company, its bill passed. *Held*, by the vice-chancellor, and by the lord chancellor, affirming his honor's decision, that the plaintiff having, on the faith of the agreement between the two companies, offered no opposition to the passing of the act, the second company, as the condition of entering upon the lands of the plaintiff, were bound by the terms of the agreement between the plaintiff and the first company. *Stanley v. Chester and Birkenhead R'y Co.*, 1 Eng. R. R. & Canal Cases, 58. 1838.

47. Contract with member of parliament to withdraw opposition to special act. An agreement had been entered into between the plaintiff, a peer of parliament, and the defendants, proprietors of a railway company, whereby, in consideration of the plaintiff's withdrawing his opposition to a bill then before the house of lords, for authorizing the undertaking, the defendants contracted to pay to the plaintiff 5,000*l.*, and to endeavor to procure in the then next session of parliament an act to authorize a deviation from the then contemplated line. It was pleaded that this agreement was void on three grounds: First, because it had been concealed from the legislature; secondly, because concealed from the other landholders; and thirdly, because the plaintiff, being a peer of parliament, could not legally enter into a contract of that nature. *Held*, by the court of the exchequer chamber, reversing a judgment of the court of queen's

bench, that the agreement was valid, and that the plaintiff was not bound to communicate to the legislature the bargain he had made with the company. *Held*, also, by the court of the exchequer chamber, that the plaintiff was not bound to communicate the agreement to the other landholders; and that a member of the legislature could make any terms for the sale of his land, and compensation for injury to his comforts and property, which it is lawful for a private individual to make. *Howden v. Simpson*, 1 Eng. R. R. & Canal Cases, 347, 1839; *Simpson v. Howden*, 3 ib., 294, 1842.

48. Control of railways. Railroad corporations are *quasi* public corporations dedicated to the public use. In accepting their charters they necessarily accept them with all the duties and liabilities imposed upon them by law. Thus a *quasi* public trust is created which clothes the public with an interest in the use of railroads, which can be controlled by the public to the extent of the interest conferred therein. Unjust discrimination by them may be prevented by injunction. *McCoy v. Cincinnati, etc., R. R. Co.*, 18 Federal Reporter, 8. 1882.

49. Corporate powers; majority. It is a general rule that the acts of a majority of a body politic bind the whole corporation when confined to its ordinary transactions and consistent with the original objects of its formation. *Mowrey v. Indianapolis and Cincinnati R. R. Co.*, 4 Bissell (U. S. C. C.), 78. 1866.

50. Duration. Where a charter, granted by the general assembly to a private corporation, is silent as to the time of its continuance, it will expire thirty years from its date. *West End and Atlanta R. R. Co. v. Atlanta R. R. Co.*, 49 Ga., 151. 1873.

51. Duty of common carriers. The acceptance of their charters by railway companies is upon the implied understanding that they will fairly perform these duties to the public as common carriers of both persons and property, under the responsibility which that relation imposes. *Peoria and Rock Island R'y Co. v. Coal Valley Mining Co.*, 68 Ill., 489. 1873.

52. Earnings payable in part to state. A stipulation in the charter of a railway company, that the company shall pay to the

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state a *bonus*, or a portion of its earnings, is not repugnant to the constitution of the United States. Such a stipulation is different, in principle, from the imposition of a tax on the movement or transportation of goods or persons from one state to another. The latter is an interference with and a regulation of commerce between the states, and beyond the power of the state to impose; the former is not. *Railroad Co. v. Maryland*, 21 Wallace, 456, 1874; 6 Amer. R'y Rep., 483.

53. — The charter of the Baltimore and Ohio R. R. Co., for constructing and working a branch railroad between Baltimore and Washington, contained a stipulation that the company at the end of every six months should pay to the state one-fifth of the whole amount received for the transportation of passengers. This charter was accepted and complied with for many years. *Held*, that this stipulation was not repugnant to the constitution of the United States. *Ib.*

54. **Eminent domain; change of general law.** After the present Revised Statutes of Wisconsin took effect, they defined and controlled the power of the plaintiff railway company in respect to the acquisition of rights of way, whatever may have been the provisions of its original charter in that regard. *Wisconsin Central R. R. Co. v. Cornell University*, 52 Wis., 537, 1881; 10 Amer. & Eng. R. R. Cases, 108.

55. — **trial by jury; change of constitutional provision.** A provision in the constitution of 1836, that "the right of trial by jury shall remain inviolate," related to the trial of issues of fact in civil and criminal causes, and not to a statutory proceeding for the assessment of damages for the appropriation of a right of way. The provisions of the constitution of 1868, requiring that damages for the appropriation of a right of way should be assessed by a jury of twelve men, did not, as to the Cairo and Fulton R. R. Co., a prior existing corporation, repeal the act of January 23, 1855, providing for the assessment of damages by five commissioners, in the absence of a statute authorizing the land owner to proceed in conformity to the new constitutional requirement. *Cairo and Fulton R. R. Co. v. Trout*, 32 Ark., 17, 1877.

56. **Evidence; judicial notice.** The charter of an incorporated railroad company is a private statute, of which the courts cannot take judicial notice; and in the chancery court it must be pleaded as well as proved, although the statute (Rev. Code, § 2698) dispenses with the necessity of pleading it specially in the courts of law. *Perry v. New Orleans, Mobile and Chattanooga R. R. Co.*, 55 Ala., 413, 1876.

57. — Courts generally will treat a charter as a private act, of which judicial notice will not be taken. *Conley v. Columbus Tap R'y Co.*, 44 Tex., 579, 1876.

58. — Judicial notice cannot be taken of the charter of a private corporation, nor of its corporate power or capacity, if it derives existence from such charter, *i. e.*, a special act of incorporation. If it is shown, however, to have been incorporated under the general laws which authorize the formation and define the powers of corporations, these are public laws, of which notice must be taken, and the power must be referred to such general laws. *Kelly v. Ala. and Cincinnati R. R. Co.*, 58 Ala., 489, 1877; 21 Amer. R'y Rep., 138.

59. — The court will take judicial notice of the statutes conferring corporate powers on the Baltimore and Ohio R. R. Co. *Hart v. Baltimore and Ohio R. R. Co.*, 6 West Va., 336, 1873.

60. — The courts, while taking judicial notice of an act of the legislature authorizing the sale of a railroad, will not take such notice as to the fact of the sale. Nor do they judicially know that the corporate existence of a company, whose charter has not expired by limitation, has ceased, or that the corporation has successors. *Shea v. Knoxville and Ky. R. R. Co.*, 6 Baxter (Tenn.), 277, 1873.

61. **Exercise of rights not given in charter.** The charter of the Central Crosstown R. R. Co. construed. The exercise of rights not given in its charter may be inquired into by the proper public officers, but cannot be made the subject of an action by another railway company. *Christopher and Tenth St. R. R. Co. v. Central Crosstown R. R. Co.*, 67 Barbour (N. Y.), 315, 1875.

62. **Forfeiture; constitutional law.** The act of assembly of Pennsylvania, forfeiting

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the charter of the Pittsburgh and Connells-ville Railroad Company, declared unconstitutional. *Baltimore v. Pittsburgh and Connellsville R. R. Co.*, 3 Pittsburgh (U. S. C. C.), 20. 1866.

63. — failure to elect officers. A failure of a railroad company to elect directors does not work a dissolution of the corporation, as the old board hold over until their successors are elected and qualified, and though they may not have had any election since the date of the amended charter, it is not dissolved until it has lost its power to perpetuate itself. So long as there remains the capacity of reviving restoration, it is not dead. *Harris v. Mississippi Valley, etc., R. R. Co.*, 51 Miss., 602. 1875.

64. — The legislature in chartering a corporation has the power to provide that it may lose its corporate existence without the intervention of the courts by any omission of duty or violation of its charter, or default, as to limitations imposed. *Brooklyn Steam Transit Co. v. City of Brooklyn*, 78 N. Y., 524. 1879.

65. — Where the language used shows the legislative intent was to make the continued existence of the corporation depend upon its compliance with some requirement of the charter, in case of non-compliance the powers, rights and franchises granted are forfeited and terminate; it is not simply a cause of forfeiture to be enforced in an action by the attorney-general. *Ib.*

66. — how enforced. The forfeiture of corporate rights is a sovereign prerogative to be enforced only by and in the name of the people of the state acting in their sovereign capacity. It cannot be taken advantage of or enforced against a corporation collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation; and the government creating the corporation can alone institute the proceeding, and it can waive a forfeiture; and this it can do expressly or by legislative acts recognizing the continued existence of the corporation. *Central Crosstown R. R. Co. v. Twenty-third Street R. R. Co.*, 54 Howard's Practice (N. Y.), 168, 1877; *New Jersey Southern R. R. Co. v. Long Branch Commissioners*, 39 N. J. Law, 28. 1876; 14 Amer. R'y Rep., 311.

67. — An information by the district attorney against a railroad company for the purpose of forfeiting its charter will not lie, save for an act made a cause of forfeiture by its charter, or for wilful abuse or improper neglect on the part of the company. Such remedy would not lie on complaint of a stockholder who had instituted proceedings to enforce his rights against the company. Such former suit is an election of remedies conclusive against him. *State v. Rio Grande R. R. Co.*, 41 Tex., 217. 1874.

68. — The B. W. and N. R'y Co., a corporation organized under the general railroad act, did not comply with the condition of the act of 1867 (§ 1, ch. 775, Laws of 1867), requiring it to begin the construction of its road and expend thereon ten per cent. of its capital within five years after its articles are filed and recorded, and declaring that in case of non-performance "its corporate existence and powers shall cease." After the expiration of the time so fixed for beginning the work of construction, an act was passed (ch. 575, Laws of 1874), which revived the corporation and extended the time within which it was required to finish the road, for three years from the passage of the act. The corporation did not, within the three years, finish, or begin its road. In proceedings thereafter commenced to condemn lands for the purposes of the road, *held*, that by the act of 1874 the three years' condition therein was substituted for the conditions of the act of 1867, as to beginning work, and the condition requiring the work to be completed in ten years, but the corporation was not relieved from the penalty of non-compliance with the condition, as declared by the later act, and at the end of three years its corporate existence and power ceased; that it needed no action or judicial procedure to declare or complete a forfeiture of the charter and loss of corporate powers. *Brooklyn, Winfield and Newtown R'y Co., In re*, 72 N. Y., 245. 1878.

69. — A statute which imposes a forfeiture of franchises for failure to perform should explicitly fix the time at which the forfeiture may be enforced. *Toledo and Ann Arbor R. R. Co. v. Johnson*, 49 Mich., 148. 1882.

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70. — A claim of the forfeiture of a franchise cannot be raised collaterally, but only in a direct proceeding instituted for the purpose. *Ib.*

71. — **land owner may allege forfeiture.** Each corporation formed under the general laws for the formation of railroad corporations, previous to 1869, is required by the laws of 1867 (ch. 775, § 1) to begin the construction of its road, and spend thereon ten per cent. of its capital, within five years after its articles should be filed and recorded in the office of the secretary of state; and to finish its road and put it in operation in ten years from the time of such filing, etc., or in default thereof "its corporate existence shall cease." The existence of the corporation is determined by the omission to comply with either of the prescribed conditions; and the omission to begin the construction and spend ten per cent. of the capital within five years is as fatal as the failure to finish the road within the ten years. Where, by non-performance of either of these conditions, the company forfeits or loses its corporate rights and powers, the fact may be asserted by any one whose lands or property are sought to be appropriated to the uses of the corporation under the laws authorizing the taking of private property for public use. *Brooklyn, Winfield and Newtown R. R. Co., In re*, 55 Howard's Practice (N. Y.), 14, 1878.

72. — **quo warranto.** It is not every excess of power, nor every omission of duty, that produces the effect of forfeiting a charter. The public must have an interest in the act done. If it is confined to the corporation, and in no wise affects the community, it should not be considered as of those conditions upon which the grant is made. The injunction of the legislature to the courts is to construe the charter favorably and liberally for the corporation, so as to carry out its purposes. In order to a forfeiture there must be something wrong done, arising from wilful abuse or improper neglect. *Harris v. Mississippi Valley, etc., R. R. Co.*, 51 Miss., 602. 1875.

73. — **quo warranto; keeping corporate records out of the state.** The statutes of Wisconsin relating to the levy of attachment or execution upon shares of stockhold-

ers in corporations to proceedings by or against corporations, and to the exercise of the visitatorial powers of the state over them, as well as the act regulating the duties of the railway commissioner, and the general act concerning railway corporations, under which the defendant was organized, and other statutes, require, at least by necessary implication, that the principal place of business, the records, and the residence of the principal officers of private corporations created by the state shall be within the state, at least so far as may be necessary to give full effect to those statutes; and the charter of such a corporation may be adjudged forfeited for continued neglect of such duty, under ch. 283 of 1874. *State ex rel. v. Milwaukee, Lake Shore and Western R'y Co.*, 45 Wis., 579. 1878.

74. — Independently of statutes, it is the duty of a private corporation to keep its principal place of business, its records and the residence of its officers so located as to render it accessible to the process and to the exercise of the visitatorial power of the state by which it is created; and a forfeiture may be adjudged for violation of this common law obligation. *Ib.*

75. — An information showing that the principal office of the defendant company is in New York; that its books and records have always been kept in that city; that none of its principal officers reside in Wisconsin; and that, by reason of these facts, it has been impossible to enforce an attachment against the shares of stockholders in actions brought in courts of Wisconsin in accordance with the state laws, *held*, on demurrer, to show sufficient ground for adjudging a forfeiture of the company's charter. *Ib.*

76. — **trust.** Where a charter provided for forfeiture in case the railway was not built within a fixed time, and after issuing bonds and building a part of the railway the state declared a forfeiture, and took possession of the property, turning it over to the *cestuis que trust*, who organized another company, and persons who were connected with the road, one of them having been the president, claimed that they were holders of bonds, and filed their bill to enforce the trust, *held*, that the state took the prop-

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erty, under the forfeiture, free from the trust. *Silliman v. Fredericksburg, etc., R. R. Co.*, 27 Grattan (Va.), 119. 1876.

77. Horse railway. The certificate of incorporation of the Baltimore and Randallstown R. R. Co. recited that certain persons had associated "for the purpose of constructing a horse railroad in accordance with the provisions of the act of 1870, ch. 476," entitled "An act to provide for the creation and regulation of incorporated companies in the state of Maryland." The termini of said road were to be the "City of Baltimore and the village of R.;" the whole route of said road passed through Baltimore county, the Baltimore terminus being within the city. The certificate was acknowledged before a justice in Baltimore city and certified by a judge of the supreme bench of that city. *Held*, that the provisions of the act are not restricted to steam railways, and that this horse railway could be legally incorporated under it. *Oler v. Baltimore and Randallstown R. R. Co.*, 41 Md., 583, 1874; 7 Amer. R'y Rep., 495.

78. Jurisdiction; federal courts; corporations organized under the laws of two or more states. Where a corporation is organized under the laws of one state it becomes a citizen of that state, although the same persons, by the same corporate name, have been incorporated with the same powers and the same objects by another state, such acts of incorporation must be construed as only a license enlarging the field of its operations, and it does not constitute it a corporation of that state. It is privileged to elect to sue in the United States courts. *Missouri, Kansas and Texas R'y Co. v. Texas and St. Louis R'y Co.*, 10 Federal Reporter, 497. 1882.

79. — The act of the Tennessee legislature entitled "An act to incorporate the Louisville and Nashville R. R. Co." was simply the grant of a license or right of way to that company to construct its railroad into the state of Tennessee, under its charter granted in the state of Kentucky, and it did not create a new corporation of that name in Tennessee. *Callahan v. Louisville and Nashville R. R. Co.*, 11 Federal Reporter, 536. 1882.

80. Lapse; bill in equity. Corporate franchises cannot be declared forfeited, or

lapsed to the commonwealth, by bill in equity. *Lejee v. Continental Passenger R'y Co.*, 10 Philadelphia, 362. 1875.

81. Length of railway. The general railway law authorizes the organization of a company to build a railway wholly within one city. *National Docks R'y Co. v. Central R. R. Co. of New Jersey*, 32 N. J. Eq., 755. 1880.

82. Organization of corporation. An act of the territorial legislature, approved February 11, 1847, entitled "An act to incorporate the Milwaukee and Waukesha R. R. Co.," appoints commissioners to take subscriptions of stock in the company, and provides that as soon as a certain amount of the stock shall be subscribed, and a certain sum actually paid on each share, and a certain statement showing these facts deposited with the treasurer of Milwaukee county, the subscribers of such stock shall be a corporation, vested with the franchises specified in the act. *Held*, that the corporation did not come into existence until such stock was subscribed and certified, and perhaps not until directors were elected; that under such a charter, where the present existence of the corporation appears, there is a presumption that it was organized immediately after the passage of the charter. *Attorney-General v. R. R. Companies*, 35 Wis., 425. 1874.

83. Organization in two states. Two corporations, viz., the Newport and Cincinnati Bridge Co., established by the laws of Ohio, and the same company, established by the statute of Kentucky, are agents for each other, and each is bound by the act of the other in the transaction of their common business. *Newport and Cincinnati Bridge Co. v. Woolley*, 78 Ky., 523, 1880; 7 Amer. & Eng. R. R. Cases, 18.

84. — Two states may, by concurrent legislation, unite in creating the same corporate body. *Wilmer v. Atlanta and Richmond Air Line R'y Co.*, 2 Woods (U. S. C. C.), 409. 1875.

85. — Although corporations created by one state can exercise no corporate powers within the limits of another state without the consent of the latter, when that consent is obtained the fact that an amendment to the charter of the corporation by the state

Pleading — Recognition by Legislature.

creating it is in conflict with some law or constitutional provision of the state licensing the corporation to exercise certain powers within its limits, cannot destroy the validity of the amendment. *Covington v. Covington and Cincinnati Bridge Co.*, 10 Bush (Ky.), 69. 1873.

86. — residence. A corporation cannot have two domiciles at the same time. It obtains a residence not by its own act, but by the legislative authority which fixes the requisites of residence. *Newport and Cincinnati Bridge Co. v. Woolley*, 78 Ky., 523, 1880; 7 Amer. & Eng. R. R. Cases, 18.

87. Pleading. A reference to its charter in the complaint of a corporation plaintiff does not so incorporate the charter into the complaint as to render the statement of its right to sue defective, by reason of the failure to allege the performance of conditions precedent to its corporate existence. *Cheraw and Chester R. R. Co. v. White*, 14 So. Car., 51. 1880.

88. Power to purchase railway. The charter of a railroad company authorized it "to have, purchase, possess, enjoy and retain lands, rents, hereditaments, goods, chattels and effects, of whatsoever kind, nature or quality the same may be, and the same to sell, grant, demise, alien and dispose of." *Held*, that this authorized a purchase by the company of a railroad lying within the limits prescribed by its charter. *Branch v. Atlantic and Gulf R. R. Co.*, 3 Woods (U. S. C. C.), 481. 1879.

89. Power to construct railway into a city. The Macon and Brunswick R. R. Co., under its charter and its amendments, authorizing it to construct a railroad from Brunswick to the city of Macon, and clothing it with the rights, privileges and immunities of the Central R. R., is authorized to construct its roads *into* the city of Macon, and is not limited to the city line; and a private citizen cannot enjoin it from appropriating ground for the location of its track, because of its want of authority to come within the city lines. *Hazlehurst v. Freeman*, 52 Ga., 244. 1874.

90. — A power conferred by charter to build a railway to a city imports an authority to extend such railway *into* the corporate limits. *Rio Grande R. R. Co. v.*

Brownsville, 45 Tex., 88, 1876; 13 Amer. R'y Rep., 223.

91. Power to contract with another company to operate a railway. An agreement that another railway company shall work a particular line of railway, and that the property and plant shall be handed over for that purpose, implies a delegation of the powers conferred by statute on the particular company, which cannot be made by them nor accepted by the other company without the authority of parliament, and equity will grant an injunction to prevent the performance of such an agreement. *Winch v. Birkenhead R'y Co.*, 13 Eng. Law & Equity, 506; 16 Jurist, 1035. 1853.

92. Power to establish steamship line. The act incorporating the Panama R. R. Co. states, among the objects of such corporation, that of "purchasing and navigating such steam or sailing vessels as may be proper and convenient to be used in connection with the said road." *Held*, that such powers were conferable in conjunction with the power to construct a railroad, and need not be specially expressed in the name of the corporation; and such language, construed in the light of facts existing at the time of the passage of the act, was broad enough to cover such vessels as navigate the ocean between New York and Aspinwall on the one side, and Panama and San Francisco on the other, in connection with the railroad. *Freeman v. Panama R. R. Co.*, 7 Hun (N. Y.), 122. 1876.

93. Proceedings to vacate; leased lines. Where a suit is brought by the attorney-general to vacate the charter of a railway company which has leased a portion of its line to another company, the lessee has such an interest in the subject of the action and in the real estate to be affected by the judgment as to entitle it, under § 452 of the Code of Civil Procedure, upon application for that purpose, to be made a party defendant. *People v. Albany and Vermont R. R. Co.*, 77 N. Y., 232, 1879; reversing *Same v. Same*, 15 Hun (N. Y.), 126, 1878.

94. Recognition by legislature. The state having sold a railroad to certain individuals, requiring them to form themselves into a corporation, and the legislature having, in several subsequent acts, recognized

 Repeal of Charter — Taxation.

the existence of the corporation, *held*, that its existence could not be questioned by third parties, and such recognition dispensed with other evidence of the fact. *Atlantic and Pacific R. R. Co. v. City of St. Louis*, 66 Mo., 228. 1877.

95. Repeal of charter. Where the dissolution of a corporation is had by act of assembly or by decree of court, it is proper to appoint a suitable person by the repealing act, or a receiver by the court, to collect and apply the assets of the annulled body in the discharge of its liabilities. And it is competent to select another corporation, as well as a natural person, to administer the assets. *Western North Carolina R. R. Co. v. Rollins*, 82 N. C., 523. 1880.

96. Repeal; right of stockholder to remedy. Where, by a state statute, the charter of a street railway company was repealed, and its franchises and track were transferred to another, and the company refuses to seek a remedy, a stockholder who asks an injunction on the ground that the statute impairs the obligation of a contract will have a standing in a court of equity. *Greenwood v. Freight Co.*, 105 U. S., 13, 1881; 9 Amer. & Eng. R. R. Cases, 526.

97. Route designated; termini. The obvious meaning and intent of § 4 of act 14, 1876, the legislative charter of the plaintiff company, were to secure Shreveport as the northwestern terminus, and to prevent the company from evading this requirement by building connections to other possible *termini*, under the name of branches, before completing the line to Shreveport. The company had the right to begin its route at Baton Rouge, or to build via that point, and the construction of the Baton Rouge branch, while the main line was in process of completion, did not violate the spirit or meaning of the law. *New Orleans and Pacific R. R. Co. v. Robertson*, 34 La. An., 865. 1882.

98. — Under ch. 243, Laws of 1863, the defendant was chartered as the "Tomah & Lake St. Croix R. R. Co.," to build a road between the two terminal points named in said title, being a part of the land-grant road originally located by the La Crosse & Milwaukee R. R. Co.; and so much of the land grant as was applicable to the construction of such road from Tomah to Lake St. Croix

was resumed by the legislature from the La Crosse and Milwaukee Co., and given to defendant; and the road which defendant was to build is several times designated in § 14 of said charter as a road from Tomah to Lake St. Croix. By the terms of § 5, defendant was authorized to locate, construct and operate a railway "from such point as the directors should determine in the town of Tomah, in the county of Monroe, or on the track of the Milwaukee and La Crosse Railroad, or of any other railway running out of Tomah," to a point on Lake St. Croix. *Held*, that if the language of § 5 as to the southern terminus be construed literally, there is a positive contradiction between it and § 14; that in view of the whole tenor of the act, the first "or" in § 5 must be construed as having a copulative and not a disjunctive force; and as requiring the southern terminus of defendant's road to be in the town of Tomah and on the track of some other railway running out of that town. *Attorney-General v. West Wisconsin R'y Co.*, 36 Wis., 466. 1874.

99. Speed of trains; cities. That a railway company is authorized by the legislature to lay its tracks along the streets of a city does not prevent such city from regulating and limiting the rate of speed of the engines run thereon. *Neier v. Missouri Pacific R'y Co.*, 12 Mo. App., 25. 1882.

100. Statutes. The statutes authorizing the construction of the Sirhowy Tramroad construed. *Sirhowy Tramroad Co. v. Jones*, 3 Adolphus & Ellis, 640n; 30 E. C. L., 296. 1835.

101. Taxation; exemption from; change of charter; constitutional law. The provision of the charter of the Memphis and Little Rock R. R. Co. exempting its property from taxation could not be repealed by a subsequent legislature or constitutional convention. *Oliver v. Memphis and Little Rock R. R. Co.*, 30 Ark., 128, 1875; *St. Louis, Iron Mt. and Southern R. R. Co. v. Loftin*, ib., 693, 1875.

102. — An exemption from taxation conferred by the legislature on a corporation subsequent to its creation may be repealed. The right of taxation cannot be parted with by one legislature so as to bind future legislatures, unless under peculiar and excep-

Transfer of Franchise — What Constitutes a Railroad.

tional circumstances and upon an adequate consideration, and no presumption in favor of exemption from taxation can be indulged. *St. Louis, Iron Mt. and Southern R. R. Co. v. Loftin*, 30 Ark., 693. 1875.

103. Transfer of franchise. A corporation has no right to sell or assign its franchise, either in whole or in part, unless specially authorized by law. The acts of 1861 and 1870 empower the leasing of completed railroads only, and will not authorize the transfer of a franchise of building a railroad. *Wood v. Bedford and Bridgeport R. R. Co.*, 8 Philadelphia, 94. 1871.

104. — A railway company, like any other trading company, may convey, either absolutely or upon condition, all property which it is authorized to hold or which is essential to carrying on the business for which it was designed. The power of a court of chancery to put the assignees or mortgagees in possession of the property and business of the corporation would leave little to be decided as between private parties. *Semble*, that whether the assignees could enjoy the franchise and corporate existence is a question in which the state alone would be interested. *McAllister v. Plant*, 54 Miss., 106. 1876.

105. — When the purchasers of a railway form a corporation under the provisions of the statute act "to constitute the purchasers of any railroad heretofore sold under authority of any law of this state a body corporate and politic," approved December 17, 1873, and amended March 20, 1875, the new corporation succeeds to the franchises, faculties and powers of the old corporation precisely as surrendered or lost; though, as to ownership of property and liabilities, it is a new corporation. *Mobile and Montgomery R. R. Co. v. Steiner*, 61 Ala., 559. 1878.

106. Assignment of chartered rights. An agreement between two railway companies, made without the authority of the legislature, whereby one company delegates to another all the powers which have been conferred upon it by parliament, is an unlawful attempt to effect that which parliament alone can authorize, and is against public policy; and in such a case the court will not interfere to assist either of the parties in obtaining a collateral benefit which the agreement

would give, or aid them in any manner which would promote the object of the agreement. *Great Northern R. R. Co. v. Eastern Counties R. R. Co.*, 9 Hare (Eng. Ch.), 306, 1851; 12 Eng. Law & Equity, 224.

107. — special privilege. Special privileges conferred on a railway company by a private charter, granted under the constitution of 1803, do not so inhere in the road constructed under such charter as necessarily to pass to any corporation which may have acquired, under subsequent legislation, the right to operate the same. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Moore*, 33 Ohio St., 384. 1878.

108. Transfer railway. A railway company may organize under the general railroad law, although its purpose be only to build a transfer railway within the limits of a single city. *Wiggins Ferry Co. v. East St. Louis Union R'y Co.*, 107 Ill., 450. 1883.

109. Ultra vires; power to loan money. The North Carolina R. R. Co., as well by its charter (Act of 1848-49, ch. 82), and the supplemental acts thereto, as upon general principles, has the power to deposit or loan its surplus funds, and of course may bring the necessary actions to recover the sums loaned. *North Carolina R. R. Co. v. Moore*, 70 N. C., 6. 1874.

110. What constitutes a franchise. The right to lay down a track on any kind of structure, and the working of a railroad thereon, is not a political franchise to be gained only from the state. The right to act as agents of the state in acquiring land under the right of eminent domain, or the power to use the public highway for the purpose of a railroad, is a franchise. *Sixth Avenue R. R. Co. v. Gilbert Elevated R. R. Co.*, 41 N. Y. Superior Ct., 489. 1876.

111. What constitutes a railroad. Iron tracks or rails securely fastened to the soil, whether of a street or a prairie, constitute a railroad, irrespective of the propelling power by which vehicles are transported thereon; and the use of such a railroad may be contracted for under the act of 1839, without any reference to the question whether such use is to be effected by horses or steam, or any other known or unknown motor, and equally without regard to the nature of the locality through which such road may extend. *Cen-*

Contributory Negligence — Negligence.

tral Crosstown R. R. Co. v. Twenty-third Street R. R. Co., 54 Howard's Practice (N. Y.), 168. 1877.

CHATTEL MORTGAGE.

See MORTGAGE OF CHATTELS; MORTGAGE.

CHECKS.

See BILLS AND NOTES.

CHILDREN.

See PARENT AND CHILD; INJURIES TO PERSONS ON THE TRACK; INJURIES TO PASSENGERS; NEGLIGENCE; TURN TABLE.

1. **Contributory negligence.** The same care and prudence is required which should be exercised by one of more mature years. *Squire v. Central Park, etc., R. R. Co.*, 36 N. Y. Superior Ct., 436, 1873. *Contra, Casey v. N. Y. Central and Hudson River R. R. Co.*, 8 Daly (N. Y.), 220. 1879.

2. — A child two years old cannot be guilty of contributory negligence. *Farris v. Cass Avenue R'y Co.*, 8 Mo. App., 588. 1880.

3. — **peddling on train.** Where a boy about ten years of age got on the engine to sell peanuts to the engineer, at the request of the engineer, while the engine was in motion, and jumped off at the suggestion of the engineer, and a few days after again, in like manner, got in the engine to get his pay for the peanuts, being unable to make the change the first time, and again, at the suggestion of the engineer, jumped off, and was hurt; on the first occasion the train was running from fifteen to twenty miles an hour, and the last time about fifteen miles an hour. *Held*, that the defendant was not entitled to a non-suit. Code, § 2972; *Vickers v. Atlanta and West Point R. R. Co.*, 64 Ga., 306, 1879; 8 Amer. & Eng. R. R. Cases, 337.

CITIES.

See INJURIES TO PERSONS ON THE TRACK; MUNICIPAL CORPORATIONS; SUBSCRIPTIONS BY CITIES.

COAL.

See CARRIAGE OF MERCHANDISE.

COLLATERAL SECURITIES.

1. **Bonds.** Bonds of a corporation pledged as collateral by the company can only be enforced to the extent of the advances made upon them. *Duncomb v. N. Y., Housatonic and Northern R. R. Co.*, 22 Hun (N. Y.), 133. 1880.

2. — A secured creditor of the Eastern R. R. Co. is entitled, under the statute of 1876, ch. 236, to a certificate of indebtedness, without first surrendering his collateral security; but, in ascertaining the amount for which such certificate is to issue, the value of the collateral security must be first deducted; and, if the collateral security is the bond of another company, guarantied and indorsed by the Eastern R. R. Co., it is the value of such bond, without the indorsement and guaranty, which is to be applied in reduction of the debt. A person who holds certain bonds, not yet due, of another company, payable to the order of and indorsed and guarantied by the Eastern R. R. Co., is not entitled to the security of the mortgage made by the latter company. *Merchants' Nat. Bank v. Eastern R. R. Co.*, 124 Mass., 518. 1878.

3. **Note of corporation.** A creditor of the Eastern R. R. Co., who holds its note, and, as collateral security for the same, three other notes of the corporation, with coupons attached, of a kind regularly quoted in the market, is entitled, under the St. of 1876, ch. 236, to prove only the amount of the original note against that corporation. *Third National Bank of Boston v. Eastern R. R. Co.*, 122 Mass., 240. 1877.

COLLISIONS.

See INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS.

1. **Negligence.** If the engine driver who has the right to the road at the crossing of another railroad knows, or has good reason to believe, he will come in collision with a train not entitled to the crossing if he attempts to exercise his right, prudence re-

Injury to Train — Civil Rights Act — Equal Rights.

quires him not to attempt the exercise of his right, and he might be criminally culpable for so doing. *Chicago and Alton R. R. Co. v. Rockford, Rock Island and St. Louis R. R. Co.*, 73 Ill., 34. 1874.

COLLISIONS WITH DOMESTIC ANIMALS.

See INJURIES TO DOMESTIC ANIMALS; INJURIES TO TRAINS.

1. **Injury to train.** The owner of stock unlawfully trespassing upon a railway is liable for the damages resulting to the cars in case of collision with a train. *Richelieu v. St. Lawrence and Atlantic R'y Co.*, 2 Decisions des Tribunaux, Lower Canada, 337. 1852. See, also, *Central Branch U. P. R. R. Co. v. Walters*, 24 Kans., 504. 1880.

COLORED PERSONS.

See PASSENGERS.

1. **Civil rights act.** The privilege of using for local travel any public conveyance is in general a right which belongs to a person as the citizen of a state, and not as a citizen of the United States; and the denial of that privilege (except where it is charged in the pleadings, and proved in evidence to have been on account of race, color, etc.) does not subject to the penalties of the said act of congress. *Cully v. Baltimore and Ohio R. R. Co.*, 1 Hughes (U. S. C. C.), 536. 1876.

2. — A colored woman who had purchased and held a first-class ticket was entitled to admission into the ladies' car, if there was room for her therein; and if she was refused admission, and the railroad company declined to carry her except in the smoking car, containing only men, some of whom were smoking, she had the right to decline to accept such accommodations, and it is liable to her in damages. *Gray v. Cincinnati Southern R. R. Co.*, 11 Federal Reporter, 683. 1882.

3. — Carriers are bound to provide for colored passengers holding first-class tickets accommodations precisely equal in all respects to those provided for white passengers holding similar tickets. *Ib.*

4. — In an action against a railway company to recover damages for wrongfully ex-

cluding from its cars, in which it appeared that the plaintiff, a colored lady, purchased and held a first-class ticket at the time she applied for admission to the ladies' car; that she was lady-like in appearance and conduct, and was at the time carrying a sick child in her arms; and that the company refused to carry her except in the smoking car, in which were men only, some of whom were smoking; whereupon she left the cars,— *held*, that she was entitled to such damages as would make her whole, and the jury should consider the loss of time and inconvenience she had been put to, and the proper amount of expenses incurred in the vindication of her rights. *Ib.*

5. — In an action in the United States circuit court, under the civil rights act of March 1, 1875, the petition alleged that plaintiffs (who were colored persons) and defendant were citizens of Kentucky; that plaintiff, Mrs. Smoot, purchased a first-class ticket over the defendant's road from Paris to Lexington, Ky.; that the train upon which she attempted to take passage consisted of a coach intended and used for ladies, and gentlemen accompanied by ladies, and other inferior coaches; that on account of her race and color she was denied admittance to the ladies' car, and, refusing to accept the inferior accommodations of the other coaches and to give up her ticket, she was forcibly removed from the train; for which plaintiffs asked damages. Upon demurrer to the petition, *held*, that congress had no power to protect the right alleged to have been violated, and the court had no jurisdiction to entertain the action. *Smoot v. Kentucky Central R'y Co.*, 13 Federal Reporter, 337. 1882.

6. **Equal rights.** G. and his wife, who were colored people, brought an action against a railway company for the exclusion of the wife from a car. The evidence of her exclusion was denied by the witnesses for the company, and it was attempted to be shown that G., who was in company with his wife, was smoking, and that the exclusion was for that reason. The smoking was denied by G. and other witnesses. The court charged that it was conceded on all sides that the wife was excluded; and further instructed the jury that there was no doubt

Miscellaneous.

she was excluded if the testimony be true. *Held*, that this instruction did not take the facts from the consideration of the jury, and left to them to determine whether the exclusion was on account of race or color. *Central R. R. of New Jersey v. Green*, 86 Pa. St., 421. 1878.

7. **Penalty.** The penalty prescribed by the act of March 22, 1867, relating to the exclusion of colored passengers from the cars, is given by way of punishment to the offender rather than by way of compensation to the party aggrieved; and where, therefore, several persons are aggrieved by the commission of a single offense, a recovery by one is a bar to recovery by the rest. *Central R. R. Co. of New Jersey v. Green*, 86 Pa. St., 427. 1878.

8. — G. and his wife, who were colored persons, were excluded from the car at the same time and by the same employe. *Held*, that the exclusion of the two was but a single offense, and a recovery being had by G. and his wife in the right of the wife, G. could not recover thereafter in his own right. *Ib.*

COMMONS.

See EMINENT DOMAIN.

COMPARATIVE NEGLIGENCE.

See INJURIES TO DOMESTIC ANIMALS; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; INJURIES TO PERSONS ON THE TRACK; NEGLIGENCE.

COMPENSATION.

See DIRECTORS; OFFICERS.

1. **President; bonds taken as collateral.** Where the president of a railway company received the notes of the corporation, secured by its bonds, as collateral for a sum due him upon his salary, *held*, that such a debt honestly incurred could be so secured; and that he was entitled to prove such bonds. *Duncomb v. New York, Housatonic and Northern R. R. Co.*, 4 Amer. & Eng. R. R. Cases, 293; 84 N. Y., 190, 1881; reversing *Same v. Same*, 23 Hun (N. Y.), 291, 1880.

COMPROMISE.

1. **Deed for right of way.** Where the petition embraced two causes of action, damages for the trespass and for the right of way taken, and an offer of compromise was made and accepted in the case, both claims were thereby settled and adjusted. *Robertson v. Central Ia. Ry Co.*, 57 Ia., 376, 1881; 10 Amer. & Eng. R. R. Cases, 420.

2. — Under the pleadings the compromise stood in the place of the judgment of a court, and upon payment of the amount agreed upon the defendant had the right to demand a deed for the right of way, and the court had jurisdiction to order the deed executed. *Ib.*

3. — The appointment of a commissioner to execute the deed for the right of way upon the tender of the amount agreed upon therefor, without giving the party a reasonable time to execute it, if irregular, worked no prejudice, and affords no ground for reversal. *Ib.*

4. **Right of widow to compromise.** When suit is brought by the widow, whose husband received a personal injury resulting in death, she has the right to compromise or settle the suit as she may see fit, without the consent of the guardian of the child of the deceased, and against the consent of her attorneys who managed the case. *Stephens v. Nashville, Chattanooga, etc., R. R. Co.*, 10 Lea (Tenn.), 448, 1882; 11 Amer. & Eng. R. R. Cases, 671.

5. **Effected through a physician.** The relation of patient and physician is one of trust, and in case a physician, in behalf of a railway company, obtains a settlement with his patient for damages for a personal injury, and the advice as to settlement is not made in good faith, the settlement will be set aside. *Rowe v. Grand Trunk Ry Co.*, 16 Upper Canada, Common Pleas, 500. 1866.

CONDEMNATION OF LANDS.

See EMINENT DOMAIN.

CONDITIONAL SALE.

See MORTGAGE.

1. **Subrogation.** A railway company held its rolling stock under an agreement to pay

Miscellaneous.

for it in instalments, the title not to pass to the company until the whole sum agreed to be paid for it should be paid, and, in case of default, all previous payments to be forfeited. It became insolvent, and had no money to pay an instalment which became due. Directors of the company, in order to save the rolling stock, advanced the money out of their private funds, on the strength of an agreement made by the other members of the board with them that they should be subrogated to the rights of the vendors for their repayment, but no resolution to that effect was in fact passed by the board. *Held*, that they were entitled to subrogation, subject to the superior right of the vendors as to the unpaid balance of the price. *Coe v. New Jersey Midland R'y Co.*, 31 N. J. Eq., 105. 1879.

CONDUCTOR.

See APPEALS; INJURIES TO EMPLOYEES.

1. Fares not accounted for; evidence.

Where, in an action against a railway company by one of its employes for a balance due him for services rendered as conductor of a passenger train, it was undertaken by the company to prove an offset in moneys alleged to have been collected and not accounted for by the conductor, by comparison of daily returns extending over a period of eleven months, by the plaintiff in the action and a fellow-conductor running alternate days over the same route, *held*, that such method of proof was erroneous, and the evidence properly excluded from the jury. *Held*, also, that where the verdict must, under the law, have been the same, notwithstanding the admission of the evidence excluded, the verdict would not be disturbed. *Denver and Rio Grande R'y Co. v. Glascott*, 4 Colo., 270. 1878.

CONFEDERATE MONEY.

1. *Contracts.* A contract by a railway company made January 1, 1865, payable in Confederate money, will be enforced in lawful money at the actual value of the consideration. *Doud v. North Carolina R. R. Co.*, 70 N. C., 468. 1874.

CONNECTING LINES.

See AGENCY; BAGGAGE; CARRIAGE OF LIVE STOCK; CARRIAGE OF MERCHANDISE; GAUGE; INJURIES TO PASSENGERS; INJURIES TO PERSONS ON THE TRACK; STREET RAILWAYS.

1. *Booking offices.* A railway company is not bound to provide booking offices for traffic at places off its railway, nor to arrange for the conveyance by road of goods between such places to the nearest station on its railway. *Dublin and Meath R'y Co. v. Midland Great Western of Ireland R'y Co.*, 3 Neville & McNamara, 379. 1879.

2. *Connection of railways.* Both terminal points of a railroad, constructed for the purpose of forming a connection between existing roads, may be in the same town, city or village. *Long Branch Commissioners v. West End R. R. Co.*, 29 N. J. Eq., 566. 1878.

3. — A railway constructed under the general railroad law may connect with another railroad at a point where there is neither town, city nor village. *Ib.*

4. *Contract.* A railway company is not bound to undertake the carriage of goods beyond the terminus of its road; but if it does enter into a contract to do so it is bound by it, and is under the same obligation to furnish means of conveyance beyond the line of its own road as it is upon it. *Bussey v. Memphis and Little Rock R. R. Co.*, 4 McCrary (U. S. C. C.), 405. 1882.

5. — A railroad company has the power and the right to contract, as a common carrier, to transport freight through another state over another railroad and beyond its own terminus. *Ogdensburg and Lake Champlain R. R. Co. v. Pratt*, 49 Howard's Practice (N. Y.), 84; *R. R. Co. v. Pratt*, 23 Wallace (U. S. S. C.), 123. 1874.

6. — An agreement between two railway companies, that any injury to persons or goods shall be paid for by the company on whose road it may occur, and that, when the damage cannot be traced to either of the lines, it shall be paid for by each in the proportion it shares in the through price of carriage, does not make the two corporations partners; if one company has made a contract for the carriage of goods over the lines of both companies, an action for breach of such contract cannot be maintained

Contract Limiting Liability — Constitutional Law.

against the other company, if the loss is not proved to have taken place while the goods were in its custody; and the contract between the two corporations is inadmissible in evidence. *Aigen v. Boston and Maine R. R. Co.*, 132 Mass., 423, 1882; 6 Amer. & Eng. R. R. Cases, 436.

7. — **injunction.** A contract between two connecting railroads for the division of earnings, according to the distance which each corporation shall have carried the passenger or freight for which the money is paid, is within the discretionary powers of the directors, and its execution cannot be enjoined at the instance of a stockholder, who does not show dishonest or fraudulent purpose on the part of the directors in making such contract, and that he will be injured thereby. *Elkins v. Camden and Atlantic R. R. Co.*, 36 N. J. Eq., 241, 1882; 11 Amer. & Eng. R. R. Cases, 579.

8. **Contract limiting liability.** A carrier may by contract restrict its liability to its own line, and it may also extend its liability beyond its own line. *St. Louis and Iron Mountain E. R. Co. v. Larned*, 103 Ill., 293, 1882; 6 Amer. & Eng. R. R. Cases, 436.

9. — Such contract will be presumed from the fact that a clause limiting the liability is to be found printed in the bill of lading, even though the shipper's attention was not called to it, if it appears that he had previously shipped like articles and taken like bills of lading. *East Tenn., Va. and Ga. R. R. Co. v. Brumley*, 5 Lea (Tenn.), 401, 1880; 6 Amer. & Eng. R. R. Cases, 356.

10. — When there is no express statute forbidding it, a carrier may contract not to be liable for damages which do not occur from the negligence of himself or his servant or agents. When he undertakes to carry goods, not only over his own route, but over connecting lines, he cannot contract that his responsibility may terminate at the end of his own line. He will still be held liable for the negligence not only of himself and his employes, but of their connecting lines, they being considered his agents for carrying out the particular contract. *Galveston, Houston, etc., R. R. Co. v. Allison*, 12 Amer. & Eng. R. R. Cases (Tex.), 28. 1883.

11. **Condition of goods on delivery; burden of proof.** Where an action for an in-

jury to goods carried by successive lines is brought against one of them, it is error to charge that, if the goods were delivered in good order to the first line, it is inferable, in the absence of evidence, that they continued so until received by the defendant. *Marquette, Houghton and Ontonagon R. R. Co. v. Kirkwood*, 45 Mich., 51, 1880; 9 Amer. & Eng. R. R. Cases, 85.

12. — One who sues a common carrier for injury to goods must prove that defendant received them in good order. *Ib.*

13. — A carrier must receive and forward goods on the usual terms, and deliver them in the condition in which he received them; he has ordinarily no means of opening packages and examining their contents, and has nothing to do with previous dealings with the property by independent carriers. *Ib.*

14. **Constitutional law.** The meaning of the last clause of art. 15, § 4, of the constitution of Colorado, which provides that "every railroad company shall have the right with its road . . . to connect with . . . any other railroad," is that such roads are to be connected physically, as distinguished from the business connection between roads which have approximate *termini*. It is a union of tracks admitting of the passage of cars from one road to the other, and not a mere meeting of roads which may admit of continuous traffic in some form. The evident object is the protection of the public rather than simply to enable corporations to perform their agreement. By the union of tracks it was intended to make the roads practically continuous for all that may come in the course of business between companies friendly to each other; that the companies are to be brought into harmony when they fail or refuse to agree in the due and proper exercise of their public functions as common carriers; and this court will not hold that a bill that alleges that complainant has connected its road with defendant's road, but that defendant refuses to grant complainant equal facilities in conducting business that it grants to a rival road, does not present a case calling for the consideration of a court of equity, and dismiss such bill on demurrer, without first examining such facts as may be developed by proper evidence. *Denver and New Orleans R. R. Co. v. Atchison, To-*

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peka and Santa Fe R. R. Co., 13 Federal Reporter, 546. 1882.

15. — discrimination. A provision of the constitution of the state of Colorado, that "all individuals, associations and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the state, and no railroad company, nor any lessee, manager or employee thereof, shall give any preference to individuals, associations or corporations in furnishing cars or motive power" (§ 6, art. 15, Const. of Colorado), is not merely authority to the legislature to pass laws on the subject to which it applies, and otherwise incapable of enforcement. While, in the absence of a special law directing such a proceeding, this provision would not authorize a company to make a physical connection of unconnected railroads, yet, independently of legislative power and action, it requires the railroads in the state of Colorado to be operated in conjunction for the convenience of the public; at least to the extent usual and customary between connecting lines in the control of companies not hostile to each other; and to this extent it will be enforced by the courts. *Denver and New Orleans R. R. Co. v. Atchison, Topeka, etc., R. R. Co.*, 15 Federal Reporter, 650, 1883; 9 Amer. & Eng. R. R. Cases, 374.

16. Crossing; expense of signals. Under s. 12 of the Railways Clauses Act, 1863, where a railway forms a junction with another railway, the company with whose railway the junction is made is empowered to erect such signals and conveniences incident to the junction, etc., as may be necessary for the prevention of danger or interference with the traffic at or near the junction; and the expenses of erecting and maintaining such signals, etc., are at the end of each half year to be repaid by the company making the junction. *Held*, that, to sustain an action for such expenses, proof must be given that they have been actually paid; proof that a liability has been incurred for them is not enough. *Carmarthen and Cardigan R'y Co. v. Manchester and Milford*

R'y Co., Law Reports, 8 Common Pleas Cases, 685. 1873.

17. Damage; evidence; presumption. Where goods have been carried by several successive carriers, and it appears that they were in good condition when delivered to the first carrier, the jury may, in the absence of evidence to the contrary, presume that the goods reached the hands of the last carrier in the same condition as when delivered to the first carrier. This rule is not changed by the fact that the last carrier, instead of transferring the goods, transports them over the line in the foreign car in which it received them. *Leo v. St. Paul, Minneapolis and Manitoba R'y Co.*, 12 Amer. & Eng. R. R. Cases (Minn.), 35. 1883.

18. Delivery to next carrier. The intermediate carrier is bound to deliver the goods to the carrier whose line of transportation is next in the route over which the goods are to be carried, and it is not relieved of responsibility by storing them in a warehouse at the terminus of its own route. *Bancroft v. Merchants' Despatch Co.*, 47 Ia., 262. 1877.

19. Delivery to wrong line. Where goods are delivered to the first of a connecting line of railways to be carried to a given destination by a specified route, a delivery by the first company to another company which forms a part of a different route is a breach of the contract, and a conversion which renders the first company liable for the value of the goods. If they be delayed by such delivery, or damage result, the first company may be held responsible therefor. *Georgia R. R. Co. v. Cole*, 68 Ga., 623. 1882.

20. Each carrier the agent of consignee. A carrier of goods acts as agent of the consignee in transferring them to another carrier, and not as the latter's agent. *Marquette, Houghton and Ontonagon R. R. Co. v. Kirkwood*, 45 Mich., 51, 1880; 9 Amer. & Eng. R. R. Cases, 85.

21. Failure to carry goods. The implied obligation of a common carrier, arising from its relation to the public, is limited by the termini of its own route; and the fact that it has connections with other lines, extending beyond its own termini, which it does not operate, control or own, does not, in the absence of a special contract so to do, make it liable as a common carrier for a failure to

 Freight Charges — Liability of Each Carrier.

carry, or furnish means to carry, merchandise over such other routes. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Morton*, 61 Ind., 539. 1878.

22. Freight charges. Where one carrier receives goods at the end of a second carrier's line, and the second company neglects to inform the first company that the freight was paid, the first company is not responsible for this omission, and has the right to retain the goods in its possession for a reasonable time, until it can inquire into and ascertain the facts. *Union Express Co. v. Shoop*, 85 Pa. St., 325. 1877.

23. — Where no agreement for special rates exists, and freight is received by one railroad to be delivered at a point on the line of another for a sum less than the aggregate regular charges of both, the latter line, on receiving it and carrying it to such point, must deliver it to the consignee, upon his tendering such sum, provided it equal the regular charges of the latter, whether it does or does not include any charges for the former line. *Evansville and Crawfordville R. R. Co. v. Marsh*, 57 Ind., 505, 1877; 18 Amer. R'y Rep., 482.

24. — offset. The value of an article lost by a prior connecting carrier cannot be recouped, in a suit by the last carrier against the consignee, for the freight bill for carrying several articles, including the lost one. *Lowenburg v. Jones*, 56 Miss., 688. 1879.

25. Inspection. It is not the duty of one company to require distinct assurance from a connecting line that all its cars have been thoroughly examined and repaired before being transferred. *Richardson v. Great Eastern R'y Co.*, Law Reports, 1 Common Pleas Division, 342, 1876; 17 Eng. (Moak), 293.

26. Joint ownership of connecting branch. A railway was built for the purpose of uniting three other roads, which were the principal owners of its corporate stock. One of these three other roads allowed a portion of the uniting road to be located over its property and built that portion at its own expense. Subsequently it claimed the exclusive control over that portion, and refused to allow the uniting road to transport freight and passengers thereon. *Held*, that, although it might have a proprietary right in that por-

tion of the road, it was bound to allow the uniting road a reasonable use thereof, as a part of the latter's continuous line. *Held*, further, that the right to such use might be enforced by a preliminary injunction restraining the company owning the portion of road from interfering with the transportation of the freight and passengers carried by the uniting road. *Lathrop v. Junction R. R. Co.*, 4 Federal Reporter, 41. 1880.

27. Joint use of track; charter. A state has no authority, in violation of a railway company's charter, to require it to permit another company to use a portion of its track. Such an act impairs the contract contained in the charter. *Pennsylvania R. R. Co. v. Baltimore and Ohio R. R. Co.*, 60 Md., 263. 1883.

28. Liability of each carrier. When several carriers unite to complete a line of transportation, and receive goods for freight and give a through bill of lading, each carrier is the agent of all the others to accomplish the carriage and delivery of the goods, and is liable for any damage to them, on whatever part of the line the damage is received. *Texas and Pacific R. R. Co. v. Fort*, 9 Amer. & Eng. R. R. Cases (Tex.), 392, 1882; *Texas and Pacific R'y Co. v. Ferguson*, 9 ib. (Tex.), 395, 1882.

29. — A company chartered and organized for railway transportation is a common carrier over its own line, but it is not so beyond its *termini* and over connecting lines unless it has become so by usage, character of business or contract. *Piedmont Manufacturing Co. v. Columbia and Greenville R. R. Co.*, 19 So. Car., 353. 1882.

30. — In case of the transportation over several connecting lines, neither company is agent of the owner; each exercises an independent employment as a contractor with the owner and is responsible for its own negligence, and it cannot make the owner responsible for the negligence of a connecting road. *Sherman v. Hudson River R. R. Co.*, 64 N. Y., 254. 1876.

31. — Where goods are shipped over connecting lines of railways, the last line receiving them as in good order for transportation is liable to the consignee for damages. *Georgia R. R. Co. v. Gann*, 68 Ga., 350. 1882.

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32. — When parts of a continuous line or route of transportation are owned by different carriers, between whom no connection is shown to exist, each carrier is liable, in the absence of a special contract, only for losses and injuries occurring on his own particular portion of the route. *Montgomery and West Point R. R. Co. v. Moore*, 51 Ala., 394. 1874.

33. — The liability of a common carrier which receives goods for transportation beyond its line ceases, in the absence of a special contract, when it safely carries, and within a reasonable time delivers them to the connecting carrier. *Goldsmith v. Chicago and Alton R. R. Co.*, 12 Mo. App., 479. 1883.

34. Operation of railway; power to compel one company to allow its line to be used by another. A railway company having refused to allow the plaintiff to run engines and carriages over part of its line under the powers of the Railways Clauses Act, 1845, s. 92, the plaintiff filed its bill for an injunction to restrain the company from preventing the exercise of the right. *Held* (affirming the decision of Hall, V. C.), that, inasmuch as the plaintiff could not run over the line unless the points and signals on the line were properly worked by the railway company, this court could not grant relief, as it does not order the performance of a continuous act, like working signals, the doing of which requires continuous attention, and cannot be seen to by the court. *Powell Duffryn Steam Coal Co. v. Taff Vale R'y Co.*, Law Reports, 9 Chancery Appeal Cases, 331, 1874; 8 Eng. (Moak), 888.

35. Partnership; connecting lines not partners. Where three companies constitute a through line, and the fare received for through tickets is accounted for by the first company to the other companies, according to a tariff established by each company for itself, and there is no division of profits or losses, such an arrangement is not a partnership involving joint liability. *Craft v. Baltimore and Ohio R. R. Co.*, 1 MacArthur (Dist. of Columbia), 492. 1874.

36. Rates. The right of connecting railways to make contracts for through rates is incident to their powers, unless prohibited by their charter. Where such contracts are

not unjust, unconscionable or in restraint of trade, they will not be interfered with. *Munhall v. Pennsylvania R. R. Co.*, 92 Pa. St., 150, 1879; 5 Amer. & Eng. R. R. Cases, 337.

37. — The giving of a through rate by the receiving carrier does not create a liability extending beyond its own line. *Goldsmith v. Chicago and Alton R. R. Co.*, 12 Mo. App., 479. 1883.

38. Receipt for goods. The carrier's receipt, which shows that the goods were consigned to a point beyond his line, does not make it responsible for the entire route. *Ib.*

39. Rights as against each other. One connecting railway company cannot maintain an action against another company for failing to ship goods over the line of the former, even although the owner of the goods had contracted and directed the shipment to be made over the plaintiff's line. *Railroad Co. v. Railroad Co.*, 9 So. Car., 325. 1877.

40. Through bills of lading. Through bills of lading impose on a railway company as a carrier the obligation to provide means of transportation for the goods shipped to their ultimate destination without delay, and it is no excuse for the non-performance of this duty that it could not procure transportation by boat by reason of a previous accumulation of freight, of which it was advised when it received the goods for transportation. *Bussey v. Memphis and Little Rock R. R. Co.*, 4 McCrary (U. S. C. C.), 405. 1882.

41. Transportation companies. The "Red Line" consisted of several connecting common carriers, of which the defendant herein was one, and the bill of lading provided that the responsibility of the companies should terminate on the delivery of the freight, as per bill of lading, to the connecting company. The freight was carried by the defendant and delivered to the connecting carrier, as required by the contract. *Held*, that it was not liable for any subsequent injury to the goods. *Shiff v. New York Central and Hudson River R. Co.*, 16 Hun (N. Y.), 278. 1878.

42. — Where there was an arrangement between different railroads connecting with each other, whereby each road agreed to carry

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the cars of the others having the name "Green Line" painted thereon, over its own road, without breakage of bulk, at such rates as might be agreed on, each company fixing its own rates of freight passing over its own road and collecting the freight passed over its road, and having no interest in freights not reaching its road, each road desirous of making a through rate over other roads *via* these Green Line cars, would ascertain the rates the intermediate road or roads charged, and, adding the same to its own rates, fix its own schedule of through rates, which it termed "Green Line Rates," and there was no joint expense or loss or profit, except that where a loss could not be located on any particular road a *pro rata* share of the loss was borne by all that carried the freight, it was held there was no partnership as between the different roads. *Irvin v. Nashville, Chattanooga and St. Louis R'y Co.*, 92 Ill., 103. 1879.

43. Way bills. The sending of way bills from one railway company to another connecting carrier held, under the facts in the case, to raise a question for the jury as to whether the second carrier had become charged with the duty of a common carrier in relation to the goods described in the way bill, the delay complained of having been caused by a damaged car. *Livingston v. New York Central and Hudson River R. R. Co.*, 76 N. Y., 631. 1879.

CONSOLIDATION.

See EMINENT DOMAIN; MORTGAGE; TAXATION.

1. Agreement against public policy. Where it was agreed, upon the consolidation of two railway companies, that a corporation which owned one of the roads so consolidated, and which had rolling stock and motive power of its own, should carry coal over a certain part of the road, to a certain amount, without charge, and that the new company should pay the coal company fifty cents per ton for all coal transported by any party except the coal company, it not appearing that the coal company was under any legal obligation to the public to carry coal and passengers after the consolidation, it was held that a court of equity would not

enforce the agreement prohibiting the new company from carrying coal, except on paying fifty cents per ton, it being the duty of the new company under the law to carry all freights, and the court not having the power to transfer that duty to another. *Peoria and Rock Island R'y Co. v. Coal Valley Mining Co.*, 68 Ill., 489. 1873.

2. Antecedent debts and liabilities. The absolute consolidation of two or more railway companies, without any provision being made for the old debts of the former companies, was held to render the new corporation liable for the former debts. *Cayley v. Cobourg, etc., R'y Co.*, 14 Grant Ch. (Upper Canada), 571, 1863; *Tysen v. Wabash R'y Co.*, 11 Bissell (U. S. C. C.), 510; 15 Federal Reporter, 763, 1883; *Harrison v. Union Pacific R'y Co.*, 13 Federal Reporter, 522, 1882.

3. — Where a recovery is sought from a consolidated railway corporation for a cause of action which originally accrued with one of its constituents, the declaration must show against what company it arose, and aver such facts as will subject the new company to liability upon it. *Marquette, Houghton and Ontonagon R. R. Co. v. Langton*, 32 Mich., 251. 1875.

4. — Where a consolidated company becomes, by virtue of the consolidation, liable for the debts of the companies composing it, the creditor's remedy is complete and adequate at law, and a court of equity will not assume jurisdiction to enforce it. *Arbuckle v. Illinois Midland R'y Co.*, 81 Ill., 429. 1876.

5. — Where several corporations are united in one and the property of the old companies vested in the new, the latter is liable in equity for the debts of the former, at least to the extent of the property received from them; and if it is also liable at law the latter remedy is not exclusive. *Harrison v. Arkansas Valley R'y Co.*, 4 McCrary (U. S. C. C.), 264. 1882.

6. — Where, by the consolidation of two railroad companies, another is created, which, by the terms of consolidation, acquires all of the property and franchises and assumes all of the debts and liabilities of the two of which it is formed, and which becomes extinct by its creation, it takes such property subject to the debts of the

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original companies, and burdened with all liens upon it which were valid against those companies, and will not be permitted to aver ignorance of an unrecorded mortgage previously executed by one of the original companies. *Mississippi Valley Co. v. Chicago, St. Louis and New Orleans R. R. Co.*, 58 Miss., 846, 1881; 8 Amer. & Eng. R. R. Cases, 575.

7. — Where a railway company, after the execution of promissory notes, is consolidated with another company, and the company thus formed assumes a new name, the company may be sued by the new name thus assumed, and it will be estopped from denying the name by which it is sued. *Columbus, Chicago and Indiana Central R'y Co. v. Skidmore*, 69 Ill., 586. 1873.

8. — After one railroad company has consolidated with another as allowed by their respective charters, and authorized and confirmed by legislative acts conferring all rights, powers and privileges belonging to either on the new company thus formed, all liabilities of either can thenceforward only be enforced against and in the name of the consolidated company. *Indianola R. R. Co. v. Fryer*, 56 Tex., 609, 1882; 11 Amer. & Eng. R. R. Cases, 324.

9. — Ordinarily, a consolidated corporation, for the purpose of answering for the liabilities of the old corporations, is deemed the same as each of its constituents, and may be sued under its new name for their debts, as if no change had been made in the name or organization of the original corporation; but this rule is restricted to voluntary consolidations. *Houston and Texas Central R. R. Co. v. Shirley*, 54 Tex., 125, 1880; 4 Amer. & Eng. R. R. Cases, 443.

10. — The foundation of the liability of a consolidated corporation for the debts and liabilities of the constituent corporations must rest on agreement, either express or implied. *Id.*

11. — The act of 1867, which provides that, in case of consolidation of two or more railroad companies, the consolidated company shall be liable for all debts of each company entering into the arrangement, is not retrospective, but was designed to apply to companies which might consolidate after its passage. *Hatcher v. Toledo, Wabash and*

Western R. R. Co., 63 Ill., 477, 1872; 6 Amer. R'y Rep., 405.

12. — The result of consolidation under a statute is that the statute becomes part of the contract of consolidation; the consolidated company assumes the liabilities and succeeds to the rights of the constituent companies. The consolidated company is substituted for them. Unsecured debts of the latter remain unsecured debts of the former. The consolidated company may execute a mortgage upon all of the consolidated property which would be paramount to the unsecured debts of the constituent companies. *Tysen v. Wabash R'y Co.*, 15 Federal Reporter, 763. 1883.

13. — action for prior personal injuries. In August, 1879, the Kansas Pacific R'y Co. owned and operated a line of railway through the city of Lawrence, and while operating its railroad one of its trains injured the plaintiff. In January, 1880, the Kansas Pacific R'y Co., the Denver Pacific Co., and the Union Pacific R. R. Co., entered into an agreement of consolidation, by which agreement they formed, or attempted to form, the Union Pacific R'y Co., and to such company, by the articles of consolidation, transferred all their respective properties. The articles of consolidation expressly stipulated that the consolidated company should not be liable for the individual debts of the constituent companies, but that such constituent companies should continue in existence for the purpose of adjusting all claims and demands, and also that the consolidation should not prevent the enforcement of any valid obligation or liability of either constituent company against the properties so transferred by such constituent company. *Held*, that before the plaintiff could maintain an action against the consolidated company, he must, by an action against the Kansas Pacific R'y Co., the party which did the injuries, convert his unliquidated claim into a liquidated demand, and have both the fact and the amount of that company's liability adjudicated. *Whipple v. Union Pacific R'y Co.*, 28 Kans., 474, 1882; 8 Amer. & Eng. R. R. Cases, 651.

14. — Where an act of the general assembly, consolidating two railroad companies into one under a new name, provided that

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the consolidation and change of name "shall in no way affect the rights of the creditors of said companies, and their separate existence shall be continued as to all the rights and remedies of creditors;" and that the president of the new company "shall be held in law, as to service of process, as the president of" each of the old companies; and that the new company "may dispose of any property, real or personal, held by each of said companies, and make and execute titles for the same, and sue for and recover in its name all debts, dues and demands, of every kind and description whatsoever, due to each of said companies:" *held*, that an action at law might be maintained against the new company, to recover damages for personal injuries caused by the wrongful act of one of the old companies. *Warren v. Mobile and Montgomery R. R. Co.*, 49 Ala., 582. 1873.

15. — preferred stock. Where two or more railway companies are consolidated, and the new company assumes the debts and obligations of the original companies, the directors or other officers of the new organization are not necessary or proper parties to an action brought by a holder of preferred and guaranteed stock of one of the old companies to enforce an alleged contract made by it to pay specified dividends upon said stock. *Chase v. Vanderbilt*, 62 N. Y., 307, 1875; 12 Amer. R'y Rep., 141.

16. — trespasses by former company. A petition by a guardian alleged that his wards were owners in fee simple of a certain woodland; that the timber thereon was cut down and removed by a person unknown and without any authority whatever, and that the same was taken, used and possessed for its own use, and without any authority whatever, by a certain railroad company, which company was afterwards consolidated with another railroad company, etc. *Held*, that on demurrer the petition stated sufficient facts to constitute a cause of action for the conversion of personal property as against the consolidated company. *Railroad Co. v. Hutchins*, 37 Ohio St., 282. 1881.

17. Abatement. A corporation becoming consolidated with another and changing its name, pending a suit against it, is not so dissolved, nor its original liability so ex-

tinguished, as that the pending suit abates. *East Tenn. and Ga. R. R. Co. v. Evans*, 6 Heiskell (Tenn.), 607. 1871.

18. — Where a suit is pending against a railroad at the time it consolidates with another road, the plaintiff has a right to treat it as having a separate existence for the prosecution of his action against it. The action of the legislature authorizing, and the corporation in acting under such authorization, cannot defeat or prejudice the right of plaintiff in suits pending against it. As to such the corporation exists for the purpose of judgment; as to them it has not lost its individuality or identity. The act of the defendant cannot defeat the right of plaintiff. *Shackleford v. Mississippi Central R. R. Co.*, 52 Miss., 159. 1876.

19. Bill to set aside; parties. By an act of state legislation, four independent railroad companies were authorized to be consolidated into one company, with provisions looking to the rights of the stockholders of each. Under this act, formal consolidation was carried into effect, and the charter and the formal consolidation had remained unimpeached for more than a year. On a bill brought by an owner of five shares in one of the companies (who had purchased fifty additional shares after consolidation), against the president and directors of that company, praying injunctions, and also on motion for temporary restraining orders, *held*, that the bill must be dismissed for want of proper defendants, especially for not making the president and directors of the consolidated company defendants, and that the temporary restraining orders must be refused. *Tyson v. Va. and Tenn. R. R. Co.*, 1 Hughes (U. S. C. C.), 80. 1871. But see *Skiddy v. Atlantic, Miss. and Ohio R. R. Co.*, 3 ib., 320. 1877.

20. Bonds. Persons who purchase bonds of a railway company while a statute is in force authorizing the consolidation of railways must be held to have contemplated, at the time of the purchase of the bonds, that the company issuing them might consolidate with other companies. *Tylen v. Wabash R'y Co.*, 11 Bissell (U. S. C. C.), 510; 15 Federal Reporter, 763. 1883.

21. Constitutional law. Defendant was incorporated under the statutes of several states to operate a continuous line of road

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running through those states which had previously been operated by the consolidated corporations. It was claimed that those statutes authorizing the consolidation in adjoining states were repugnant to the provision of the United States constitution (art. 1, § 8, sub. 3) conferring on congress the power to regulate commerce. *Held*, untenable; that, in the absence of any legislation by congress upon the subject, the power so to legislate existed in the states. *Boardman v. Lake Shore and Michigan Southern R'y Co.*, 84 N. Y., 157, 1881; 4 Amer. & Eng. R. R. Cases, 265.

22. Contract. By a contract between three railway companies, A., B. and C., it was agreed that A. should purchase the other two railways when completed, and that, in the meantime, their capitals should be amalgamated for the purpose of such completion, A. undertaking to supply any deficiency; and it was provided that all three companies should concur in applications to parliament for the necessary powers to carry the agreement into effect. At the time the agreement was entered into, B. had power, with the consent of three fifths of its shareholders, to sell its railway to A., but C. had no such power, and neither B. nor C. had any power of amalgamation. The agreement was duly ratified by three-fifths of the shareholders in each of the three companies, and C. subsequently obtained an act giving it the required powers; but before a similar act was obtained by B., a large majority of its shareholders had become adverse to the project, so that no such act could be obtained; and the directors of that company, with the sanction of the shareholders, were proceeding to construct and dispose of their railway in a manner inconsistent with the agreement. A demurrer to a bill filed by A. against B. and its directors for specific performance of the agreement, and an injunction, was overruled, and the injunction granted; it being clear that, for the completion of the purchase, no further parliamentary powers were necessary, and it being at least doubtful whether the defendants could be heard in this court to say that the plaintiffs were not entitled to the performance of that part of the agreement, merely because there was another part (*viz.*,

the provision for amalgamation) which required additional parliamentary powers to give effect to it, which powers they refused to apply for. *Great Western R. R. Co. v. Birmingham and Oxford R. R. Co.*, 2 Phillips (Eng. Ch.), 597. 1848.

23. Contract to take stock in old company. Where the owner of the land, through which a proposed railway will run, contracts to accept payment for his land in the stock of said company, upon the consolidation of the company with another, said land owner is not compelled to accept the stock of the new company. *Mobley v. Breed*, 48 Ga., 44. 1873.

24. Charter in separate states. Where a railroad corporation was made up of four distinct corporations, chartered by the legislatures of different states, and all consolidated and merged into one corporation under the laws of such states, and becomes one of that class of corporations owning a railroad extending through two or more states and chartered under the laws of each state, having a common stock, the same shareholders and officers, the same property, and a single organization, it is for most purposes one corporation. But it is a separate corporation in each state, in so far that it is governed by the laws of each within its own territory, and is considered to have a domicile in each state, and, in the absence of any statutory provision to the contrary, may hold its meetings and transact its corporate business in either state. *Graham v. Boston, Hartford and Erie R. R. Co.*, 14 Federal Reporter, 753. 1883.

25. — Several states may, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into one; and one state may, without thereby creating a new corporation, authorize a corporation of another state to carry on business within its territory. *Cope-land v. Memphis and Charleston R. R. Co.*, 3 Woods (U. S. C. C.), 651. 1878.

26. Charter of former company. The privilege conferred upon a railroad company by a charter granted in 1837, of having subscriptions made to it by county courts without the sanction of a popular vote, was not a vested right; and if the company became consolidated with another, this privilege did

Election — Legalizing Act.

not pass to the consolidated company so as to authorize such a subscription to be made, after the constitution of 1865 took effect, without such sanction. *Wagner v. Meety*, 69 Mo., 150. 1878.

27. Election. An election of a board of directors of the consolidated corporation is by the statute (Comp. L. 1857, § 1996) clearly made a condition precedent to its acquiring the rights and franchises of the original corporations. *Mansfield, Coldwater and Lake Michigan R. R. Co. v. Drinker*, 30 Mich., 124. 1874.

28. — The filing of a duplicate of the consolidation agreement in the office of the secretary of state, after being duly made and submitted to the stockholders and confirmed by them, is by the statute made a condition precedent to a merger of the original corporations. There can be no valid action as a consolidated corporation until that is done; any attempted election of directors of the consolidated corporation before that is without warrant and ineffectual. *Ib.*

29. Estoppel. If a member of a board of directors of a corporation be present at the adoption of a resolution, and aware of what is being done, and makes no opposition to its adoption, he must be presumed to have assented to it. But if such proceeding be merely preliminary to a decision by a subsequent vote of the stockholders on the consolidation of the corporation with another corporation, which can only be ultimately decided by the vote of all the stockholders, and not of the board of directors, such consent so given by a member of the board of directors, who is also a stockholder, does not estop him from afterwards objecting to the consolidation. *Mourey v. Indianapolis and Cincinnati R. R. Co.*, 4 Bissell (U. S. C. C.), 78. 1866.

30. Evidence; judicial notice. The passage of the act authorizing the consolidation of the South Pacific and Atlantic and Pacific Railroad Companies did not render the latter liable for the debts of the former without proof that they did in fact consolidate; and of such fact the courts cannot take judicial cognizance. *Southgate v. Atlantic and Pacific R. R. Co.*, 61 Mo., 89. 1875.

31. Effect of consolidation. The consolidation of two companies does not necessarily

work a dissolution of both, and the creation of a new corporation. Whether such be its effect depends upon the legislative intent manifested in the statute under which the consolidation takes place. *Central Railroad and Banking Co. v. Georgia*, 92 U. S., 665. 1875.

32. — Where a new corporation is formed by amalgamation, under the authority of the state, of two or more distinct corporations into one, it succeeds to all the rights of the several components, and is subject to all the conditions and duties imposed by the law of their creation, except so far as it may be otherwise provided by the act under which such consolidation is effected. *Chicago, Rock Island and Pacific R. R. Co. v. Moffitt*, 75 Ill., 524. 1874.

33. — After consolidation the new company becomes liable to perform the duties required of the railroad companies so consolidated, and if no part of the franchise is reserved to either of the old companies, they will not be liable to the public for the performance of duties devolving upon the new companies. *Peoria and Rock Island Ry Co. v. Coal Valley Mining Co.*, 68 Ill., 489. 1873.

34. — new charter. A new corporation may be created by the union of two or more corporations, and its powers and privileges designated by reference to the charters of other companies, as well as by special enumeration. *Railroad Co. v. Maine*, 96 U. S., 499. 1877.

35. — The legislature may incorporate a new and distinct corporation out of two or more previously existing corporations. *State v. Maine Central R. R. Co.*, 66 Me., 488, 1877; 19 Amer. Ry Rep., 323.

36. — Where a new corporation is thus formed, and by the act is to "have the powers, privileges and immunities possessed by each of the corporations" whose union constitutes such new corporation, the new corporation will have only the privileges, powers and immunities which the corporation with the fewest privileges, powers and immunities possessed, and which were common to all. This rule applies to exemption from taxation. *Ib.*

37. Legalizing act. A general law of New York authorized any railway companies having continuous lines to consolidate.

Liability of Directors — Proceedings.

Two railway companies, owning roads one of which was wholly within that state and the other partly within that state and partly in Connecticut, made a contract to consolidate and took all the formal measures required to accomplish it, but a question was made as to the validity of the consolidation by reason of the lines not having at the time a completed continuous track. A resolution of the legislature of Connecticut had provided that, whenever the company owning the road lying partly within that state should be consolidated with any other company in New York in pursuance of the laws of New York, the new company should have all the rights within Connecticut that were possessed by the old. *Held*, that an act subsequently passed by the legislature of New York, recognizing the consolidated company as in existence, validated and established the agreement under which the consolidation was made. *Mead v. New York, Housatonic and Northern R. R. Co.*, 45 Conn., 199. 1877.

38. — It matters not whether certain railway companies were empowered by their charters to construct a railroad within the city of Chicago, if, after their consolidation, the legislature, by an amendatory act, recognizes the existence of the consolidated company and the name adopted, and its authority so to construct its road, as this will confer the power. *McAuley v. Columbus, Chicago and Indiana Central R'y Co.*, 83 Ill., 348. 1876.

39. **Liability of directors.** A stockholder in a railway company which, against his protest, has been consolidated without authority of law with another company, by the action of other stockholders, and whose equitable interest has been wrongfully appropriated by the consolidated company, cannot maintain an action for the injury against the directors of the company, as such; nor are the directors responsible to the corporation for a consolidation effected by act of the stockholders. *International and Great Northern R. R. Co. v. Bremond*, 53 Tex., 96, 1880; 4 Amer. & Eng. R. R. Cases, 808.

40. **Lien.** A creditor of a corporation may pursue his lien after consolidation. *Ritten v. Union Pacific R'y Co.*, 12 Amer. & Eng. R. R. Cases, 374 (U. S. C. C.). 1883.

41. **Mortgage.** The consolidation of the Vermont Central R. R. Co. and Vermont and Canada R. R. Co. construed. *Hazard v. Vermont and Canada R. R. Co.*, 17 Federal Reporter, 753. 1883.

42. — A consolidated railway company may execute a mortgage upon all the consolidated property which will be paramount to the unsecured indebtedness of the constituent companies. *Tysen v. Wabash R'y Co.*, 11 Bissell (U. S. C. C.), 510; 15 Federal Reporter, 763. 1883.

43. **Parallel lines.** The lines of two railway companies, which are in their general features parallel and competing, cannot be connected for the carriage of freight and passengers over both "continuously," within the meaning of Rev. Stats., § 3379, and hence such companies cannot become consolidated into one corporation under that section. *State v. Vanderbilt*, 37 Ohio St., 590, 1882; 8 Amer. & Eng. R. R. Cases, 657.

44. **Power to consolidate.** Two railway companies owning lines of railroad connected only by other railroads which such companies hold by lease are not authorized to become consolidated into one corporation under Rev. Stats., § 3379. *Ib.*

45. — Where authority is given by statute to one railway corporation to consolidate with any other, whatever other corporation it selects for a union, and finds willing to join it, has power to unite with it, although such other corporation is not named in the statute. *Prospect Park and Coney Island R. R. Co., In re*, 67 N. Y., 371, 1876; 15 Amer. R'y Rep., 102; affirming *Same Case*, 8 Hun (N. Y.), 30, 1876.

46. **Proceedings.** A certificate made by the directors of consolidating railroad companies under Rev. Stats., § 3381, which fails to show any place of residence of the directors of the new company, is fatally defective. *State v. Vanderbilt*, 37 Ohio St., 590, 1882; 8 Amer. & Eng. R. R. Cases, 657.

47. — **Failure to comply with statute.** The act of March 15, 1871, left it optional with the Atlantic and Pacific R. R. Co. and the South Pacific R. R. Co. to consolidate or not as they chose. Failure of the companies to file with the secretary of state the certificate required by the second section of that act did not affect the validity of the con-

Proceedings against Consolidated Company — Statutes.

veyance by which, before the passage of the act, the South Pacific Company transferred to the other all its property, rights and franchises. *Atlantic and Pacific R. R. Co. v. City of St. Louis*, 66 Mo., 228. 1877.

48. Proceedings against consolidated company. The manner of procedure against a consolidated corporation determined. *Prouty v. Lake Shore and Mich. Southern R'y Co.*, 6 Hun (N. Y.), 246, 1875; appeal dismissed, *Same v. Same*, 64 N. Y., 641, 1876.

49. — misnomer; amendment. The New York Central R. R. Co. and the Hudson River R. R. Co., separate corporations, were consolidated pursuant to an act of the New York legislature, under the name of the New York Central and Hudson River R. R. Co. The new corporation was sued, as a common carrier, by the name of the New York Central R. R. Co., for damage to property received at a station on the line of what was formerly the New York Central Railroad, and appeared in court and claimed a misnomer. *Held*, that the plaintiff was properly allowed on trial to amend the writ by inserting the true name of the new corporation. *Hosford v. N. Y. Central and Hudson River R. R. Co.*, 47 Vt., 533. 1875.

50. — proceedings pending against former company. Where, after the commencement of a suit against a railway company upon a contract, it appeared that it and other companies were merged in a new company, the latter having assumed all of the obligations of the old companies, *held*, that an order allowing defendant to file a supplemental complaint bringing in the new company as defendant was properly granted. *Prouty v. Lake Shore and Michigan Southern R. R. Co.*, 85 N. Y., 272. 1881.

51. Purchase of capital stock. Where railway companies were by legislative authority authorized to consolidate their capital stock, and by supplement one of them, which had then mortgaged its after-acquired property, was authorized, in lieu of consolidation of capital stock, to purchase the stock of the other company, and the purchase and sale and delivery of the stock was actually made for the purpose of consolidation, and an actual consolidation of the roads was in fact made and completely recognized, the pur-

chase, and the sale and delivery of the capital stock, were held to be a consolidation in accordance with the provisions of the acts. *Williamson v. New Jersey Southern R. R. Co.*, 26 N. J. Eq., 398. 1875.

52. Receiver. In an action to prevent the consolidation of railway companies, the election of directors for the new company, at a meeting of the stockholders held under § 3383 of the Revised Statutes, will not justify an appointment of a receiver against either of the companies, on the ground that part of the stockholders participating in the meeting have been inhibited from doing so by injunction. *Railway Co. v. Jewett*, 37 Ohio St., 649, 1882; 8 Amer. & Eng. R. R. Cases, 702.

53. — The road in the hands of the court was the property of a company, constituted by the consolidation of three railroad companies, all of which had before the consolidation issued their bonds and executed mortgages on their property to secure them. *Held*, that the court might direct the property of the consolidated company to be sold as a whole, and afterwards fix the amount to be paid to the several holders of the bonds and mortgages on the respective roads. *Gibert v. Washington, Va. Midland, etc., R. R. Co.*, 33 Grattan (Va.), 586, 1880; 1 Amer. & Eng. R. R. Cases, 473.

54. Statutes — Georgia. The acts consolidating the Central R. R. and Banking Co. with the Macon and Western R. R. Co. construed. *Central R. R. and Banking Co. v. State*, 54 Ga., 401, 1875; followed, *Savannah, Griffin, etc., R. R. Co. v. State*, 55 ib., 557, 1875.

55. — Illinois. In view of the legislation in Illinois great liberality should be exercised in regard to contracts for consolidation between different railroad companies. By the general language of the statute relating to the union and consolidation of different lines of road, the means by which the result is to be or has been obtained have not been clearly designated, but that has been left to be adjusted by contracts between the parties. *Dimpfel v. Ohio and Mississippi R'y Co.*, 9 Bissell (U. S. C. C.), 127. 1879.

56. — New York statute. Under the statutes of New York railway lines cannot be consolidated unless they are substantially

Stock Dividends — Subscriptions to Stock.

continuous lines, or running in the same general direction. 2 R. S., 7th ed., 1590; *People v. Boston, Hoosac Tunnel and Western R'y Co.*, 12 Abbott's New Cases (N. Y.), 230. 1882.

57. Stock dividends. Two railroad companies were united into one and the stock of each increased and divided among the stockholders; not because earned, or to add to their future profits, but for the purpose of rendering the stock of the two companies equal in value. *Held*, that this was not such a stock dividend as would render the company liable to pay a state tax upon it, but was a mere watering of the stock, leaving the actual dividends the same as before. *Commonwealth v. Lake Shore R. R. Co.*, 2 Pearson (Pa.), 392. 1874.

58. Stockholder's rights. In 1868 and 1869 the New Jersey Western R. R. Co., acting under legislative authority, constructed parts of a railroad in New Jersey, and the complainants and others subscribed and paid for its stock. In 1870 it was consolidated with other railroads built or to be built, by an act authorizing compensation to such stockholders of the New Jersey Western R. R. Co. as were dissatisfied therewith. A mortgage, covering all the property of the consolidated roads, was given, and the legality of the consolidation recognized by subsequent legislation. Against some of the defendants there appeared to be some grounds for applying for relief. *Held*, that it cannot be satisfactorily determined on the statements of the bill whether the complainants have, by acquiescence, lost their rights as stockholders, and the demurrer, being too general, was overruled. *Hoxsey v. New Jersey Midland R'y Co.*, 33 N. J. Eq., 119. 1880.

59. — To effect a consolidation of railroad companies subsisting under special charters not providing therefor, the consent of every stockholder must be given, and any one dissenting stockholder is entitled to an injunction against such consolidation. *Mowrey v. Indianapolis and Cincinnati R. R. Co.*, 4 Bissell (U. S. C. C.), 78. 1866.

60. — Upon the consolidation of two incorporated companies the holder of bonds of one company, containing a clause authorizing their conversion at any time before ma-

turity into the capital stock of the company issuing them, at par, cannot be deprived of the privilege of such conversion and relegated to the rights conferred upon him instead by the articles of consolidation, until he has had a fair opportunity, after notice of the contemplated change, to exercise his original rights, and has elected not to do so. *Rosenkrans v. Lafayette, etc., R. R. Co.*, 18 Federal Reporter, 513. 1883.

61. — A stockholder in a railway company, against whose protest a consolidation was illegally effected by the company with another railway company, delayed for more than two years the institution of proceedings against the consolidated company for the appropriation of his equitable interests. *Held*, that, while the delay might preclude him from enjoining the further prosecution of the consolidated enterprise, it did not prevent him from following up his equitable interest in the hands of a corporation which, by appropriating it without authority, became equitably bound to compensate him therefor. *International and Great Northern R. R. Co. v. Bremond*, 53 Tex., 96, 1880; 4 Amer. & Eng. R. R. Cases, 308.

62. Street railways. Street railways are included within the term "railroads" employed in the act of May 16, 1861, and the provisions of said act relating to merger apply to said railways. *Hestonville, etc., R. R. Co. v. City of Philadelphia*, 89 Pa. St., 210. 1879.

63. Subscriptions to stock; amalgamation of railways. Two companies proposing to construct railways which would necessarily interfere with each other, their respective subscribers' agreements empowered the respective managing committees or directors "to demise and sell the undertaking, or any part thereof, or to amalgamate the same, or any part thereof, with any other railway or railways," etc. In pursuance of the powers thus conferred upon them, the directors of the two companies agreed to amalgamate and to form one united company, and this agreement was carried into effect by resolutions made at board meetings of the respective committees, and by a deed executed by a competent number of the directors of each company. *Held*, that the power to amalgamate was vested in the two boards, and

Amendment of Charter — Donation to Manufacturing Company.

that those powers were well and effectively exercised; and that the company so united or amalgamated might maintain an action for calls against a shareholder of either company who had executed the parliamentary contract and subscribers' agreement. *Cork and Youghal R'y Co. v. Paterson*, 18 Common Bench, 414; 86 E. C. L., 414, 1856; 37 Eng. Law & Equity, 398.

64. Taxation. The general railway law, in permitting the consolidation of railway companies within the state of Michigan with others beyond its boundaries, contemplates leaving the domestic company in its original position as to stock and loans, and annexing to its capital and loans those additions which are made proportional to the original amounts. This rule applies to questions of taxation. *Lake Shore and Michigan Southern R'y Co. v. The People*, 46 Mich., 193. 1891.

65. — The consolidation of the Savannah and Albany R. R. Co. and Atlantic and Gulf R. R. Co., under the name of the Atlantic and Gulf R. R. Co., construed, and held that a new corporation was thereby created. *State v. Atlantic and Gulf R. R. Co.*, 60 Ga., 268. 1878.

66. Texas and Pacific R'y Co. The Texas and Pacific R'y Co. became liable for damages caused by the Southern Pacific R'y Co. prior to the consolidation, March 21, 1872. *Texas and Pacific R'y Co. v. Murphy*, 46 Tex., 356, 1876; 13 Amer. R'y Rep., 319.

67. Vendor's lien. Two railroad companies were consolidated, the consolidated company to own all the property and assume all the debts of either company, and to issue stock to persons entitled thereto in either company. Plaintiff, who was a stockholder in one of the companies prior to the consolidation, and, as such, had an interest in its right of way, which passed to the consolidated company, and over which said company operated its road, brought suit upon notes given him by the new company for his interest in the former company, claiming a vendor's lien on such right of way. Held, that these facts did not entitle him to a vendor's lien. *Cross v. Burlington and Southwestern R'y Co.*, 58 Iowa, 62, 1882; 8 Amer. & Eng. R. R. Cases, 263.

CONSTITUTIONAL LAW.

See BONDS; CHARTER; CARRIAGE OF MERCHANDISE; EMINENT DOMAIN; HIGHWAY; INJURIES TO DOMESTIC ANIMALS; SUBSCRIPTIONS BY CITIES; SUBSCRIPTIONS BY COUNTIES; SUBSCRIPTIONS BY INDIVIDUALS; SUBSCRIPTIONS BY STATES; STOCK; TAXATION; TEXAS CATTLE ACT.

1. Amendment of charter; provision as to service of process. The provisions of a charter of incorporation, regulating the manner of serving process on the corporation, relates alone to the remedy, and a subsequent enactment, prescribing the manner of serving process in such cases, operates as a repeal of the charter provision. *Cairo and Fulton R. R. Co. v. Hecht*, 29 Ark., 661. 1874.

2. Claim against a state. Where a state law authorizes a suit against the state, the repeal of such law cuts off the right of action as to causes accruing prior to the repeal. *Railroad Co. v. Tennessee*, 101 U. S., 337; *Railroad Co. v. Alabama*, ib., 832. 1879.

3. Contracts; debts of railway company. Special Laws, 1874, c. 105, entitled "An act to secure the payment of certain debts contracted in the construction of certain lines of road of the St. Paul and Pacific R. Co.," impairs the obligation of the contract between the state of Minnesota and said company, and is therefore invalid. *De Graff v. St. Paul and Pacific R. Co.*, 23 Minn., 144. 1876.

4. Coroner's fees; expense of burial. The act of 1855, making railroad companies liable for all expenses of the coroner and his inquest, and the burial of all persons who may die on its cars, or who may be killed by collision or other accident occurring to such cars, or otherwise, is unconstitutional and void, so far as it attempts to make such companies liable in cases where they have violated no law, or have been guilty of no negligence on their part. *Ohio and Mississippi R'y Co. v. Lackey*, 78 Ill., 55. 1875.

5. Donation to manufacturing company. An attempted grant of public aid to an individual or a private corporation cannot be sustained unless upon the face of the law or record it appears that the grant is to subserve some public purpose. The silence of the law as to the purpose of the grant makes against its validity. *Central Branch*

Elevator—Texas Cattle Act.

Union Pacific R. R. Co. v. Smith, 23 Kans., 745. 1880.

6. Elevator; delivery of grain. The mandate of the constitution in respect to the delivery of grain shipped in bulk, at the warehouse or elevator to which it is consigned, must be understood to be confined to a delivery by the common carrier at the warehouse or elevator where consigned, when such delivery can be made by availing itself of tracks it has the legal right to employ or use. *Hoyt v. Chicago, Burlington and Quincy R. R. Co.*, 93 Ill., 601. 1879.

7. Foreign corporation. The provision of the constitution (art. 14, § 4), that "no foreign corporation shall do any business in this state without having at least one place of business and an authorized agent therein," is a legitimate exercise of the police power of the state, and is not in conflict with any act of congress, nor violative of any provision of the federal constitution. *American Union Telegraph Co. v. Western Union Telegraph Co.*, 67 Ala., 26. 1880.

8. Injury to domestic animals; chartered rights. A charter granted to a railroad corporation by the territorial legislature does not confer nor secure rights beyond the reach of the police power of the state. The chartered rights of a corporation are not more sacred than the individual rights of person and property, and all must give way to any legitimate exercise of the police power of the state. *Kansas Pacific R. R. Co. v. Mower*, 16 Kans., 573, 1876; 9 Amer. R'y Rep., 400.

9. — statute fixing absolute liability for killing stock. "Due process of law" implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property, in its most comprehensive sense, to be heard by testimony, or otherwise, and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law. *Zeigler v. South and North Ala. R. R. Co.*, 58 Ala., 594, 1877; 20 Amer. R'y Rep., 463.

10. Right to jury trial. An action for one thousand bushels of wheat, delivered to

defendant by mistake, in excess of the amount deposited, is a case at law, and the defendant is entitled to a jury trial. Art. 1, sec. 4, Const. Such an action cannot be referred without consent. *St. Paul and Sioux City R. R. Co. v. Gardner*, 19 Minn., 132, 1872; 10 Amer. R'y Rep., 355.

11. — In an action of tort in the federal courts, the defendant, being in default, has no constitutional right to a jury trial. The practice of the state courts should be followed. *Raymond v. Danbury and Norwalk R. R. Co.*, 14 Blatchford (U. S. C. C.), 133. 1877.

12. Taxation; fourteenth amendment. Private corporations are persons, within the meaning of § 1 of the fourteenth amendment of the federal constitution, and are entitled, so far as their property is concerned, to the equal protection of the laws. *San Mateo County v. Southern Pacific R. R. Co.*, 13 Federal Reporter, 722. 1882.

13. Texas cattle act. The Texas cattle act forbids the transportation of Texas cattle from one county to another unless such cattle have passed the previous winter in the state. This is a police regulation and not in conflict with the constitution of the United States. *Wilson v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 60 Mo., 184, 1875; 9 Amer. R'y Rep., 135; *Surface v. Hannibal and St. Joseph R. R. Co.*, 60 Mo., 216, 1875; *Husen v. Same*, ib., 226, 1875; *Dimond v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, ib., 393, 1875; *Mercer v. Same*, ib., 397, 1875; *Kenney v. Hannibal and St. Joseph R. R. Co.*, 62 Mo., 476, 1876; *Brown v. Same*, ib., 490, 1876; *Surface v. Same*, 63 ib., 452, 1876; 21 Amer. R'y Rep., 214.

14. — The Texas cattle act (1 Wag. Stat., p. 251, § 1) is in conflict with that provision of the constitution of the United States which confers upon congress the power to regulate interstate commerce. Const. of United States, art. 1, § 8 (overruling the former decisions of the court). *Gilmore v. Hannibal and St. Joseph R. R. Co.*, 67 Mo., 323, 1878; *R. R. Co. v. Husen*, 95 U. S., 465, 1877.

15. — The seizure and sale of one's property to pay a fine imposed under the provisions of a statute which is subsequently decided to be unconstitutional cannot form

 Railway Company not Liable for Neglect — Injury to Employees.

the basis of an action against a person who committed an act which led to the imposition of the fine. So held where the carrier unloaded cattle in violation of an unconstitutional law, whereby the cattle were sold to pay a fine. *McAllister v. Chicago, Rock Island and Pacific R. R. Co.*, 74 Mo., 351, 1881; 4 Amer. & Eng. R. R. Cases, 210.

CONSTRUCTION COMPANY.

1. Railway company not liable for neglect. When a railroad is being constructed, and is in the exclusive control of and operated by a contractor for its construction, and the railroad company, at the time the injuries complained of are committed, has no control thereof, such company is not liable for the damages resulting from the operation of such railroad. In such case the maxim *respondet superior* does not apply. *Kansas Central R'y Co. v. Fitzsimmons*, 18 Kans., 34, 1877; 15 Amer. R'y Rep., 220.

2. — contra. Where fifty-six miles of railway, including a turn-table, are constructed by a construction company and completed, and then the further construction of the railway is suspended for several years, and from and after the said completion of said fifty-six miles of railway the railway is operated and managed for general business and transportation, by the consent of all parties, in the name of the railroad company for which it was constructed, and the construction company is not known to the public or to persons doing business with the railway, but only the railway company, and the railway has not been leased to the construction company, *held*, that a finding of the jury, approved by the trial court, that the railway company was responsible for the condition of the turn-table, at a period of time about ten months after the completion of said fifty-six miles of railway, will not be disturbed by the supreme court, whatever the other evidence may show were the private wishes or understanding of the railway company and construction company. *Kansas Central R'y Co. v. Fitzsimmons*, 22 Kans., 686. 1879.

3. Fraudulent contracts. An association of fifteen persons, consisting among others

of two of the directors of a railway corporation, one of whom was its president, and the other its treasurer, was formed to obtain a contract for the construction of the railroad of said corporation; to gain the control of the corporation by the issuance to the association, as part payment of the work to be done, of a majority of the stock of the corporation; to depreciate and render valueless the shares of certain stockholders, and acquire for the association the property and effects of the corporation. At a meeting of a bare quorum of the directors of the corporation, at which the president and treasurer attended, a proposal was received from C., who was a member of the association, on behalf of himself and his associates, whose names were concealed, to construct the road. The directors referred the matter to the president of the corporation. He made the contract therefor with C., as previously arranged with the association, but in fact for the joint interest of all the members of the association, which included the president and treasurer. To further conceal the true character of this arrangement, C. transferred the contract to G. & Co., and under the latter name the work was done. This transfer was merely colorable; the work was performed, expenses paid, and profits divided by the association. The name of G. & Co. was only another style for the association. The president, who executed the contract, has been continued in office as a director and president. *Held*, that the contract, made by the president in the name of the corporation with C., for the benefit of himself and his associates, is fraudulent and void. *Held*, that all the persons who participated with the directors and officers of the corporation in their fraudulent and unlawful transactions, with full knowledge of all the facts, are equally liable with said officers. *Ryan v. Leavenworth, Atchison and Northwestern R'y Co.*, 21 Kans., 365. 1879.

4. Injury to employees. A company which is engaged in the construction of a railway, and to that end is running trains laden with gravel, is operating a railroad within the meaning of the statute. *McKnight v. Iowa and Minnesota R. R. Construction Co.*, 43 Ia., 406, 1876; 14 Amer. R'y Rep., 465.

5. — One who was engaged in shoveling

Assessment of Damages — Engineer as Arbitrator.

gravel from the train and had nothing to do with operating it was entitled to recover for injuries happening to him through the negligence of the company or its employees. *Ib.*

6. — A corporation organized with the power of constructing and operating a railway, although nominally a construction company, is a railway company within the meaning of § 1068 of the Code. *Langan v. I. and M. Construction Co.*, 49 Ia., 317. 1878.

7. **Services of officers; contract.** L. was president of the B., Ft. K. and P. R. R. Co., from 1869 to October, 1875, and in 1871 became a member of a construction company to complete the road, the construction company to take all the assets, assume the debts, and pay all claims and expenses of the corporation. In 1875 the B., Ft. K. and P. R. R. Co. was merged in the Nebraska R'y Co. In an action by L. against the latter company for the value of services performed by him as president of the B., Ft. K. and P. R. R. Co. from 1871 to 1875, in procuring the right of way and promoting the interests of the corporation, *held*, that he could not recover, he, as a member of the construction company, having assumed to pay for such services. *Nebraska R'y Co. v. Lett*, 8 Neb., 251, 1879; 20 Amer. R'y Rep., 364.

CONSTRUCTION OF RAILWAYS.

See ARBITRATION; CONTRACT; CONSTRUCTION COMPANY; DAMAGES; EMINENT DOMAIN; INJURIES TO DOMESTIC ANIMALS; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; SURFACE WATER.

1. **Assessment of damages; mandamus.**

By a railway act it was provided that all parties with whom the company might have any dispute should, at their own cost, before the company should be obliged to issue their warrant to summon a jury, enter into a bond to prosecute their complaint and pay their proportion of costs; and in case the warrant should be issued without such bond having been entered into, the company might give notice, requiring the same to be done before commencing the inquiry. Certain premises having been injured by floods occasioned by the company's works, on an application by the owners for a *mandamus*

to summon a jury to assess damages, it was objected that the damage resulted from acts done partly by the company, and partly by the applicants themselves; and that the bond required by the act had not been entered into previous to the application. It did not appear that there had been any demand and refusal. *Held*, that there was sufficient doubt on the facts to warrant the issuing of a *mandamus*, and that the entering into the bond, unless required by the company, was not a condition precedent to such an application. *Queen v. North Union R'y Co.*, 1 Eng. R. R. & Canal Cases, 729. 1840.

2. **Arbitration; engineer as arbitrator.**

In a contract between plaintiffs and defendants for the construction of a certain railway were stipulations constituting the chief engineer of the company an umpire to determine all questions growing out of the contract, and making him the sole judge of the quality and quantity of work done and materials furnished, etc. It appearing from the express terms of the contract that a certain price was agreed to be paid for a certain kind of work, *held*, that the chief engineer had no authority to fix another or different measure of compensation. *Starkey v. De Graff*, 22 Minn., 431, 1876; 18 Amer. R'y Rep., 444.

3. — In case the engineer refuses to measure or estimate the work done under the contract, the party entitled to compensation therefor may prove the quantity by other competent evidence. *Ib.*

4. **Engineer as arbitrator.** A written contract between a railway company and one who undertook to do certain work in its construction fixed the prices of the different kinds of work to be done, and provided that the engineer of the road should make estimates of the work from time to time upon which payments should be made, and a final estimate which should be also paid, and that all disputes as to the meaning and execution of the contract should be referred to the engineer, and his decision should be final. *Held*, that where the engineer had failed to estimate work, or by neglect or mistakes had underestimated it, suit could be maintained for the recovery of the correct amount. *Kistler v. Indianapolis and St. Louis R. R. Co.*, 88 Ind., 460. 1882.

Bankruptcy — Bridge.

5. — A stipulation whereby parties to a contract name an umpire who shall settle differences between them, and agree not to resort to the courts, is against public policy and void. *Ib.*

6. — A contract between the W. R'y Co. and certain contractors for works upon the line contained a stipulation that any difference arising thereon should be referred to T., "if and so long as he should continue to be the company's principal engineer." After the making of the contract the W. R'y Co. became merged in and amalgamated with the N. B. R'y Co., under an act of parliament, which provided that, notwithstanding the amalgamation and the partial repeal of the special act of the W. R'y Co., all contracts should be proceeded with and enforced as if such repeal had not taken place, the N. B. R'y Co. being, in all respects, with reference to such matters, substituted for the W. R'y Co. *Held*, that T., who still continued to be the engineer of the W. portion of the railway, but was not the "principal engineer" of the amalgamated company, was the proper referee in cases of disputes arising out of the above contract. *Wansbeck R'y Co., In re*, Law Reports, 1 Common Pleas Cases, 269. 1866.

7. — Where a contract provided that all matters in dispute should be determined by the engineer in charge of the work, and that if the engineer became dissatisfied with the work the company might take charge of the same on fourteen days' notice, it was *held* that where fraud was alleged as against such engineer, and a full compliance with the terms of the contract alleged on the part of the contractor, that an injunction would issue as against such company to prevent it from proceeding against the contractor for penalties under the contract. *Waring v. Manchester, Sheffield and Lincolnshire R. R. Co.*, 7 Hare (Eng. Ch.), 482. 1849.

8. — By a contract for the erection of railway works, after specifying certain works to be done for a gross sum, it was provided that extra works, which the company or its engineer should, by any writing under his hand, require to be executed, should be deemed to be included in the contract, and should be paid for at a certain rate; and that

the contractor should not be entitled to make any claim for any alteration or addition which he might make without such written and signed instructions. *Held*, by the vice-chancellor of England (affirmed on appeal by the house of lords), that a suit for an account of the moneys due to the contractor, in respect of the works done under the contract, was a proper subject of jurisdiction in equity. *Nixon v. Taff Vale R. R. Co.*, 7 Hare (Eng. Ch.), 136. 1848.

9. **Bankruptcy; forfeiture.** A contract for building a railway provided, in case of bankruptcy of the contractor and a failure for seven days to perform his agreement after notice given to proceed with the contract, that the tools and materials on the work should be forfeited. *Held*, that under the bankruptcy law the title of the assignee related back to the time of the act of bankruptcy, and the forfeiture did not accrue till seven days thereafter, and hence the forfeiture could not be enforced as against the assignee. *Rouch v. Great Western R'y Co.*, 1 Adolphus & Ellis (N. S.), 51; 41 E. C. L., 482. 1842.

10. **Branch lines; abandonment; injunction.** Where a railway company was authorized to make a direct line of railway with a branch railway, and were about to complete and open the direct line, but had abandoned the branch line, the attorney-general has no right to file an information to restrain the opening of the direct line, as a means of compelling the completion of the branch line, alleging that the abandonment of the branch line was an injury to the public. *Attorney-General v. Birmingham and Oxford Junction R'y Co.*, 8 Eng. Law & Equity, 243; 16 Jurist, 113. 1851.

11. **Bridge; courts will not undertake such work.** The plaintiff railway company entered into a contract with the defendants for the construction by the latter, for the former, of a railway bridge across the Arkansas river. Differences arose between the parties as to the contract, which resulted in stopping work on the bridge. The plaintiff thereupon filed a bill, asking the court to take possession of the defendants' plant and complete the bridge, with funds to be furnished by the plaintiff; leaving all questions of difference between the parties

Cities — Contract.

for future settlement or adjudication. *Held*, that the court had no power to seize and use the defendants' plant, and that it would not undertake the work of completing the bridge. *Texas and St. Louis R'y Co. v. Rust*, 17 Federal Reporter, 275. 1883.

12. Cities; power granted by city. The city of Kingston granted the right to construct a branch railway within its limits, and after the work was partly done it was discovered that the result of building the grade would be to produce a large quantity of stagnant water. The city thereupon required the company to desist from the work or to fill up this space. *Held*, that the company could not be required to either abandon the work or fill up the pool as ordered by the city. *Kingston v. Grand Trunk R'y Co.*, 8 Grant Ch., Upper Canada, 535. 1861.

13. Contract. Where a railway company agreed with a land owner to execute certain accommodation works, and having made the railway at such a level as to render it impossible for it to execute the works according to the agreement, so executed them as to give the land owner a less convenient approach to his house, the court refused, after the railway had been opened for public use, to decree the specific performance of the agreement, which would have involved the alteration of the level of the railway, although the works were not completed, nor the railway opened, until after the filing of the bill, and after a motion for an injunction to restrain the completion of the works had been made and ordered to stand over upon an undertaking by the company to deal with the works as the court should direct. *Raphael v. Thames Valley R'y Co.*, Law Reports, 2 Equity Cases, 37. 1866.

14. — breach of contract; damages. The plaintiffs contracted with the defendant to construct its railway for a fixed sum. While the plaintiffs were waiting for the defendant to procure a part of the right of way, which they claimed was represented by the president of the defendant to be already secured, the price of rails took a sudden rise in the market, so that the plaintiffs were obliged to pay more for them, when they concluded to purchase, than they could have gotten them for had the work not been delayed. In an action for deceit brought by

the plaintiffs against the defendant, it was *held* that the damages were too remote for allowance. *Phelps v. George's Creek and Cumberland R. R. Co.*, 60 Md., 536. 1883.

15. — compromise. H. & L., having a contract for the construction of a railway, let a portion of the work to R., who, in settling, claimed for extra work, but gave H. & L. a receipt in full, in consideration of their promise to pay him for the extra work should they succeed in getting payment of the railway company therefor. In settling with the company for various claims, amounting to \$75,000, including that for R.'s extra work, H. & L. received by way of compromise \$25,000 for a lump settlement in full. *Held*, that the consideration for the promise of H. & L. to R. was a legal one, and the presumption is that they received as much *pro rata* on R.'s claim as upon any of the claims thus settled, and that presumption is not removed by showing that R.'s claim was not a valid claim, and that some others of the claims were valid. *Read v. Hitchings*, 71 Me., 590. 1880.

16. — contract to carry material at cost; breach; damages. The defendant agreed with plaintiff (who had contracted to construct a railroad track parallel to that of defendant's road) that it would transport and distribute his material along the line, and charge him only the actual expense. In his action to recover for a breach of the agreement, *held*, that evidence of how much more it cost him to distribute the ties, etc., by laying a temporary track, was admissible, and this excess in expense was proper damages. *Wilson v. N. Y. Central R. R. Co.*, 4 Abbott's Court of Appeals Decisions (N. Y.), 618. 1867.

17. — contract to keep stock out of farm. In an action against a railway company the complaint alleged that, in consideration of the promise of the defendant to keep stock out of the crops of the plaintiff, the latter had granted the former leave to enter upon his farm and construct its line across such farm, but that the defendant had permitted stock to enter upon and destroy such crops. *Held*, that the action is one upon contract, and not for a tort. *Cincinnati, Wabash and Michigan R. R. Co. v. Harris*, 61 Ind., 290. 1878.

- Crossings.

18. — fires; error in plans. A great fire having swept over the line of a railway, after the survey and before the contract was made, and burned away the soil, so that it required more earth by way of fills and embankment than was shown by the profile and table of cuts and fills made by the engineer before the fire, it was not error to permit the jury to take this fact into account in determining the amount of work done under the contract. *Grand Rapids and Bay City R. R. Co. v. Van Dusen*, 29 Mich., 431. 1874.

19. — forfeiture; arbitration. An agreement between a railway company and a contractor provided that, in case the contractor should be guilty of any delay or default in the fulfilment of the contract, the company might take the execution of the works out of his hands, and might use all or any of his plant, materials or implements; and that, in addition to all other rights and remedies which the company might have against the contractor, the company might apply any moneys to which the contractor would otherwise be entitled under his contract towards satisfaction of all losses or expenses occasioned to the company by the delay; and that all the materials, plant and implements which, at the time of such delay or default, should be in or about the site of the works, should thereupon become the absolute property of the company, and be valued or sold, and the amount of such valuation or sale credited to the contractor in reduction of the moneys (if any) recoverable from him by the company. The company took the execution out of the contractor's hands under this clause. The contractor brought an action for breach of contract, which, with all matters between the parties, was referred to arbitration. *Held*, that the plant and materials did not become the absolute property of the company, unless loss or expense had been occasioned to them; and an interlocutory injunction was awarded to restrain them from removing and selling the plant and materials pending the arbitration. *Garrett v. Salisbury and Dorset Junction R'y Co.*, Law Reports, 2 Equity Cases, 358. 1866.

20. — interest. The contract between a railway company and a contractor provided that payments should be made monthly, as

the work proceeded, on the certificates of the company's engineer. There was no stipulation in the contract in reference to the payment of interest to the contractor on any sums due, but not paid to him. The contractor made a demand in writing for a sum as the balance due to him, and claimed interest thereon. His accounts were disputed, but on a bill filed by him against the company, the result showed that he was entitled to a balance less than one-half of the sum which he had claimed to be due from the company. *Held*, that the contractor was not entitled to interest either under the contract, there being no express stipulation on the part of the company to pay any, or under the statute 3 and 4 Will. 4, c. 42, s. 28, the demand in writing for payment not being of a sum certain payable at a certain time. *Hill v. South Staffordshire R'y Co.*, Law Reports, 18 Equity Cases, 154. 1874.

21. — payment in stock; dividends. If complainants agreed to finish a certain railway from Eufaula to Clayton, and to transfer to defendants a certain amount of stock therein, and in consideration thereof defendants agreed to issue to complainants stock in their road at the rate of one hundred and fifty shares per mile of road finished to Clayton, such payment to be made when the superintendent of one of defendants should approve said line as completed, then, in the absence of any further agreement, the issue of stock to the amount of one hundred and fifty shares per mile, exclusive of dividends, would be a full discharge of their liability under said contract, and if in the issue of such stock dividends accrued or were accruing on the same, and were paid by mistake or misunderstanding to complainants, in equity they ought to account therefor up to the date fixed for delivery. *Southwestern R. R. Co. v. Papot*, 67 Ga., 675. 1881.

22. Crossings. Lands were bought by the crown under an act enabling the crown to buy lands for the purpose of fortifications, but providing that the lands were not to be built upon or sold. By an act authorizing a railway to be made through these lands the railway company was obliged to make level crossings giving access to part of the lands then a marsh or pasture. The crown, under the authority of a subsequent act, sold part

Engineer — Injury to Land.

of the lands, and the purchasers proposed to build houses thereon. *Held*, that the purchasers could build houses thereon, and that the occupiers of the houses would be entitled to make use of the level crossings, and an injunction was granted against obstruction of the level crossings, but not so as to prevent the company from using the railway for the reasonable working of its traffic. *United Land Co. v. Great Eastern R'y Co.*, Law Reports, 10 Chancery Appeal Cases, 586. 1875.

23. — A railway company taking land compulsorily contracted to make communications by level crossings between two severed portions of an estate. The estate then consisted of marsh or mud land and was subject to a statutory provision against being built upon. The prohibition having been afterwards removed, and the land becoming applicable for building purposes, *held*, that a right of way over, under or across a railway was *prima facie* general, and not restricted to purposes to which the land was applicable at the time the right arose, and the right, being unrestricted in terms, gave the owners and occupiers of the land the use of the level crossings for all purposes connected with the houses and buildings subsequently erected or to be erected on the estate, but not so as to obstruct the proper working of the railway. *United Land Co. v. Great Eastern R'y Co.*, Law Reports, 17 Equity Cases, 158, 1873; 7 Eng. (Moak), 738.

24. Engineer; agreement to pay contractor's debts. P., who was employed by R., a contractor on a railroad, proposed to discontinue work on account of R.'s inability to pay him. Thereupon G., an engineer of the railway company, stated that if the men, of whom P. was one, would go on and complete the work, the company would see them paid. There being nothing to show that the engineer was authorized to make such promise, an action against the company will not lie thereon. *Powrie v. Kansas Pacific R'y Co.*, 1 Colo., 529. 1872.

25. Construction of railways; estimates. In this case the court holds that the allegation and proof of the estimates made by the engineer, as provided for in the contracts, or the averment and proof of legal cause for the non-production of such estimates, were

essential to the vesting of a cause of action in plaintiffs. *Loup v. California Southern R. R. Co.*, 11 Amer. & Eng. R. R. Cases (Cal.), 589. 1883.

26. — mistake of engineer. A contractor agreed with a railway company to make for it a certain part of its road, and was to receive a sum certain for every cubic yard of excavation and embankment, and for every section of the road cleared and grubbed. Monthly estimates were to be made by the company's engineer of the work done, and when the whole was completed it was to be inspected by the engineer, and payment was to be made in a manner specified for the amount of work estimated as above to have been done. Subsequently the contractor sued the company for a sum alleged to be due, alleging that the engineer had omitted in his inspection and report certain of the work done by him. *Held*, that the company was bound to see that its engineer duly estimated the work done by the plaintiff and that it had failed in this duty, and that therefore plaintiff was entitled to recover. *Kistner v. Indianapolis and St. Louis R. R. Co.*, 12 Amer. & Eng. R. R. Cases (Ind.), 314. 1883.

27. Government work. The crown held liable for damages for a breach of contract in construction of the Intercolonial R'y. *Isbester v. Queen*, 7 Canada Supreme Ct., 696. 1877.

28. Injunction. In this case there was a dispute between a contractor and a railway company, and each party claimed possession of the line of road and imputed the fault to the other. The court granted an injunction restraining the contractor from interfering with the operations of the company, the dispute having delayed completion of the work; the court reserving all other questions to the trial and report. *East Lancashire R. R. Co. v. Hattersley*, 8 Hare (Eng. Ch.), 72. 1849.

29. Injury to land; subsequent grantee. A railroad company is not liable to a party who purchases land, after the road is constructed across it, for any damage done to the land in the construction of the road. If the owner of the land, at the time of the construction of the road, does not complain of the damage done to the land, his grantee certainly cannot. *Toledo, Wabash and*

Improper Construction — Subcontractors.

Western Ry Co. v. Morgan, 72 Ill., 155. 1874.

30. Improper construction; culvert; marsh. Where a railway has been constructed across a watercourse, the want of a culvert for the passage of the water in its natural channel is an imperfection; but mere proof that it is built across a cranberry marsh, without a culvert, and that in consequence of its construction the marsh on one side has become dry, has no tendency to show that the road is improperly constructed. *Lyon v. Green Bay and Minnesota Ry Co.*, 42 Wis., 538, 1877; 15 Amer. Ry Rep., 91.

31. Liability of company for work of laborers. The statute making railroad companies amenable to laborers for work done under the employment of contractors (Wagn. Stat., 302, § 10) does not include persons who furnish wagons and drivers to haul or deliver material in the construction of the road. *Groves v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 57 Mo., 304. 1874.

32. Lien; bankruptcy. A railway company contracted with R. to build a bridge, and the agreement provided that, if R. should fail to comply with the contract, the company might build it, and should have a lien on the tools and materials of R. R. committed an act of bankruptcy, and a fiat of bankruptcy was issued against him. It was held that the rights of the assignees in bankruptcy were inferior to the lien of the company on the tools and materials. *Hawthorn v. Newcastle Ry Co.*, 3 Adolphus & Ellis (N. S.), 734; 43 E. C. L., 949. 1842.

33. Mandamus; demand. A mandamus will not issue to compel a railway company to build its works in the manner provided in an act of parliament, unless a demand of compliance with the act is first made. *Regina v. Bristol and Exeter Ry Co.*, 4 Adolphus & Ellis (N. S.), 162; 45 E. C. L., 161. 1848.

34. Powers of contractor. A contractor or laborer has no power to bind a railroad company for materials furnished for the construction of the road. A railroad company, having only a right of way over land, has no right to take stone or other materials upon the line of its track to aid in the con-

struction of the road. *Nisley v. Harrisburgh, etc., R. R. Co.*, 1 Pearson (Pa.), 23. 1851.

35. Right of way contract; road need not be built in center of right of way. Under an agreement relinquishing to a railroad company the right of way one hundred feet wide, over a tract of land situated in two sections of a township, the railroad was to be located "on the section line." Held, that the company would not forfeit its right to the land because its track was not laid immediately on and along the section line, provided that it was constructed within the limits of the one hundred feet, and that this strip embraced that line. *Munkers v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 60 Mo., 334, 1875; 9 Amer. Ry Rep., 234.

36. Settlements; monthly accounting. Monthly settlements made between the contractors and company under a contract for the construction of a railroad were held not to be conclusive as final settlements between the parties. *Ford v. St. Louis, Kansas City and Northern Ry Co.*, 54 Ia., 723. 1880.

37. Subcontractors; failure to furnish right of way. A subcontractor for the construction of a railroad is not bound to procure the right of way; and if he is prevented from fulfilling his contract by reason of the fact that the company has not a right of way over some of the lands through which the road is to run, and the owners refuse him permission to enter and do the work, this is sufficient excuse for his failure. *Bean v. Miller*, 69 Mo., 384. 1879.

38. — forfeiture. A railway contractor made a subcontract for building a section of railway, and stipulated therein that if the work should not be carried on with sufficient force and energy, the chief engineer of the company might, on giving written notice to the subcontractor, declare the subcontract forfeited, or might take possession of the work and carry it on at the subcontractor's expense, and for his benefit. Held, that as the chief engineer was a stranger to the agreement he could not be compelled to give the notice, and that a written notice from the contractor to the subcontractor was sufficient where the engineer had orally notified both that the work was not advancing satisfactorily. *Hendrie v. Canadian Bank*

Surface Water — Torts and Negligence of Contractor.

of *Commerce*, 11 Amer. & Eng. R. R. Cases (Mich.), 610. 1882.

39. — injuries by subcontractors; control of engineer. Where a subcontractor and his employes trespassed beyond the right of way and made excavations in an improper manner, the same being done under the direction of the engineer of the company, it was held that the company was liable. *Bechnel v. New Orleans, Mobile, etc., R. R. Co.*, 23 La. An., 522. 1876.

40. Surface water. A railroad company has no right, in the use of its right of way, to injure the lands of upper proprietors by flooding them with surface water which had been used to pass over the right of way, when, by reasonable care and expense, it might, consistently with the enjoyment of the right of way, leave a free passage for the water. *Little Rock and Fort Smith R'y Co. v. Chapman*, 39 Ark., 463. 1882.

41. Torts and negligence of contractor. Where work is done for a railway company under a contract (parol or otherwise), the company is not responsible for injury resulting to a third person from the negligent manner of doing the work, though it employ its own surveyor to superintend it and to direct what shall be done. *Steel v. South Eastern R'y Co.*, 16 Common Bench, 550; 81 E. C. L., 549; 32 Eng. Law & Equity, 366. 1855.

42. — Where works are going on over a line of railway, with which works the railway company has nothing to do, and the execution of such works is intrusted to contractors who are entirely independent of the railway company, it is not the duty of the railway directors to assume that such works will be negligently conducted by those who have contracted for their execution, and to take precautions against possible negligence on the part of persons who are not in their employment nor under their control. *Daniel v. Metropolitan R'y Co.*, Law Reports, 5 English and Irish Appeal Cases, 45. 1871.

43. — A railway company cannot avoid a public duty by devolving the same upon a contractor. The company is liable for the injury to crops along the line of the railway occasioned by the trespass of its contractor. *Houston and Great Northern R. R. Co. v. Meador*, 50 Tex., 77. 1878.

44. — But such company is not responsible for the negligent operation of a train by a contractor, where the train is controlled by the contractor. *Cunningham v. International R. R. Co.*, 51 Tex., 503. 1879.

45. — A company, empowered by act of parliament to construct a railway, contracted under seal with certain persons to make a portion of the line, and by the contract reserved to itself the power of dismissing any of the contractors' workmen for incompetence. The workmen, in constructing a bridge over a public highway, negligently caused the death of a person passing beneath along the highway, by allowing a stone to fall upon him. *Held*, in an action against the company, by the administratrix of the deceased, that it was not liable, and that, in such case, the terms of the contract in question did not make any difference. *Reedie v. London and North Western R'y Co.*, 4 Welsby, Hurlstone & Gordon (Exchequer), 244, 1849; 6 Eng. R. R. & Canal Cases, 184; *Hobbitt v. London and North Western R'y Co.*, 6 Eng. R. R. & Canal Cases, 188, 1849.

46. — abutting property; injury to buildings. Where a railway company, in executing works authorized by its statutory powers, took insufficient precautions to secure the safety of an adjoining house, the court granted an injunction to restrain the negligent exercise of their powers, and appointed a surveyor to report what was necessary to secure the plaintiff's premises; and the company having complied with the requisitions of the surveyor, the court granted an inquiry as to damages. *Biscoe v. Great Eastern R'y Co.*, Law Reports, 16 Equity Cases, 636, 1873; 7 Eng. (Moak), 630.

47. — A railway company is liable for damages to buildings caused by the construction of its road with want of skill and care. *Davis v. London and Blackwall R'y Co.*, 1 Manning & Granger, 799; 39 E. C. L., 1033. 1840.

48. — damage from water; pleading. Declaration stated that the defendant wrongfully raised an embankment near the plaintiff's house, and wrongfully continued the same, by reason whereof large quantities of water flowed against and into the house; with an averment of special damage. Plea, that the embankment was raised and con-

Agent.

tinued by the defendant under certain acts of parliament. Replication, that although the embankment was raised and continued under the acts of parliament, the flowing of the water against and into the house was occasioned by the wrongful construction and negligent and improper raising of the embankment, and the want of proper and sufficient drains to the same, and the continuing the embankment so wrongfully constructed and insufficiently drained. On demurrer, *held*: 1. That a departure in pleading was ground of general demurrer. 2. That the replication was not a departure from the declaration; by Crompton and Blackburn, JJ., Cockburn, C. J., not assenting. *Brine v. Great Western R'y Co.*, 2 Best & Smith, 402; 110 E. C. L., 402. 1862.

49. — injuries to trade of adjacent proprietors. A mere temporary obstruction (the cause of loss of trade to an individual), occasioned by the performance of some lawful and necessary work, would not have been the subject of such an action; and is not, under the sixteenth section of the Railways Clauses Act, the subject of compensation. R. was the occupier of a public house, situated by the side of a public footway. A company obtained powers under certain acts of parliament (with which the provisions of the Lands Clauses Act and the Railways Clauses Act were declared to be incorporated) to build a railway. The company, in carrying these powers into execution, obstructed streets leading to this footway so as to make the access to the public house inconvenient. The obstructions were not permanent, and, after some time, the streets were restored to their original condition. It was found by the jury that there was no structural damage to the premises, but that R. had sustained damage in respect of the interruption of his business. *Held* (diss. Lord Westbury), that R. was not entitled, under the sixty-eighth section of the Land Clauses Act nor the sixth or the sixteenth sections of the Railway Clauses Act, to receive compensation for the injury to his trade consequent upon these obstructions. *Ricket v. Metropolitan R'y Co.*, Law Reports, 2 English and Irish Appeal Cases, 175. 1867.

50. Tunnel; deviation from chartered line. By s. 13 of the Railway Clauses Consolidation Act (8 and 9 Vict., c. 20), it is enacted that, where a tunnel is marked on the plan or section as intended to be made at any place, the same shall be made accordingly, unless the owners, lessees or occupiers of the land on which such tunnel is intended to be made shall consent that the same shall not be made. By s. 14 it is enacted that no tunnel shall be altered or deviated, except that it may be lawful for the company to make a tunnel not marked on the said plan or section, instead of a cutting, or a viaduct instead of a solid embankment, if authorized by a certificate from the board of trade. And by s. 15 it is enacted that it shall be lawful for the company to deviate within certain limits. *Held*, that the company is bound to make a tunnel at the spot marked, and cannot deviate therefrom without consent, unless authorized so to do by their special act. But that, where it has deviated its line at a spot where a tunnel is marked, it is not bound to make a tunnel in the deviated line. *Little v. Newport R'y Co.*, 12 Common Bench, 752; 74 E. C. L., 752. 1852.

CONTRACTS.

See BAGGAGE; CARRIAGE OF LIVE STOCK; CARRIAGE OF MERCHANDISE; DISCRIMINATION; EQUITY; INJURY TO DOMESTIC ANIMALS; INJURY TO PASSENGERS; ULTRA VIRES.

1. Agent. The agent of defendant agreed orally with the plaintiff to purchase of him a quantity of railway sleepers upon certain terms. The sleepers were received and used by the company. *Held*, that there was evidence from which the jury might find a contract by the company, the ninety-seventh section of the 8 and 9 Vict., c. 16, having provided that the directors may contract by parol on behalf of the company, where private persons may make a valid parol contract. *Pauling v. London and North Western R'y Co.*, 8 Welsby, Hurlstone & Gordon (Exchequer), 867. 1853.

2. — The conversations of an agent authorized to make and modify the contract sued on, had at the time concerning it and its terms, are proper evidence for the plaintiff; so, also, the conversations of others

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which are part of the *res gestæ*. *Louisville, New Albany and Chicago R'y Co. v. Henly*, 88 Ind., 535. 1883.

3. — Where the general manager of a railroad company directs an assistant to have certain work about the railroad done, and in pursuance thereof the assistant makes a contract with a third party to do the work, and a memorandum of the contract is reduced to writing, in which it is simply recited that such third party will do the work, without mentioning for whom, for a certain sum, under the direction of the engineer of the company, which memorandum is signed by the third party and by the assistant, without any designation of his office or the capacity in which, or the party for whom, he makes such contract, but also without any express assumption of personal liability, *held*, that it was the contract of the company. *Missouri, Kansas and Texas R'y Co. v. Brown*, 14 Kans., 557. 1875.

4. **Agent; services; breach.** In an action for alleged services under a contract with the company, it was held that the contract to employ and pay plaintiff having been shown, it was not necessary for him to prove a subsequent and distinct promise to pay, nor a further offer on his part, from time to time, to perform his services, after he had once notified the company of his constant readiness to do so, and had furnished them with his address, so that notice might reach him at any time; and that in such case, where the engagement was to cease in event that a certain contract of defendant with another company was rescinded, the petition need not allege that such contract continued in force, such averment being a matter of affirmative defense. *Kitchen v. Cape Girardeau and State Line R. R. Co.*, 59 Mo., 514, 1875; 8 Amer. R'y Rep., 481.

5. **Attorney for railway company.** Where an attorney of a railway company contracted as such, but managed all the concerns of the company, there being no acting committee, *held*, that the attorney was not personally liable under such contracts. *Russell v. Reece*, 2 Carrington & Kirwan, 669; 61 E. C. L., 668. 1847.

6. **Authority of officer; ratification.** Where a railway company receives railway material bought upon its credit and for its

use by one of its officers, without authority, and uses it for the corporate purposes for which it was designed, this is an adoption and ratification of the act of the officer. *Scott v. Middletown, Unionville and Water Gap R. R. Co.*, 86 N. Y., 200, 1881; 4 Amer. & Eng. R. R. Cases, 114.

7. — The directors using such material are bound to inquire and are presumed to know whether it was paid for or not; it is not essential to an adoption of the act of the officer that the directors should know the terms of the contract. *Ib.*

8. **Assumpsit for occupation of land.** Where the defendant with permission of the owner is occupying land, and the company is within the provisions of stat. 8 and 9 Vict., c. 16, Companies Clauses Consolidation Act, 1845, sec. 97, that any contract which, if made between private persons, would be valid though made by parol only, may be made by parol on behalf of the company by the directors, and shall bind the company, such parol contract may be presumed against the company in an action for use and occupation, in the absence of direct evidence to the contrary, upon proof of actual occupation by the corporation or its agent. *Lowe v. London and North Western R'y Co.*, 18 Adolphus & Ellis (N. S.), 632; 83 E. C. L., 631. 1852.

9. **Breach; profits.** In an action by a railway contractor for damages for breach of a contract of construction by a railway company, it is competent for the company to show that the contractor was insolvent and unable to perform his contract, for the purpose of showing that loss of his profits was in part, at least, attributable to such inability. *Waco Tap R. R. Co. v. Shirley*, 45 Tex., 355, 1876; 13 Amer. R'y Rep., 233.

10. **Boarding employees; evidence.** Where there was evidence tending to show that the defendant had authorized one H. to make a certain contract with plaintiff for boarding some of its employees, or had subsequently ratified the contract so made, there was no error in rejecting evidence offered by defendant to show that it had not in other cases paid such bills except upon special conditions not included in such alleged contract. *Hall v. Chicago, Milwaukee and St. Paul R'y Co.*, 48 Wis., 317. 1879.

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11. — Payment by defendant to plaintiff for board of such employes, for two months subsequent to the alleged contract made by H. in its behalf, if such payment was made with knowledge of the contract on defendant's part, would be evidence of a ratification. *Id.*

12. Bridge; parol evidence. A written contract was entered into to build a bridge which was not described. *Held*, that it might be shown by parol that, at the time of the contract, the parties referred to a plan or draft of a bridge then in existence. *Sandford v. Newark and Hudson R. R. Co.*, 37 N. J. Law, 1. 1874.

13. — bridge over railway. A contract of a railroad company to build a bridge over its road at a given point within one year after the completion of the road imposes no obligation on the company to complete its road within any given period or within a reasonable time, and the other party to the contract cannot recover upon it for a failure of the company so to do. *St. Louis, Jacksonville and Chicago R. R. Co. v. Lurton*, 72 Ill., 118. 1874.

14. — draw-bridge; specific performance. Where a railroad company, in consideration of the grant of a right of way over real estate, covenanted with the owners of the land, their heirs and assigns, to construct a draw-bridge on its track at a certain point, and maintain the same, so as to admit vessels from a river through a contemplated slip or canal, and it appeared that, owing to an agreement made by certain owners of the land afterwards, the slip or canal to the river could not be made continuous, so as to be of avail for canal purposes to the complainants, who had succeeded to a part of the land, so that a draw-bridge would not subserve the end designed by the original contract, and the effect of specifically enforcing the agreement would be to seriously embarrass the railway company in its business, delay trains and endanger their safety, and from the large number of cars and locomotives daily passing over the bridge, would be a serious public detriment, a decree of specific performance against the company was refused. *Chicago and Alton R. R. Co. v. Schoeneman*, 90 Ill., 258. 1878.

15. Carriage — bricks; breach. Where a party has established a brick yard, and expended a large sum of money upon an agreement with a railway company to furnish transportation for not less than sixty thousand bricks per week, and the contract has been violated by the company, and suit has been brought for damages for the breach of the agreement, the damages are not the difference between the expenditures, with interest, less the receipts and value of the property deducted therefrom. The plaintiff may have made unnecessarily large investments. Without, however, defining a true rule, the court awarded \$7,500 as damages. *Harrison v. New Orleans, Jackson, etc., R. R. Co.*, 28 La. Ann., 777. 1876.

16. — carriage of property during a fixed time; not ultra vires. The board of directors of a railway company, who are authorized by the act of incorporation to construct, maintain and operate a railroad, and, for that purpose, are empowered to make contracts and "to do all acts needful to carry into effect the objects for which it was created," including the right to demand and receive for the transportation of passengers and property a compensation not exceeding a maximum rate, may, within that limit, make contracts for transportation for a fixed future period. Such a contract, if otherwise valid, is not *ultra vires* and void, for the reason that it binds the corporation for a fixed period of time. *Railroad Co. v. Furnace Co.*, 37 Ohio St., 321. 1881.

17. — special rates. Contract construed, and held that the defendants are only entitled to claim a drawback on the tolls paid for goods carried on the thirty-two boats mentioned in the agreement, which constitute the "freight line" therein mentioned. *Lehigh Valley R. R. Co. v. Stewart*, 36 N. J. Law, 259. 1873. See *Stewart v. Lehigh Valley R. R. Co.*, 37 ib., 53. 1874.

18. — A suit to recover back \$6 per carload for freight paid under protest at the rate of \$22 per car for lumber carried, based on an alleged contract that, in consideration that plaintiff would build a mill, and cause the pine timber on his lands near by to be sawed thereat, and furnish the timber to the company for carriage, the company would transport the same for \$16 per car, will fail,

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in the absence of evidence that such an undertaking, binding upon the company, was in fact made; and the evidence was held to have failed to prove such promise on behalf of the company. *Michigan Central R. R. Co. v. Edwards*, 33 Mich., 16. 1875.

19. Construction; construction of various contracts. A contract for sale of timber construed. *Records v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 9 Philadelphia, 55. 1872.

20. — Contract between Boston and Lowell R. R. Co. and others construed. *Ogdensburg and Lake Champlain R. R. Co. v. Boston and Lowell R. R. Co.*, 4 Federal Reporter, 64, 1880; *Same v. Same*, 5 ib., 880, 1881.

21. — A contract for sale of coal, with a condition of forfeiture, construed. *Gray v. Delaware, Lackawanna, etc., R. R. Co.*, 48 N. Y. Superior Ct., 121. 1882.

22. — The provisions of a contract between the respondent and the Minnesota Construction Company construed. *Winona v. Thompson*, 24 Minn., 199, 1877; *Same v. Same*, 27 ib., 415, 1880.

23. — Certain provisions of two contracts — one a contract between the St. Paul and Chicago R'y Co. and the Minnesota R'y Construction Co., for constructing and equipping a railroad from St. Paul to Winona, the other a contract for the delivery and payment, by the construction company, to H. M. Rice or his assignees, of a certain share of the proceeds and profits of said contract for construction and equipment, considered, construed and applied. *Hatch v. Minnesota R'y Construction Co.*, 26 Minn., 451. 1880.

24. — A contract for the construction of the Lamoille Valley Railroad construed. *King v. Lamoille Valley R. R. Co.*, 51 Vt., 369. 1879.

25. Construction bonds. The court, in construing the contract between the parties to this suit, holds that the company is not bound to deliver the stipulated new bonds until all the construction bonds which are still outstanding shall be surrendered to it, or due proof made of the loss of such as cannot be produced, and adequate security offered to indemnify the company against liability to any adverse claimant. *Railway Co. v. Stewart*, 95 U. S., 279. 1877.

26. Carrying mails. Contract for carrying the mails construed. *Chicago and Northwestern R'y Co. v. United States*, 104 U. S., 680; 10 Amer. & Eng. R. R. Cases, 616. 1882.

27. Cattle pass. A contract with a railway company, embodied in the deed for the right of way, provided for the construction of a cattle pass by the company, but fixed no time therefor; held, that the company had a reasonable time after the completion of the road. *Livingston v. Iowa Midland R'y Co.*, 35 Ia., 555, 1872; 5 Amer. R'y Rep., 166.

28. Coal road; rates. The proprietors of a coal company built a railway twelve miles long and sold it to a railway company, which on the same day turned the road over to another railway company. The latter corporation operated the road for several years, during which it complied with the terms of a contract between the first purchaser and the builders, in relation to carriage of coal. Held, that the corporation operating the road, having recognized the contract, was bound by its terms. *Chicago and Alton R. R. Co. v. Chicago, Vermillion and Wilmington Coal Co.*, 79 Ill., 121. 1875.

29. Connecting lines. A contract for carriage over several connecting lines, and a condition limiting liability for loss by fire, held to apply to the whole route. *Railroad Co. v. Androscoggin Mills*, 22 Wallace, 594, 1874; 11 Amer. R'y Rep., 113.

[See CARRIAGE OF MERCHANDISE.]

30. Construction of locomotive. The plaintiffs agreed with the defendant to manufacture for it certain locomotive engines under the following contract: "Each engine and tender to be subject to a performance of a distance of one thousand miles, with proper loads; during which trial Messrs. S. & Co. (the plaintiffs) are to be liable for any breakage which may occur, if arising from defective materials or workmanship, but they are not to be responsible for nor liable to the repair of any breakage or damage, whether resulting from collision, neglect or mismanagement of any of the company's servants, or any other circumstances, save and except defective materials or workmanship. The performance to which each engine is to be subjected, to take place

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within one month from the day on which the engine is reported ready to start; in default of which, Messrs. S. & Co. shall forthwith be released from any responsibility in respect of the said engine; the balance to be paid on the satisfactory completion of the trial, and release of Messrs. S. & Co. from further responsibility in respect of such engine." It was also agreed that the fire boxes should be made of copper, of the thickness of seven-sixteenths of an inch (and they were accordingly made); and that the best materials and workmanship were to be used. The engines were accordingly delivered to the defendant, and performed the distance of one thousand miles within the month of trial, but nine months afterwards the fire box of one of them burst, when it was discovered that the copper had been considerably reduced in thickness. *Held*, in an action against the defendant for the balance due, that it could not give evidence of an inherent defect in the copper (no fraud being alleged), since, by the terms of the contract, the month's trial, if satisfactory, was to release the plaintiff from all responsibility in respect of bad materials and bad workmanship. *Sharp v. Great Western Ry Co.*, 9 Meeson & Welsby (Exchequer), 7, 1841; 2 Eng. R. R. & Canal Cases, 722.

31. Construction of railways. An account stated between a railway company and a contractor under the facts in the case. *Chaplin v. Memphis and Ohio R. R. Co.*, 9 Heiskell (Tenn.), 633. 1872.

32. — A contract for the construction of a railway construed. A forfeiture under this contract enforced. *Geiger v. Western Md. R. R. Co.*, 41 Md., 4. 1874.

33. — A, who had undertaken to build a railroad, entered, July 18, 1872, into a sealed contract with B. for building one hundred and sixty miles of the road. The contract, among other things, provided that B. should complete the first section of forty miles on or before September 1st, then next ensuing; the third section, of twenty miles, by September 15th; the fourth section, of twenty miles, on November 15th; the fifth section, of twenty miles, on December 15th, and so on; the whole to be completed May 1, 1873. Payment was to be made to B., as the work progressed, the 15th of each month, on

monthly estimates, by the engineer of the railroad company, of the work done the previous month, except fifteen per cent., after the completion of forty miles, which was to be retained as security until completion, and to be forfeited to A., and applied to any claim for damages which he might sustain by the failure of B. to perform the contract. Fifteen per cent. of the estimates on the first forty miles, and a liquidated sum of \$15,000 agreed to be paid for extra work on that section, were to be retained as security for the completion of the first sixty miles. B. failed to finish any portion of the work by the specified time; but A. excused the failure, paid B. the estimate for the work then done, and permitted him to proceed with the work. B. continued to do so, until A. failed to pay the large sums due him by the estimates for work done in October and November. B. then learned from A. that the latter was unable to pay those and future estimates. B. thereupon ceased to do any further work, and brought this suit. *Held*, 1. That the declaration of B. was sufficient on demurrer, as it averred, in substance, that from the time he entered upon the performance of the contract in July, 1872, until December 15th of that year, when A. failed to make payment for the work done, he had prosecuted the work with all the energy and skill that he possessed, and that A. had expressed satisfaction therewith. 2. That A. so far waived absolute performance on the part of B. as to consent to be liable on his covenant for the contract price of the completed work, but did not waive his right to whatever damages he may have sustained by the failure of B. to perform such work by the specified time, and that A. might set up such damages by way of cross-demand against B. 3. The court below erred in charging the jury that time was not of the essence of the contract sued on; but, inasmuch as there was no legal evidence of damages, the misdirection of the court worked no prejudice to A. 4. That B. was not required, after A. had defaulted on a payment due, to proceed with the work at the hazard of further loss; and that he was entitled to recover the contract price of the work done, together with the fifteen per cent. on the estimates, and the \$15,000, both

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of which had been retained by A. as a security for B.'s performance of the contract. *Phillips and Colby Construction Co. v. Seymour*, 91 U. S., 646. 1875.

34. — The contract in this case, for grading and preparing for ties the bed of a railway, is held to contemplate, as a general rule, that the road-bed will be an embankment made by earth thrown up from ditches on either side; but that the "cuttings on the line of the road" referred to are not these ditches, but the cuttings necessary in places where the natural surface was higher than the level of the road, and, to be brought to grade, required to be cut down; and that all earth thrown into embankments, whether taken from the ditches or from cuttings on the line, should be measured in the embankment, and not as excavation, according to the space it occupied before removal, and that all the earth thrown into spoil banks was to be measured as excavation; and a ruling that the contractors were to be allowed for all shrinkage of the earth, arising from its being thrown into embankments, and measuring less there than it did where it was taken from, is held erroneous. *Grand Rapids and Bay City R. Co. v. Van Dusen*, 29 Mich., 431. 1874.

35. — A contract for grading and laying the track of a railroad provided that the track was to be laid with a good, even surface; that the contractor should fill in after the track was laid with earth from the nearest point on the side of the track, and to do all necessary grading to finish the road, to be measured in the earth work aforesaid, and that the contractor should receive twenty cents per cubic yard for earth work done under the contract. *Held*, that the work of filling in between the ties with earth, after the track was laid, should be taken and measured as earth work, to be paid for at the rate of twenty cents per cubic yard, and was not embraced in the work of laying the track. *Snell v. Cottingham*, 72 Ill., 161. 1874.

36. — A railway construction contract construed and held not to be a time essence contract. *Savannah and Charleston R. Co. v. Callahan*, 56 Ga., 331. 1876.

37. — A contract to construct the road-bed of a railroad, between Fulton and Port

Byron, will include all the grading between the termini of the road at the points as indicated by the depot grounds, and will not be satisfied by completing the work to the corporate limits of the places named. *Western Union R. R. Co. v. Smith*, 75 Ill., 496. 1874.

38. — A contract for grading a railway provided that the company might relocate its road, and change the grade line if deemed expedient; that whether the work became greater or less by any change that might be made, the contractors should be paid only for the actual work done. The work was divided into sections so as to make the excavation and embankment in each as nearly equal as possible. The line was changed after the contract was made so that a certain number of feet, consisting of excavation, were included in a section wherein they were paid only for embankment. *Held*, that plaintiff, having been once paid for his work, could not demand payment upon a sectional division which would give him more. *Fish v. Wolfe, Carpenter and Angle*, 50 Ia., 636. 1879.

39. — A party agreed, in writing, with a railway company to lay its track, using the words "to make up the track in good running order, *well surfaced*, ties evenly and firmly bedded, and two thousand six hundred good ties to be put in per mile, joints to be properly set between ties, fastened with clasp joint, supplied for the purpose, properly fitted so as to hold an equal portion of each rail, and no greater space to be left between the ends of the rails than is sufficient for expansion," etc. *Held*, that whether this required the contractor to fill up the space between the ties with earth or other proper substance was a question of fact depending upon usage in such cases, and that what was meant by the word "surfaced" must be determined from the evidence of witnesses conversant with the subject to which it relates. *Western Union R. Co. v. Smith*, 75 Ill., 496. 1874.

40. — abandonment. A contract between M. and a railroad company provides that if M. shall fail to prosecute the work with such force as the engineer shall deem adequate to its completion within the time specified, the engineer in charge may proceed to employ such number of laborers, etc., as may be

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necessary to insure the completion of the work within the time limited; pay all persons so employed, and charge the amount to M.; or the company may, for any neglect or omission on the part of M. in complying with the contract, declare the same abandoned and render it void, and the percentage, or as much thereof remaining in the hands of the company as may be necessary for its complete indemnity, be forever retained. *Held*, that on the voluntary abandonment of the work by M., and while the contract is still subsisting between the parties, there is nothing in the hands of the company due to the contractor which may be attached. *Strauss v. Railroad Co.*, 7 West Va., 363. 1874.

41. — **commission.** Under a contract for the grading of a railroad which provided that the contractors should receive in payment the wages for actual labor of men and teams in performance of the work, at prices to be approved by the chief engineer, with ten per cent. additional as compensation to themselves, it was *held* that they might properly sublet the work with the approval of the chief engineer, and were entitled to recover their percentage computed upon the amount paid the subcontractors, such amount being the wages paid them for the performance of the work as contemplated in the contract. *Ford v. St. Louis, Kansas City and Northern R'y Co.*, 54 Ia., 723. 1880.

42. — **conditions; pleading.** In an action to recover for the construction, in a certain township, of certain sections of a railway, under a written contract providing that payment for part thereof should be made from the collections of certain subscriptions, and the residue on the collection, and payment to the company, of a certain tax voted for such railway, the complaint alleged that such services had been performed, and that more than sufficient of such stock and tax, to pay for such services, had "been collected and paid over to" such company. *Held*, on demurrer, that the complaint was sufficient. *Clark v. White*, 59 Ind., 435. 1877.

43. — The engineer of a railway company prepared a specification of the works on a proposed railway, and certain contractors fixed prices to the several items in the speci-

fication, and offered to construct the railway for the sum total of the prices affixed to the items. A contract under seal was thereupon made between the contractors and the company, by which the contractors agreed to construct and deliver the railway completed by a certain day for a sum equal to the sum total above mentioned. If the contractors failed to proceed with the works the company might take possession and proceed with them, in which case a valuation should be made by the engineer, or, if either party required it, by arbitration. The contract contained provisions making the certificate of the engineer conclusive between the parties, and it was provided that all accounts relating to the contract should be submitted to, and settled by, the engineer, and that his certificate for the ultimate balance should be final and conclusive; it was further provided that all questions, except such as were to be determined by the engineer, were to be referred to arbitration. The railway was completed, and the engineer gave his final certificate as to the balance due to the contractors. The contractors had assigned their interest in the contract to trustees in trust for their creditors and for themselves, in certain proportions. The contractors filed a bill against the company, making claims on several grounds, and praying an account and payment. *Held*, that the contractors could not, on mere verbal promises by the engineer, maintain against the company a claim to be paid sums beyond the sums specified in the contract under seal. *Held*, that, although the amount of the works to be executed might have been understated in the engineer's specification, the contractors could not, under the circumstances, maintain any claim against the company on that ground. *Held*, that in the absence of fraud on the part of the engineer, and where his certificate has been made a condition precedent to payment, his certificate must be conclusive between the parties. *Sharpe v. San Paulo R'y Co.*, Law Reports, 8 Chancery App., 597; 6 Eng. (Moak), 516. 1873.

44. — **engineer as arbitrator.** Where the plaintiffs proceeded to deliver cross-ties to the defendant under a written contract, one of the provisions of which was, in substance, that, in case of any dispute touching

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the contract, the parties waive any right of suit or any other remedy in law or otherwise, and the decision of the chief engineer of the defendant shall, in the nature of an award, be conclusive on the rights and claims of said parties, and said chief engineer decided against the plaintiffs upon a claim presented by them, the award of the chief engineer was no more binding than the award of any other arbitrators selected by the parties. *Atlanta and Richmond Air Line R. R. Co. v. Mangham*, 49 Ga., 266. 1873. [See CONSTRUCTION OF RAILWAYS.]

45. — What an engineer is sole judge of under a contract. *Estel v. St. Louis and Southeastern R. R. Co.*, 56 Mo., 232. 1874.

46. — Where a contract for construction of a railway provided that all matters of dispute should be referred to arbitration of engineers, it was held that no action for damages could be sustained upon the contract until the amount had been ascertained by arbitrators. *Myers v. St. Andrews and Quebec R. R. Co.*, 5 Allen (New Brunswick), 577. 1863.

47. — A contract provided that the engineer should be arbiter of the rights of the parties to the agreement. *Held*, that the award of the engineer could only be attacked for fraud, or some other recognized ground of illegality. *Grant v. Savannah, Griffin, etc., R. R. Co.*, 51 Ga., 348, 1874; 7 Amer. R'y Rep., 81.

48. — A contract between a railway company and a building contractor stipulated that payments should from time to time, during the progress of the works, be made by the company to the contractor, such payments to be made on certificates granted by the "Principal Engineer of the Company or his Assistant Resident Engineer." In case of dispute between the contractor and the assistant resident engineer, the decision of "the Principal Engineer of the Company" was to be final; but at the completion of the works, if the contractor and the principal engineer differed, the differences between them were to be settled by arbitration. After differences had so arisen between the contractor and the company, it was discovered by the former that the principal engineer was a shareholder in the company. On a bill to have accounts taken, one of the

grounds for which was this fact, then first discovered, *held*, that (no fraudulent concealment being alleged) it formed no ground for relief; for that by contract the contractor had bound himself to submit to the judgment of a particular individual, whose position as principal engineer made him interested for the company. *Ranger v. Great Western R'y Co.*, 5 House of Lords Cases, 72. 1854.

49. — But on a similar contract a bill, charging the fraudulent withholding of a certificate by the engineer in collusion with the company, was held sufficient. *McIntosh v. Great Western R'y Co.*, 2 De Gex & Smale (Eng. Ch.), 758. 1849.

50. — Contractors agreed to perform certain works for a railway company within a certain time, and were to be paid from time to time for the work certified by the company's engineer to have been duly performed. On default, the company were to be at liberty to take possession of the works, and of all contractors' plant and materials. Some delay in performing the works was occasioned by the acts of the engineer, not repudiated by the company, and the rate of proceeding with them was distinctly varied by him. The company afterwards gave notice to the contractors that they were not proceeding to the satisfaction of the company, and they soon afterwards took possession of the plant and materials. The contractors filed a bill, alleging that certificates had been unjustly withheld, and the payments had improperly fallen into arrear; and prayed that accounts might be taken of what was due to them, and for an injunction to restrain the company from taking the works and plant. A demurrer, for want of equity, was overruled. *Waring v. Manchester, etc., R'y Co.*, 2 Hall & Twell (Eng. Ch.), 239. 1850.

51. — *estoppel*. A railway company having filed a survey of a route over which another company also had filed a survey, having held such company out as the builder of the track over such route, and having taken the benefit of a contract incident to the laying of such route, made in the name of such other company, cannot repudiate such contract, on the ground that itself is the builder of such road. *Coe v. Delaware, Lackawanna*

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and *Western R. R. Co.*, 34 N. J. Eq., 266, 1881; 4 Amer. & Eng. R. R. Cases, 513.

52. — extra work. If a contract with a railroad company for constructing its road provides that the contractor shall not deviate from the contract, nor receive any pay for extra work, unless a written order for the same is made and signed by the engineer, the contractor cannot recover for extra work done on the verbal order of the engineer, even if there is another clause in the contract which provides that the engineer may direct alterations in and additions to the work. *White v. San Rafael and San Quentin R. R. Co.*, 50 Cal., 417. 1875.

53. — failure to build through fault of railway company. Where it is stipulated in a contract that the work to be done under it is to be paid for upon the estimates of an engineer, to be made at stated times, if the engineer makes only approximate estimates, and the contractor is prevented from completing the work through the fault of the other party, he may recover for the whole amount of work done, as well that of which no estimate has been made as that which has been estimated. *Bean v. Miller*, 69 Mo., 384. 1879.

54. — forfeiture; abandonment. In a contract with a railway company for grading, it was stipulated that monthly estimates of the work done should be made by the engineer, and eighty-five per cent. thereof paid, and the residue paid when the whole work should be accepted; but if the contractor should fail to comply with the contract, or to complete it within the time agreed, the engineer might annul it, in which case the unpaid part of the value of the work done should be forfeited to the company in the nature of liquidated damages. The contractor failed to complete the work within the specified time, and afterward abandoned the contract, whereupon the engineer annulled it. *Held*, the forfeiture agreed upon as liquidated damages should be enforced as to the fifteen per cent. retained, but not as to the full value of the work not estimated; and the failure to annul the contract because the work was not completed within the time prescribed was no waiver of the right to annul it afterward when abandoned by the contractor. *Elizabethtown and Paducah R.*

Co. v. Geoghegan, 9 Bush (Ky.), 56. 1872.

55. — forfeiture. In an action of debt, the declaration stated that, by an indenture of December, 1837, in consideration of the sum of 250,000*l.*, the plaintiff covenanted with the defendant to make and complete a certain railway, and to provide railway bars or rails and chairs on or before the 1st of May, 1840; that afterwards, by another indenture of March, 1839, in consideration of the further sum of 1,500*l.*, the plaintiff covenanted with the defendant, that he, being provided by it with bars or rails and chairs for temporary and permanent use, would complete the said railway and certain other works, on or before the 1st of June, 1840; provided that, if the plaintiff should not complete the said railway by that day, he should pay the defendant the sum of 300*l.*, and the like sum for every succeeding day until the work should be completed, so that the whole amount forfeited should not exceed 15,000*l.* Breach, that the defendant detained from and did not pay the plaintiff 20,000*l.*, parcel, etc. Plea as to 7,500*l.*, parcel of the 20,000*l.*, that the said sum of 7,500*l.* is parcel of the sum of 15,000*l.* agreed to be detained by the defendant; that the plaintiff did not complete the railway on the 1st of June, 1840, nor until twenty-four days after, whereby the plaintiff then became liable to pay the defendant the sum of 300*l.* per day for the twenty-five days during which the railway remained incomplete; by reason of which the defendant deducted and retained the said sum of 7,500*l.* out of the moneys payable by it to the plaintiff. Replication, that the plaintiff did not become, nor was liable to pay the defendant *modo et forma*. At the trial, it was proved that the plaintiff did not complete the railway until twenty-four days after the 1st of June, but that the defendant had not provided him with sufficient bars or rails and chairs to enable him to complete it by that day; whereupon the court directed the jury that such supply was a condition precedent to the defendant's right to deduct the penalty. *Held*, that this was a misdirection, the covenants being independent, and the supply of the bars, etc., not a condition precedent to the right of the defendant to make the deduction. *McIntosh*

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v. Midland Counties R'y Co., 3 Eng. R. R. & Canal Cases, 780. 1845.

56. — forfeiture; injunction. Disputes arose between a contractor for the construction of a railway and the company for whom the railway was to be constructed as to the time which the works done had taken for their execution; as to the probable time within which the railway could be finished; and as to defaults in the execution of works and in payment, which were alleged on the one side and denied on the other, and as to which there was a considerable conflict of evidence. The contract and specification provided, amongst other things, that, if the contractor failed to proceed with the works in the manner and at the rate of progress required by the company's engineer, the contract should be, at the option of the company, but not otherwise, considered void so far as related to the work remaining to be done, and that all sums of money which might be due to the contractor, together with the materials and implements in his possession, and all sums of money named as penalties for the non-fulfilment of the contract, should be forfeited to the company, and the amount considered as ascertained damages for breach of contract. The company, seeking to avail itself of these provisions in the contract on the ground of alleged default on the part of the contractor, claimed the right of completing the works itself. The contractor thereupon filed a bill against it, seeking an injunction to restrain it from declaring the contract void as to work remaining to be done, and from declaring the amount remaining due to him for work already done under the contract forfeited, and from taking possession of the materials and implements in his possession or belonging to him. He then moved interlocutorily for an injunction in the terms of the prayer of his bill, and also for an injunction to restrain the company from entering upon the line of railway mentioned in the contract. *Held*, that the case was not one for an interlocutory injunction. *Munro v. Wivenhoe and Brightlingsea R'y Co.*, 4 De Gex, Jones & Smith, 723; 69 Eng. Ch., 723. 1865.

57. — forfeiture; engineer's decision. The plaintiff agreed to construct certain

works for defendant, and the contract provided that the company's engineer should make estimates of the work, and that, in case the engineer should not be satisfied with the work, seven days' notice should be given to the contractor, and, in case of his non-compliance with the notice, the contract should be forfeited, together with the material, plant and unpaid percentage. *Held*, that the engineer could decide as to the quality of the work, but that a court of equity would decide as to the quantity of work done. Where no fraud is shown in such a case a court of equity will not grant relief against forfeiture. *Ranger v. Great Western R'y Co.*, 3 Eng. R. R. & Canal Cases, 298. 1843. See, also, *Same v. Same*, 27 Eng. Law & Equity, 35. 1854.

58. — payments in stock; evidence. Where a firm contracted to construct a number of miles of railroad, and on their completion to receive certain stock in payment therefor, and where, before the work was completed, some of the stock was transferred to the firm, who received and disposed of it through their agents, correspondence between such agents and the president of the contracting railroad company was admissible to show the terms upon which it was delivered by the company and received by the firm in advance of the time contemplated by the contract. *Central R. R. and Banking Co. v. Papot*, 59 Ga., 342. 1877.

59. — repudiation. A contract made by a managing director, not under seal, for the construction of a railway, was repudiated by the company after a greater portion of the work had been done, the action of the company being founded on the claim that the prices were extravagant. *Held*, that the company was bound to pay the contract price, and that it was presumed to have had notice of the contract. *Whitehead v. Buffalo and Lake Huron R'y Co.*, 7 Grant Ch., Upper Canada, 351. 1859.

60. — specific performance. Contractors agreed to make a railway according to a specification to be prepared by the engineer for the time being of the company, all differences as to the details of the arrangement to be determined by a referee, and a bond, in a stated sum, was to be given by the contractors to the company, for the due per-

Conveyance—Correspondence.

formance of the works. The company filed a bill for specific performance, to which a demurrer was put in and allowed by one of the vice-chancellors. *Held*, on appeal, affirming the decision of the court below, that the entire contract was one which the court would not decree to be specifically performed, and that, as the court would not decree the performance of the entire contract, it would not decree the execution of the bond. *South Wales R'y Co. v. Wythes*, 31 Eng. Law & Equity, 236. 1854.

61. — An agreement between a railway company and railway contractors (who were also land owners) for the construction of a branch railway provided that the company should find the land within a reasonable time and build the stations; that the contractors should give a bond to the amount of 50,000*l.* to secure the performance of the contract, and undertake to execute the works for a double line of railway, and the ballasting and permanent way for a single line, according to the terms of a specification, to be prepared by the engineer for the time being of the company; that the company should work the branch in a reasonable and proper manner as compared to the remainder of the main railway; and that in case of difference as to working, the same should be settled by arbitration; and that any of the details of the arrangement in case of difference should be determined by a referee to be appointed by the solicitor-general for the time being. *Held*, on demurrer, that this agreement was too vague, obscure and uncertain to be enforced in a specific performance suit, and that the stipulation as to the execution of a bond could not be enforced apart from the rest, being merely an incidental and subsidiary part of the agreement, and not within the principle of *Lumley v. Wagner*, 1 De Gex, McNaghten & Gordon, 604, when the negative stipulation was a distinct and substantive part of the contract. *South Wales R'y Co. v. Wythes*, 5 De Gex, McNaghten & Gordon, 880; 54 Eng. Ch., 880. 1854.

62. — statute; bond. The liability of the obligors on a bond given by a contractor with a railroad company for the construction of its road, under § 35, ch. 84, Comp. Laws 1879, p. 785 (Laws 1872, p. 286), does not extend to an account for provisions fur-

nished to the laborers employed by a subcontractor upon the order of such subcontractor. Such an account is not for provisions supplied to the contractor within the terms of the statute. *Wells & Co. v. Mehl*, 25 Kans., 205, 1881; *St. Louis, Kansas and Arizona R'y Co. v. Cobb*, ib., 383, 1881.

63. — stone. Where a contract for the grading of a railway provided that the contractor should have a certain price per cubic yard for stone excavated, and a given price per cubic yard for placing the same on the sides of embankments, it was held that the price named in the contract was not applicable to stone furnished by the contractor, not excavated in the line of the road, but got from other places, and hauled by him with teams, to encase the embankments, and that for such stone so furnished the company was liable to pay what it was reasonably worth. *Western Union R. R. Co. v. Smith*, 75 Ill., 496. 1874.

64. Conveyance; costs. A agreed to sell land to a railroad company, but died before he had executed the conveyance, leaving an infant heir. The company then instituted a suit, in order to obtain a conveyance from the infant. *Held*, that, although the company was bound, by its act, to pay the expenses of the conveyance of land taken by it, yet, as A. had occasioned the suit by suffering the land to descend to an infant, the costs of the suit, and of having the conveyance settled by the master, must be paid out of the purchase money. *Midland Counties R. R. Co. v. Westcomb*, 11 Simons (Eng. Ch.), 57. 1840.

65. — covenant in deed; rates of transportation. A covenant in a deed of a railway providing for special rates of freight, construed, and *held* not to inure to the benefit of the grantees of the party for whose benefit the covenant was made. *Maryland Coal Co. v. Cumberland and Pa. R. R. Co.*, 41 Md., 343, 1874; 6 Amer. R'y. Rep., 524.

66. Correspondence. Where an agreement has been commenced by letter, but in the course of the treaty an offer, made by letter, has been verbally rejected, *held*, that the party who has made the offer is relieved from his liability unless he consent to renew the treaty. The party who has rejected the

Countermanding Order — Death of Party.

offer cannot afterwards at his own option convert the same offer into an agreement by acceptance, without a renewed offer from the other party. *Sheffield Canal Co. v. Sheffield and Rotterham R'y Co.*, 3 Eng. R. R. & Canal Cases, 131. 1843.

67. — The secretary of a company has of himself no independent authority to bind the company by letters or documents signed by him. *Williams v. Chester and Holyhead R'y Co.*, 5 Eng. Law & Equity, 497; 15 Jurist, 828. 1851.

68. — In an action by plaintiff against M. for money had and received, it was admitted on the trial and found by the jury that M. received the money from plaintiff's treasurer, and was responsible to plaintiff for its repayment; but M. denied that he was responsible only as the agent of plaintiff or as guarantor, while plaintiff claimed that he was responsible as a borrower; and the jury found that the money was received by M. from plaintiff in accordance with the terms of a certain letter from plaintiff's agent to M., which letter contained, among other things, the following: "You . . . to draw upon me as you need the funds for the purpose, becoming responsible to me for the funds lent you on your drafts;" and there was nothing in the letter showing that M. was to receive the money in any other capacity than as above stated in the letter. *Held*, that, according to the terms of the letter, the money that was transferred thereunder from plaintiff to M. was "lent," and that M. became responsible therefor as a borrower. *Atchison, Topeka and Santa Fe R. R. Co. v. Maher*, 23 Kans., 163. 1879.

69. Countermanding order. October 24, 1865, the C. H. and D. R. R. Co. gave D. an order for a quantity of timber for building cars. On March 9th following, none of the timber having been delivered, the company countermanded the order, and stated that D. might deliver the "sticks" he had then ready, but need not saw any more. D., having logs then on hand, sawed them and delivered all the timber to the company, which refused to receive that part thereof which had been sawed after the original order was countermanded. *Held*, that the contract between the parties, made by the original order and countermanding order,

did not embrace the lumber sawed by D. after the revoking order was received by him. *Cincinnati, Hamilton and Dayton R. R. Co. v. Dickey*, 30 Ohio St., 16. 1876.

70. Crossings. A contract to construct a suitable railway crossing, where the failure to comply with the contract cannot be adequately compensated in damages, will be specifically enforced. *Storer v. Great Western R. R. Co.*, 2 Younge & Collyer (Eng. Ch.), 48. 1842.

71. — By an indenture of agreement entered into by the defendant with the plaintiff, the defendant covenanted "that it would construct and forever thereafter maintain one neat archway, sufficient to permit a loaded carriage of hay to pass under the railway, at such place as the plaintiff, his heirs and assigns, should think most convenient in his pleasure grounds, and should form and complete the approaches to such archway." The defendant having neglected to comply with the plaintiff's request to fulfil the covenant, a bill was filed to compel a specific performance. *Held*, that the court will interfere for the purpose of directing the specific performance of a contract by defendant to do defined work on its own property, in the performance of which the plaintiff, with whom it has covenanted, has an interest so material that the non-performance cannot be adequately compensated by damages at law. *Storer v. Great Western R'y Co.*, 3 Eng. R. R. & Canal Cases, 106. 1842.

72. Death of party. The death of one of several defendants, sued upon a joint contract, severs the cause of action, and the executor or administrator cannot be summoned to defend the action. *New Haven and Northampton Co. v. Hayden*, 119 Mass., 361. 1876.

73. — The death of a member of a partnership will not release the surviving members from the obligation to perform the contracts of the firm, except where the personal service or peculiar skill of the deceased partner is required for their performance. And the grading of a railway is not a work requiring personal service or peculiar skill. *Ayres v. Chicago, Rock Island and Pacific R. R. Co.*, 52 Ia., 478. 1879.

74. — Although a contract involving personal confidence is put an end to by the

Debt of Contractor on Railway — Depots.

death of the party confided in, it is not thereby rescinded so as to take away a right of action already vested. The defendant employed S. as consulting engineer for fifteen months to complete certain works. S. was to be paid 500*l.* for his services in equal quarterly instalments. Before the work was finished, and whilst two quarterly instalments which were due to him were still unpaid, he died. *Held*, that his personal representative was entitled to recover them. *Stubbs v. Holyuell R'y Co.*, Law Reports, 2 Exchequer Cases, 310. 1887.

75. Debt of contractor on railway; consideration. If a railroad company let a contract to construct a road to a firm, and that firm sublets the contract to another firm, which does a large amount of work, and the first firm fails and does not pay the subcontractors, and the railroad company, to induce the subcontractors to go on with the work, agrees to pay to them the debt of the contractors, such agreement is founded on a valid consideration and is binding. *Chapman v. Pittsburgh and Steubenville R. R. Co.*, 18 West Va., 184, 1881; 9 Amer. & Eng. R. R. Cases, 484.

76. — The citizens of Oskaloosa subscribed \$20,000 to be paid to a railroad company if its line should be completed to their place on January 1; the company contracted with Q. for the construction of a portion of the road; after performing a part thereof, Q. informed the president of the company that he owed for supplies, and that he could not complete the work at the contract price; the president then instructed him to go on with the work, promising him and the agent of his creditors that for money actually expended in the work he should be paid, and that the just claims of his creditors should be met, and thereupon Q. proceeded with the work. *Held*, that the agreement of the president of the company was without consideration. *Ayres v. Chicago, Rock Island and Pacific R. R. Co.*, 52 Ia., 478. 1879.

77. — Where the laborers employed by contractors and subcontractors in the construction of a railroad quit work, from an apprehension that they will not be paid, and are about to mob one of the principal contractors, and the president of the railroad company goes to the place where the mob is

assembled, and in a speech to them says: "Go back to your work, and I will see that you are paid," and one of the subcontractors is present and hears the speech, this does not constitute a contract between the railroad company and such subcontractor that the company will pay such subcontractor for any work he may do on the railroad. *Indianapolis and St. Louis R. R. Co. v. Miller*, 71 Ill., 463. 1874.

78. Delivery. A proposition in writing to deliver hay "not to exceed two hundred tons," and with no other stipulation as to quantity, payment to be made on the delivery of designated instalments, which is accepted in writing, confers no right upon the party accepting to enforce delivery to the limit mentioned, and leaves it optional with each party to avoid the agreement, on giving notice to the other, at any period during the time of delivery. *Houston and Texas Central R'y Co. v. Mitchell*, 38 Tex., 85. 1873.

79. Depots. It is the duty of a railway company to furnish reasonable depot facilities for the accommodation of the public in the matter of transportation and travel. *St. Joseph and Denver R. R. Co. v. Ryan*, 11 Kans., 602. 1873.

80. — contract. Where land was conveyed to a railway company "in consideration of the company placing the station for Prescott upon his land," and the station was built and maintained for over twenty years, when it was closed and a new station erected a mile and a half away, *held*, that the grantor was entitled to damages, or a restitution of the land. *Jessup v. Grand Trunk R'y Co.*, 28 Grant Ch., Upper Canada, 583. 1881.

81. — An agreement to erect, maintain and keep a permanent freight and passenger station at a certain village is not complied with by the erection of buildings, without providing the necessary agents and employes at the station. *Township of Wallace v. Great Western R'y Co.*, 25 Grant Ch., Upper Canada, 86, 1877; *Same v. Same*, 3 Ontario Appeal Reports, 44, 1878.

82. — The company leased its line for one thousand years to another company, which latter company agreed to equip, maintain and work the line. *Held*, that the

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agreement to maintain the station was binding upon the lessee. *Ib.*

83. — Where the grantor, in consideration of \$25, and of the building of the railroad, conveyed to a company, its successors or assigns forever, in fee simple, the right of way through his land, and added in the deed the following words: "It is hereby agreed and understood a depot and station is to be located and given to said Reeves, on the land or strip above conveyed, to be permanently located for the benefit of said Reeves and his assigns, and to be used for the general purposes of the railroad company," the grantee, by accepting such deed, entered into a covenant to comply with its terms, and this covenant ran with the land and became obligatory upon any second company which became the purchaser, under proper legal direction, of all the rights, privileges, franchises and property of the former. *Ga. R. R. Co. v. Reeves*, 64 Ga., 492, 1880; 11 Amer. & Eng. R. R. Cases, 333.

84. — The owner of a tract of land agreed in writing to convey it to a railway company for depot purposes, on condition it should be occupied for the western part of the company's depot grounds, and a part of the usual depot buildings be erected thereon. It was then expected that the other part of the depot grounds and buildings would be located across a street adjoining the ground to be conveyed on the east, but nothing was said in the agreement about the location of the same. The company caused to be erected and maintained on said piece of ground a warehouse for the accommodation of the public in doing business on the road, and constructed thereon facilities for loading and unloading live stock, coal and lumber, but erected the principal depot buildings forty rods further east. *Held*, that the company had complied with the condition of the agreement, and was entitled to hold the land. *Pittsburgh, Fort Wayne and Chicago Ry Co. v. Rose*, 24 Ohio St., 219, 1873; 7 Amer. Ry Rep., 1.

85. — **contract to stop trains at a station; injunction against breach.** Where a company has agreed for a sufficient consideration to stop all trains at a particular station, a court of equity will restrain a breach of such contract. *Lindsay v. Great Northern*

Ry Co., 19 Eng. Law & Equity, 87; 17 Jurist, 522. 1853.

86. — **damages.** One who executed an absolute grant of the right of way to a railway company, in consideration of one dollar paid, and of enhanced value to result to his property by the construction of the road, claimed damages for the breach of a collateral verbal agreement by which a terminal depot should be established at a particular point, which was not done. *Held*, that the measure of his damages would have no relation to the value of the land, but would be determined by the injury to the grantor, caused by the erection of a depot at another point, and the failure to deliver passengers and freight at the point agreed on for a terminal depot. *Galveston, Harrisburg and San Antonio R. R. Co. v. Pfeuffer*, 56 Tex., 66, 1881; 11 Amer. & Eng. R. R. Cases, 373.

87. — In 1870, the defendants, in consideration that the Montclair R. R. Co. would construct a depot on the premises, and stop a specified number of daily trains there for ten years, and build the fences along the track, agreed in writing to convey to the company the lands necessary for its track and depot. The company took possession at once, and built its track, but nothing more. In 1875, under the foreclosure of a mortgage, all of the Montclair Company's property was sold, and a new company organized. In 1878, under a foreclosure against the latter company, all of its property was sold, and another company formed. After the complainant had been incorporated, the defendants began an ejectment at law to recover their lands, and this action was enjoined by complainant and relief in equity sought. The defendants answered, protesting against the specific performance of their contract, and expressing willingness to convey the premises to complainant, on receiving compensation therefor and damages assessed as of the date when the Montclair Company took possession. *Held*, that they were equitably entitled to have their compensation and damages so estimated. *New York and Greenwood Lake R. R. Co. v. Stanley*, 34 N. J. Eq., 55. 1881.

88. — **forfeiture; waiver.** R. conveyed to a railroad company twenty-two acres of

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land, upon condition subsequent that the company should locate its track and depots as specified in the deed. Afterwards it was agreed by parol between R. and the president and chief engineer of the company that the track and depots should be located differently, that the company should reconvey to R. the twenty-two acres, and that R. should convey to the company six acres, a part of the twenty-two. The six acres were marked off in a map made by the company, as its property, and the track and depots located thereon according to the last agreement. R. afterwards applied to the president of the company for a conveyance. He declined to make it until it was ascertained how much of the twenty-two acres another connecting railroad company might need for depot purposes, stating that then all not so needed would be reconveyed. He told R., however, to go ahead and make sales of town lots, parts of the property, and the company would convey to his vendees. Upon the president's death, R. brought this agreement to the notice of his successor, who recognized it, and promised that it should be carried out. R. laid off town lots on the sixteen acres, and sold many, which were afterwards improved. The company's officers were aware of these sales, and saw the improvements being made. In a subsequent controversy between R. and the company the latter asserted its right to the whole twenty-two acres, denying the authority of its president and chief engineer to make the agreement to reconvey, and insisting that it was void, because not in writing. *Held*, that the company was estopped to deny the authority of its own officers, and that R. was entitled to all the land except the six acres. *Held*, also, that R., by the agreement aforesaid, had waived, as to the six acres, his right to a forfeiture for non-compliance by the company with the condition in the deed. *Vicksburg and Meridian R. R. Co. v. Ragsdale*, 54 Miss., 200. 1876.

89. — hotel and refreshment rooms. In 1840 a railway company entered into an agreement under seal to grant A. a lease for ninety-nine years of the hotel to be erected at X. station, with power for the company to determine the lease if any complaint as to the mode of carrying on the business

should not be remedied within three months after notice of such complaint. It was also agreed that the lessees "should have the occupation of the refreshment rooms at X. station, subject to the same restrictions and provisions as relate to the carrying on the business of the hotel, both as regards the quality and prices of provisions, and management thereof." The lease granted in pursuance of this agreement was confined to the hotel, and contained no mention of the refreshment rooms. The refreshment rooms on the up line, adjoining the hotel, had been always occupied with it. In 1849, B., a director of the company (head of a firm at X., who were assignees of the lease of the hotel), erected, at a cost of £300, refreshment rooms on the down line, pursuant to an alleged agreement with the company that his firm should have a lease of such refreshment rooms for a term co-extensive with the lease of the hotel. The only evidence of such agreement was this minute in the books of the company: "A ground rent of £3 per annum was ordered to be fixed for the new refreshment rooms built by the lessees at the down station in X." In 1837 the company gave notice to C., the assignee from B. of the lease, and occupier of both refreshment rooms, that its arrangements with reference to a new station (recently erected) at X. would involve the determination of his tenancy of the existing refreshment rooms. *Held*, 1. As to the refreshment rooms on the down line, that no agreement of which the specific performance could be granted was proved, and that in any case the court could not enforce specific performance of an agreement by a director with the company for the benefit of himself or his firm. 2. As to the upper refreshment rooms, that the occupation was not determinable at the mere will of the company, and that C. was entitled to have the agreement of 1840 carried into effect by having a deed executed to him as the assignee of A., with all proper provisions, granting the right of occupation of the upper refreshment rooms to him, his assigns and nominees, being tenants of the hotel, subject to the provisions and restrictions contained in the agreement. *Flanagan v. Great Western R'y Co.*, Law Reports, 7 Equity Cases, 116. 1868.

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90. — In a declaration in covenant the plaintiffs stated that the defendant demised to them certain refreshment rooms at Swindon for ninety-nine years, at the yearly rent of 1*d.*, and that the plaintiffs covenanted to complete, keep in repair and insure the said rooms; that the defendant covenanted that, in case the rooms should be disused as the regular and general place of stoppages for the refreshment of passengers, it would purchase the buildings of plaintiffs on certain terms; that it was by the said indenture declared to be the intention of defendant and the understanding of the plaintiffs that all trains conveying passengers, not being goods trains or trains to be sent express or for special purposes, or trains not under the control of the defendant, which should pass the Swindon station, up or down, should stop there for refreshment of passengers for a reasonable time of about ten minutes, and that the defendant did, by the said indenture, covenant and agree with the plaintiffs not to do any act which should have an effect contrary to the above intention. Breach, that, whilst the Swindon station was used as the regular and general place of stoppage for refreshment of passengers, the defendant caused divers trains carrying passengers, being trains under the control of the defendant, and not express trains, etc., to pass the Swindon station, both up and down, without stopping there for the refreshment of passengers for a reasonable period of about ten minutes, or any other reasonable period, and caused the said trains to stop there for a short and unreasonable period, to wit, one minute, and no more, not being sufficient to enable the passengers to obtain any refreshment there. *Held*, on demurrer, that the declaration of the above intention, taken in conjunction with the rest of the indenture, amounted to an absolute covenant by the defendant that the arrangement for trains to stop at Swindon should continue as long as the company chose to make it the general place of stoppage for refreshment; that a good breach was assigned. *Rigby v. Great Western R'y Co.*, 4 Eng. R. R. & Canal Cases, 190. 1845. See, also, *Same v. Same*, *ib.*, 175, 1846; *Same v. Same*, 14 Meeson & Welsby (Exchequer), 811, 1845.

91. — A railway company covenanted

with the builders of refreshment rooms at a station on the line of railway that all trains which should pass the station carrying passengers, not being goods trains or trains to be sent express or for special purposes, and except trains not under the control of the company, should stop for a reasonable period of about ten minutes. The postmaster-general, proceeding under an act of parliament which was passed before the covenant was made, required the company to run a train carrying mails at a certain hour, and stopping at the station for five minutes only. *Held* (reversing the order of Wickens, V. C.), that such a train was a train "not under the control of the company," within the meaning of the exception. *Phillips v. Great Western R'y Co.*, Law Reports, 7 Chancery Appeal Cases, 409; 2 Eng. (Moak), 316. 1872.

92. — **restraint of location of depot; illegality.** Where the owner of lots conveyed the same in trust, for the benefit of a railroad company, in consideration of the illegal agreement of the company not to establish any depot or station within three miles of a certain place on its road, and the trustee afterward reconveyed the property back to the grantor, it was held that the company could not maintain a bill to have the lots sold for its benefit, and have the same again conveyed to a trustee for its benefit, nor could it claim the right to have the taxes paid on the lots made a charge thereon for its reimbursement. *St. Louis, Jacksonville and Chicago R. R. Co. v. Mathers*, 104 Ill., 257, 1882; 9 Amer. & Eng. R. R. Cases, 600.

93. — The plaintiffs procured the conveyance to the defendant of certain lots in the city of Des Moines upon consideration of a promise by defendants that it would build depots thereon, which should be the only ones built or maintained by it in said city. Defendant built, and has since maintained, both passenger and freight depots thereon, but, having also built a depot in another part of the city, an action was brought by plaintiffs to recover, as damages, the value of the lots conveyed. *Held*, that such action was based upon the contract, which was illegal and void as against public policy, and, the parties being in *pari delicto*, the action could not be maintained.

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Williamson v. Chicago, Rock Island and Pacific R. R. Co., 53 La., 126. 1880.

94. — right of way; agreement to build depot, etc.; lease of line to another company. Where the petition sets out the execution of a written agreement between the J. C. and Ft. K. R'y Co. and a land owner for a right of way for a railroad through the latter's premises, upon the condition that such company should construct a side track, depot and station buildings on the premises of the land owner, and furnish to such person Osage orange plants to fence the railway, and also pay him for growing the fence when sufficient to turn stock; the assumption of the obligations therein created against the J. C. and Ft. K. R'y Co. by the K. P. R'y Co.; the fact that the only consideration moving the land owner to part with his land for such right of way was the concurrent agreement of the railway company; the entry and possession of the two corporations upon the premises of the land owner, in pursuance of the agreement, and the continued use and occupation of the same for a right of way by the K. P. R'y Co.; the failure and refusal of either company to perform any of the said agreements contained in the contracts; the damage occasioned by such failure and the demand of judgment,—*held*, that sufficient facts are therein set forth to constitute a cause of action against the K. P. R'y Co. *Kansas Pacific R'y Co. v. Hopkins*, 18 Kans., 494, 1877; 15 Amer. R'y Rep., 287.

95. — Where, in such an action as above stated, the two railway companies are impleaded together, but a demurrer to the evidence is sustained as to the one company, and thereafter the cause is prosecuted against the other company only, the election to proceed against the latter company implies an abandonment of the former; and the action against the latter is maintainable on well settled rules. The promise of the K. P. R'y Co. to the J. C. and Ft. K. R'y Co., made upon a valid consideration, and having been adopted by the land owner, is to be deemed as made to him, though he was not a party nor cognizant of it when made. *Ib.*

96. — specific performance. A railway company agreed for valuable consideration with a land owner to erect, construct and fit

up a station on certain lands which it had bought from him. The agreement contained no further description of the station, nor any stipulations as to the use of it. The company having refused to erect a station in the specified place, and substituted one at a distance of two miles, *held* (affirming the decision of Bacon, V. C.), that the case was one in which justice could be better done by an inquiry as to damages than by a decree for specific performance. *Wilson v. Northampton and Banbury Junction R'y Co.*, Law Reports, 9 Chancery Appeal Cases, 279. 1874.

97. — Where the owner relinquishes to a railway company the right of way over his land, the depot under the relinquishment to be located at a certain designated point on it, he cannot, after relinquishment and entry by the company, maintain trespass or ejectment against the company for failing so to locate the station; but he may recover damages resulting from their appropriation of his land under false pretenses, and his measure of damages would be payment for his land, and all subsequent injuries occasioned by the construction of the railroad, as though no such grant of the right of way had ever been made. And in such suit, in the estimation of damages, the defendant would not be entitled to such considerations as would be appropriate in proceedings for original condemnation or an exercise of the power of eminent domain. Or he may have his remedy in equity for specific performance. *Hubbard v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 63 Mo., 68, 1876; 20 Amer. R'y Rep., 446.

98. — On the purchase of land by a railway company in 1888, the company covenanted with the land owners that a piece of the land purchased should forever thereafter be used as a first-class station. The station was built, and the railway was completed in 1842; the railway company was afterwards made part of a company with a much greater length of railway. In 1889 the land owner filed a bill to compel the company to build a larger station, and to stop all the trains at that station. *Held*, that, as the existing station had not been objected to, and had remained for many years, and as it did not appear that the passengers were numerous, the court

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would not compel a larger station to be built; but that as many trains as stopped at any other station between the *termini* of the original railway, excepting mail, express and special trains, must stop at this station. *Hood v. North Eastern R'y Co.*, Law Reports, 5 Chancery Appeal Cases, 525. 1870.

99. — On the purchase of land by a railway company in 1838, the company entered into a covenant with the vendors that a specified portion of the land purchased should be "forever thereafter used and employed as and for a first-class station or place for the purpose of taking up and setting down passengers traveling along the railway." The company having broken its covenant by stopping at this particular station only such trains as stopped at all (or nearly all) other stations, and also by gradually withdrawing at the station the accommodation originally provided for passengers, *held*, that the land owner was entitled to a decree ordering the company to supply the necessary rooms and conveniences (to be ascertained at chambers) for the accommodation of a first-class station, and restraining the company from allowing any of its ordinary or fast trains, other than mail, express, or special trains, to pass the station without stopping to set down or take up passengers, subject to liberty to apply, in certain events, for a relaxation of the injunction. *Hood v. North Eastern R'y Co.*, Law Reports, 8 Equity Cases, 666. 1859.

100. **Employees; releasing from liability.** A railroad company cannot contract in advance with its employees for the waiver and release of the statutory liability imposed upon every railroad company organized or doing business in the state by ch. 93, Laws of 1874. Such a contract is void, and no defense to an action brought by an employee of a railroad company for damages done to him in consequence of the negligence or mismanagement of a co-employee. *Kansas Pacific R'y Co. v. Peavey*, 29 Kans., 169, 1883; 11 Amer. & Eng. R. R. Cases, 260.

101. — **suit for wrongful discharge.** In an action by a superintendent against a railway company for improperly dismissing him from its employ, *held*, that the plaintiff was entitled to have an inspection of all minutes or entries in the company's books having any reference to the plaintiff's employment.

Hill v. Great Western R'y Co., 10 Common Bench (N. S.), 148; 100 E. C. L., 148. 1861.

102. **Evidence; usage.** The general custom or usage of a railway company, or of various companies, cannot be shown to modify an unambiguous contract for carriage of freight. *Martin v. Union Pacific R. R. Co.*, 1 Wyoming, 143. 1873.

103. — **right of way; parol evidence.** Where a party agrees to release the right of way for a railroad over any of his lands in a county, parol evidence cannot be received to show that it was expected the road would be located by a different route over other lands of the party. *Conwell v. Springfield and Northwestern R. R. Co.*, 81 Ill., 232. 1876.

104. **Exchange of property.** Plaintiff contracted to deliver to the defendants old railroad iron at \$51 per ton, and to receive in exchange therefor "fish joints," at \$1.65 each. Plaintiff delivered old iron in excess of the "fish joints" received; the iron in excess was not ordered by defendants; it was shipped to them without notice, and upon its arrival they notified plaintiff that they did not need it, but would receive it on account of "fish joints," to which notice plaintiff made no objection. *Held*, that plaintiff was not entitled to recover the value of the excess without proof of a breach of the agreement on the part of defendants by a refusal to deliver "fish joints" to the extent of the iron delivered. *Long Island R. R. Co. v. Verree*, 69 N. Y., 486. 1877.

105. **Excursion train; agent.** Plaintiff, station agent of a railroad company, sued the company for damages for breach of an alleged contract in failing to furnish a train for an excursion. Upon correspondence had the company supposed the train was intended for a third party and agreed to furnish it on certain terms, but afterwards refused on discovering that plaintiff was attempting to procure it for his own benefit. *Held*, that plaintiff could not, from his fiduciary relation towards the company, enter into a binding contract with it for such purpose, unless it agreed thereto after being fully advised of all the circumstances. *Pegram v. Charlotte, Columbia and Augusta R. R. Co.*, 84 N. C., 696, 1881; 6 Amer. & Eng. R. R. Cases, 470.

Executory — Fencing.

106. — The general ticket agent of a railway company, who has made a contract to run an excursion train on certain terms, has power to change the terms of said contract. *Louisville, etc., R'y Co. v. Henly*, 12 Amer. & Eng. R. R. Cases (Ind.), 801. 1883.

107. Executory. The provision in the act concerning railroad corporations, that "no contract shall be binding on the company unless made in writing," refers only to contracts wholly executory; but the action against the corporation on such verbal executory contracts must be brought upon an implied promise, and the recovery must be limited to the value of the benefit received by the corporation. *Foulke v. San Diego and Gila Southern Pacific R. R. Co.*, 51 Cal., 365, 1876; 11 Amer. R'y Rep., 494.

108. — In an action on a contract to deliver goods, when the plaintiff performs, the defendant having continuously called for execution of the contract, it is not competent for the latter to refuse to accept performance; but if, upon notice of the promisor of an executory contract that he will not perform, the promisee accepts the situation and treats the contract as at an end, the promisor cannot afterwards, by changing his mind, compel the promisee to accept performance. *New Brunswick and Canada R. R. Co. v. Wheeler*, 12 Federal Reporter, 877. 1882.

109. Fare boxes. A contract to furnish fare boxes upon a conditional sale construed. *Slawson v. Albany R'y Co.*, 3 Thompson & Cook (N. Y. Supreme Ct.), 768; 1 Hun (N. Y.), 438, 1874; affirmed, 60 N. Y., 606, 1875.

110. Fencing. In an action against a railway company for a breach of a simple contract to make culverts and fences along its right of way, the declaration alleged two considerations: a waiver by plaintiff of a right of appeal from the assessment of damages for right of way, and plaintiff's agreement to convey the right of way by deed. The plaintiff testified that he did not agree to give a deed, and that nothing was said about one, and the proof failed to show that anything was said about waiving any right of appeal, and no proceedings were shown to condemn the land, so as to show there was any right of appeal. *Held*,

that no recovery could be had upon the contract, for the want of proof of a sufficient consideration. *Indianapolis, Bloomington and Western R'y Co. v. Rhodes*, 76 Ill., 285. 1875.

111. — Where, in consideration of a right of way for a railroad company, such company covenanted that it would construct a lawful fence on each side of the railroad track, and a crossing with cattle-guards on each of the eighty acres of the land described in the agreement at such places as the owner of the land should designate, and in default thereof would forfeit and pay to the owner of the premises the sum of \$1,000, *held*, the sum of \$1,000 must be construed as a penalty, and on default that the owner is entitled to recover his actual damages only. *St. Louis and San Francisco R'y Co. v. Shoemaker*, 27 Kans., 677, 1882; 11 Amer. & Eng. R. R. Cases, 379.

112. — A railroad company, which is the successor of another railroad company, having secured the railroad franchises and property through a judicial sale, made by a decree of a court having jurisdiction, and using lands, for the occupation of which the prior company had by parol entered into an agreement with the owner in regard to damages, fencing and repairs, is bound by that agreement. *Wheeling, Pittsburgh and Baltimore R. R. Co., Appeal of*, 1 Pennypacker (Pa.), 360. 1880.

113. — Where the owner of land executed an agreement with a railway company, which constituted not only an irrevocable license to enter and occupy a part of the same as a right of way, but obliged the owner, as soon as the road was finally located and built, to convey to the company the right of way of fifty feet on each side of the center of the road, it was held that the failure of the company to perform conditions subsequent contained in the agreement, such as fencing, etc., furnished no ground for the revocation of the license under which the company entered and constructed its road, as complete indemnity in damages were recoverable therefor in an action at law. *Morris v. Indianapolis, Bloomington and Western R'y Co.*, 76 Ill., 522. 1875.

114. — The defendant, in consideration of the grant of a right of way through the

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plaintiff's land, agreed to build for the plaintiff a certain wagon road, and also to fence both sides of the way. In an action for the breach of these agreements, *held*, that the plaintiff was entitled to recover what it would reasonably cost to construct the road and fence. *Taylor v. North Pacific Coast R. Co.*, 56 Cal., 317. 1880.

115. Ferry company. A ferry company granted rights and easements to a railroad company over two tracts of land, which were assumed to be a distinct property from the ferry franchise, in consideration of which the railroad company covenanted with the ferry company always to employ the latter to transport over the Mississippi river all property and persons which might be taken across the river either way, by the railroad company, either for the purpose of being transported on the railroad of the grantee or having been brought to said river upon said railroad, so that the ferry company, its representatives and assigns, owners of the ferry, should have the profits of the transportation, etc. *Held*, that as the covenant was for the benefit of the owners of the ferry, and not for the owners of the land out of which the easement was granted, a separate and distinct property, the ferry company could not maintain an action at law against a party succeeding to the rights, property and franchises of the railroad company for a breach of the covenant. *Wiggins Ferry Co. v. Ohio and Mississippi R'y Co.*, 94 Ill., 83. 1879.

116. Forfeiture. A building contract, by which the plaintiffs contracted with the defendant to construct a dock and other works in connection therewith, provided as follows: "Should the contractor fail to proceed in the execution of the works in the manner and at the rate of progress required by the engineer, or to maintain the said works, as hereinafter mentioned, to the satisfaction of the engineer, his contract shall, at the option of the company, but not otherwise, be considered void as far as relates to the works or maintenance remaining to done; and all sums of money that may be due, and all the contractors' implements and materials, shall be forfeited to the company, and the amount shall be considered as ascertained damages for breach of contract."

The contract provided that "the whole of the works should be entirely completed on or before the 31st of August, 1873." "The works were not completed by that date. There were other clauses in the contract, in the following terms: "If the contractors shall not complete the said works within the period limited for the purpose, or if they shall become bankrupt, or if from any cause whatever (not arising from any acts done or omitted to be done by the said company, contrary to the true intent and meaning of these presents) they shall be delayed or prevented in the completion of the said works according to the specification, it shall be lawful for the company, without any previous notice, to take the works entirely or in part out of their hands, and to employ any other contractor to complete the same."

"Should the engineer be at any time dissatisfied with the nature or mode of proceeding with, or at the rate of progress or maintenance of the works, or any part thereof, he shall have full power to procure and make use of all labor and materials from the money that may then be due or that may become due to the contractor; but it is hereby expressly declared that the possession of this power by the engineer shall not in any degree relieve the contractor from his obligation to proceed in the execution of and complete the works with the requisite expedition or to maintain them as hereinafter mentioned." On the 22d of January, 1874, and consequently after the time fixed by the contract for completion of the works, the defendant gave notice to the plaintiffs to avoid the contract, and thereupon took possession of the works and of the materials and implements of the plaintiffs. *Held*, that upon the true construction of the contract, the clause above set forth, with reference to the avoidance of the contract and the forfeiture of the contractors' implements and materials, could only be enforced before the time originally fixed for completion of the works had expired. *Walker v. London and North Western R'y Co.*, Law Reports, 1 Common Pleas Division, 518, 1876; 17 Eng. (Moak), 403.

117. — breach. A contractor does not forfeit his right to the fifteen per cent. retained by his employer under the contract when he

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is driven from his work by the unreasonable and arbitrary conduct of those representing the employer company. *Elizabethtown and Paducah R. R. Co. v. Pottinger*, 10 Bush (Ky.), 185. 1873.

118. — A person in possession of land under a contract of purchase, by the terms of which it is provided that a failure to pay at the time agreed upon shall work a complete forfeiture of his interest, has no right, after default made, to sell the fence-rails used to inclose the premises. *Hannibal and St. Joseph R. R. Co. v. Crawford*, 68 Mo., 80. 1878.

119. — time essence. Where the time is made the essence of the contract by the express terms thereof, and the language of the instrument discloses that a strict compliance with its conditions was the intention of the parties, a failure in performance will entitle the obligor to declare a forfeiture. *Iowa Railroad Land Co. v. Michel*, 41 Ia., 402. 1875.

120. — Where after default in the payment of the last instalment due upon a contract for the conveyance of land, which made time of its essence, an extension for a certain time was granted upon consideration of the payment of interest at a higher rate, it was held that the provision of the original contract making time of its essence did not apply to the time as extended. *Van Vranken v. Cedar Rapids and Missouri River R. Co.*, 55 Ia., 135. 1880.

121. — The forfeiture of a time essence contract for sale of railway lands enforced. *Mo. River, Ft. Scott and Gulf R. R. Co. v. Brickley*, 21 Kans., 275. 1878.

122. — A contract for sale of land, with condition as to forfeiture, construed. *Cunningham v. Ill. Central R. R. Co.*, 77 Ill., 178. 1875.

123. — Where time was made essential in a contract of purchase, and it provided for a forfeiture of the purchase if payments were not punctually made, and of all rights acquired under it, without any right in the vendee of reclamation or compensation for money paid, etc., the vendor declared a forfeiture for default of making payment of the notes given for the purchase money, when due, but did not surrender the notes to the purchaser; *held*, that the pur-

chaser was not entitled to a specific performance, and that, under such contract, an offer to return the notes was not necessary before declaring the forfeiture. *Phelps v. Illinois Central R. R. Co.*, 63 Ill., 468. 1872.

124. Free pass. The rector of Woodstock filed a bill against the Great Western R'y Co. for the specific performance of an alleged contract for a free pass for himself and his successors, as the consideration for certain rectory land conveyed by the plaintiff to the company for railway purposes. The court of chancery decreed for the plaintiff. The court of appeal, not being satisfied with the evidence of the alleged contract, and also deeming the contract to be open to various objections, reversed the decree, and ordered the bill to be dismissed with costs. *Bettridge v. Great Western R'y Co.*, 3 Grant (Error & Appeal, Upper Canada), 58. 1866.

125. — An agreement between two companies, by which a railway company agreed with the other to furnish free passes for certain officers and employes, is valid. *Niagara Falls Bridge Co. v. Great Western R'y Co.*, 25 Upper Canada (Queen's Bench), 313. 1866.

126. — A railway company agreed to give to D., during his life, a free pass over its road for himself and family. The company afterwards refused to comply with its contract, and D. brought an action to recover damages for the breach. *Held*, that no other rule could be applied to the case but damages for the refusal of the pass as the only cause of action, and this being single, to be compensated by such damages as a pass for life for D. and family would be worth. And that, while it was difficult to estimate its value, because of the length of life and the number of passages D. and his family might demand, yet certainty must be approximated to as closely as the nature of the case would admit. *Erie and Pittsburgh R. R. Co. v. Douthet*, 88 Pa. St., 243. 1878.

127. Fuel contract. By contract made between the E. C. R'y Co. and the defendants, it was, amongst other things, provided that the defendants should supply, and the company should purchase, subject to certain terms, all the coke that should be required by the company for working its railways between London and Cambridge and London

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and Colchester. By the fourth clause, the company engaged to take from the defendants five hundred and fifty tons and one hundred tons of coke weekly during the period of seventeen years; and it further agreed, that, if it should require *more* than those quantities for the working of its railways, it would take the same from the defendants,— with a proviso that, if it should require *less* than the stipulated quantities, the supply should be reduced accordingly, upon its giving the defendants three months' notice. And, by the eleventh clause, the company engaged that, "so long as the defendants should punctually and duly supply *the said coke*, and so long as the same should be of the best quality, it would abstain from making purchases of coke for its lines from any other persons." *Held*, that the readiness and willingness of the company to take from the defendants *all* the coke it required for the purpose of its railways was not a condition precedent to its right to insist upon being supplied with the quantities expressly stipulated for; and, consequently, that the fact of the company having bought coke from other persons afforded no answer to an action by it against the defendants for a failure to deliver the quantities contracted for. *Eastern Counties R'y Co. v. Philipson et al.*, 16 Common Bench, 2; 81 E. C. L., 2, 1855; *Eastern Counties R'y Co. v. Philipson*, 30 Eng. Law & Equity, 421, 1855.

128. — A contract entered into to furnish articles or supplies, such as fuel, at a specified price and without limit as to duration, will not be construed as a perpetual contract, and will not be enforced as imposing a never-ending burden. *Echols v. New Orleans, Jackson, etc., R. R. Co.*, 52 Miss., 610. 1876.

129. — Where fire-wood or timber is purchased for some specific purpose, which requires it to be of a certain length, if wood of a length different from that contracted for is delivered and received, the contract is not satisfied. But when the contract is for wood for being burned, and the contract does not define the length, it may be longer or shorter than four feet; but the vendor must deliver one hundred and twenty-eight cubic feet for a cord. *Kennedy v. Oswego and Syracuse R. R. Co.*, 67 Barbour (N. Y.), 169. 1867.

130. — In an action against a railway

company, based upon a contract under which the plaintiff has placed near the defendant's road a quantity of fire-wood, which, by the contract, the defendant was to measure, receive and pay for at a certain price per cord, of which placing of the wood the defendant has been notified by the plaintiff, but as to a portion thereof has not measured, received or paid therefor as agreed upon, which portion, having been insured by the plaintiff as his own after it should have been so accepted, has been destroyed by fire without the plaintiff's fault, is not an action for the contract price of the wood, but is a suit for not accepting the wood according to the contract; and the measure of damages is the difference between the contract price and the market price at the time and place at which the wood ought to have been accepted. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Heck*, 50 Ind., 303. 1875.

131. **Implied contract.** A party who has performed a special contract may sue upon an implied *assumpsit*, and, upon the trial, give in evidence the contract price as the measure of damages. *Higgins v. Newtown and Flushing R. R. Co.*, 3 Hun (N. Y.), 611, 1875; affirmed, *Same v. Same*, 86 N. Y., 604, 1876.

132. **Incapacitated persons.** A railway company having, under its act of parliament, power to contract with incapacitated persons for the purchase of lands, and a right, upon payment of the purchase money into the bank, to the fee simple of the lands, contracted with an incapacitated person, who died before the purchase money was paid. *Held*, that the title of the company could not be completed without the assistance of a court of equity. *Midland Counties R. R. Co. v. Oswin*, 1 Collyer (Eng. Ch.), 74, 1844.

133. **Incumbrance.** A contract to pay incumbrances on certain real estate construed. *B., C. R. and M. R. R. Co. v. Ross*, 48 Ia., 706. 1878.

134. **Joint use of railway.** Two directors of the plaintiff met two directors of the defendant, and entered into an agreement in writing, signed by all four directors on behalf of their respective companies, whereby it was mutually agreed that each of the

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companies should, interchangeably, use the railway of the other company, on certain specified terms. The agreement contained no words of succession or of restriction. *Held*, that these contracts were not mere licenses determinable at will, but conferred rights of a permanent nature on the companies. *Held*, also, that the terms of the contract were not too vague; but that the user conceded was one consistent with the proper enjoyment of the railway, the subject matter of the contract, and with the rights of the granting party. *Held*, also, that this court will grant an injunction restraining the defendant from acting contrary to a negative agreement, although it cannot specifically enforce the performance of the whole of the agreement. *Great Northern R'y Co. v. Manchester, etc., R'y Co.*, 5 De Gex & Smale (Eng. Ch.), 138. 1851.

135. — A switch was built by the Midland R'y Co. for the joint convenience and use of a mining company and the Midland R'y Co., under an agreement which expressly excepted a certain part from the use of the mining company. The assigns of the mining company claim the right to use such excepted part. *Held*, that a mere use by the permission of the Midland R. R. Co. conferred no right. Nor is such switch a "public highway," within the meaning of the charter of the Midland R'y Co. Nor does the fact that the Midland R'y Co. built such switch without legislative authority give the assignee a right to use it. *Coe v. New Jersey Midland R'y Co.*, 28 N. J. Eq., 100; 14 Amer. R'y Rep., 17; *Same v. Same*, 28 N. J. Eq., 593. 1877.

136 Lease; damages; profits. In actions of tort, where the amount of profits of which the injured party is deprived as a legitimate result of the trespass can be shown with reasonable certainty, such profits, to that extent, constitute a safe measure of damages, and so far as they are safely traceable he should receive compensation for them; but such damages must be the necessary and natural consequence of the act. Profits which are merely probable and speculative cannot be recovered. These rules applied to a lease of a certain part of a depot for restaurant purposes, and destruction thereof by a trespass. *Illinois and St. Louis Railroad*

and Coal Co. v. Decker, 3 Bradwell (Ill.), 135. 1878.

137. Lex loci. Where a contract is made in one state, to be partly performed there, and partly performed in several other states, the contract is to be governed by the law of the place where it is made. *Morgan v. New Orleans, Mobile and Texas R. R. Co.*, 2 Woods (U. S. C. C.), 244. 1876.

138. — The *lex loci* governs in determining the validity and in the construction of contracts, but in respect to the time, mode and extent of the remedy the *lex fori* governs. *Mineral Point R. R. Co. v. Barron*, 83 Ill., 335. 1876.

139. — In passing upon the rights of the parties, the supreme court of the United States will not be controlled by the judicial decisions of the state where the contract of carriage was made. *Myrick v. Michigan Central R. R. Co.*, 107 U. S., 102. 1882.

140. License. An agreement held to be a mere license, revocable at will. The agreement was to furnish transportation at a reduced rate, the shipper to furnish the cars. This is not a license coupled with an interest. *Baltimore and Ohio R. R. Co. v. Potomac Coal Co.*, 51 Md., 327. 1878.

141. Lighterage. Where a charter-party provides that "the cargo is to be brought to and taken from alongside at merchant's risk and expense, and free of lighterage to the ship, etc., and being so loaded shall therewith proceed," etc., the cost of lighterage at the ports of both departure and destination for lading and discharge of the cargo is at the expense of the merchant. *Carr v. Austin and Northwestern R. R. Co.*, 14 Federal Reporter, 419. 1882.

142. Location of railway. A contract to build a railway by one route rather than another, in consideration of a subscription, is void. If the route thus contracted for is not as good a one as the other, it is a wrong upon the stockholders or upon the public. Such agreements are contrary to public policy. *Holliday v. Patterson*, 5 Oreg., 177; 18 Amer. R'y Rep., 260. 1874. See, also, *O. and C. R. R. Co. v. Potter*, 5 Oreg., 228. 1874.

143. — An agent of a railway company, charged with the duty of selecting a route for its construction, cannot disregard the

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interest of his principal in making the selection. An agreement for a consideration moving to himself to select a particular route is void. *Holliday v. Davis*, 18 Amer. R'y Rep., 268; 5 Oreg., 40. 1873. See, also, *Holliday v. Patterson*, 5 Oreg., 177. 1874.

144. — S. agreed to convey to the L. L. and G. R. R. Co. forty acres of land in consideration of the building of its railway in a given time to Coffeyville, the company binding itself to convey to him a town lot in Coffeyville, to be selected by S. Held, that S. could not plead the failure to convey the lot as a defense to an action on the contract, as he had not yet made the selection of the lot. *Sullivan v. Leavenworth, Lawrence and Galveston R. R. Co.*, 17 Kans., 503. 1877.

145. Medical services. The general manager of a railway company has, as incidental to his employment, authority to bind the company to pay for surgical attendance, bestowed at his request, on a servant of the company injured by an accident on its railway. *Walker v. Great Western R'y Co.*, Law Reports, 2 Exchequer Cases, 223. 1867.

146. — Where the conductor of a railway company brought a brakemen, who had received a serious injury whilst in its service, to the plaintiff's house, to be cared for, and immediately after telegraphed to the officers of the company the facts, and they never notified the plaintiff of their intention that the company should not be responsible, held, in an action by the plaintiff against the company, that the company was liable to pay the plaintiff what his services were reasonably worth. *Indianapolis and St. Louis R. R. Co. v. Morris*, 67 Ill., 295. 1873.

[See MEDICAL SERVICES; INJURY TO EMPLOYEES.]

147. Operation of railways; connecting lines; leased lines. By an agreement entered into between the directors of two railway companies, the N. W. Co. was to have running powers over the L. Co.'s lines, subject to the L. Co.'s by-laws; was to be at liberty to have its own staff at the L. Co.'s stations, and be allowed a reasonable sum for carriage, clerkage, etc.; the L. Co. was to be at liberty to call on the N. W. Co. to carry passengers and goods for the L. Co. upon the L. Co.'s local lines, and both sets of directors bound themselves to send by

each other's lines all traffic not otherwise consigned. A chief consideration for this agreement was an advance of money by the N. W. directors to the L. Co.'s directors; but no mention of this consideration was made in the agreement. Nor, though there were in the agreement provisions for referring to arbitration any differences that might arise as to the agreement, was there any mention of any time for which it was to endure, or how it might be terminated. Held, that all the provisions of the agreement showed that it was a permanent and not a terminable agreement, and that, consequently, a notice to terminate it at the end of six months from a given time was invalid. *Llanelly R'y and Dock Co. v. London and North Western R'y Co.*, Law Reports, 7 English and Irish Appeal Cases, 550. 1875. See *Same v. Same*, Law Reports, 8 Chancery Appeal Cases, 942, 1873; 7 Eng. (Moak), 492; 13 Eng. (Moak), 73.

148. — working agreement. By an agreement dated the 26th of February, 1866, and afterwards confirmed by act of parliament, the plaintiff agreed to construct a line of railway between certain termini, and the defendant agreed to work it, and during the continuance of the agreement to develop and accommodate the local and through traffic thereon, and carry over it certain traffic particularly specified; and it was agreed that all differences under the agreement should be determined by a standing arbitrator to be named by the companies in January in each year, or, failing such nomination, by the board of trade on the application of either company in February in each year, and that all such clauses of the acts of parliament for the time being in force in regard to railways, as should relate to the settlement of disputes by arbitration, should, so far as applicable, and except as therein otherwise provided, be deemed incorporated with the agreement, and that the agreement should continue for nine hundred and ninety-nine years from the date thereof. The plaintiff constructed the line, and the defendant entered into possession thereof, but carried a large proportion of traffic which ought to have passed over the plaintiff's line by other lines belonging to the defendant, and a bill was filed to restrain the defendant

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from so doing. *Held*, on demurrer, first, that inasmuch as no standing arbitrator had been appointed in accordance with the agreement, the jurisdiction of the court was not ousted; secondly, that the case was one in which the court could interfere by injunction. *Wolverhampton and Walsall R'y Co. v. London and North Western R'y Co.*, Law Reports, 16 Equity Cases, 433. 1873.

149. — The S. R'y Co. was authorized by its act to "make and maintain" a railway, with all proper stations, approaches and works, and was empowered to transfer or sell the railway, before or after completion, and all the powers of the company, to the D. R'y Co. By a working agreement, the terms of which were incorporated in the act, it was provided that the S. Co. was to complete the line, and that, when completed, it should be maintained and worked by the D. Co. in perpetuity, and that it was to pay an annual sum to the D. Co. On the completion of the line the D. Co. took possession of and worked the same under the agreement, but no sale to it of the railway had been effected. While the D. Co. was thus in possession, the S. Co., acting under the alleged powers in the act, in order to provide a better access to a station on the line, erected some stone steps in the station yard, which the D. Co. removed. In an action for a mandatory injunction to compel the D. Co. to restore the steps, *held*, that, on the true construction of the act and working agreement incorporated therewith, the D. Co. was entitled to the exclusive possession and right of maintenance of the railway and works; and that the erection of the steps was a work of maintenance, and was a wrongful act on the part of the S. Co. *Seven Oaks, Maidstone and Tunbridge R'y Co. v. London, Chatham and Dover R'y Co.*, Law Reports, 11 Chancery Division, 625, 1879; 27 Eng. (Moak), 831.

150. **Parol contract by corporation.** The agent of an incorporated railway company agreed by parol with the plaintiff to purchase of him a quantity of railway sleepers, upon certain terms. The sleepers were received and used by the company. *Held*, that there was evidence from which the jury might find a contract by the company; s. 97 of the 8 and 9 Vict., c. 16, having provided

that the directors may contract by parol, on behalf of the company, where private persons may make a valid parol contract. *Pauling v. London and Northwestern R'y Co.*, 22 Eng. Law and Equity, 560; 23 Law Jour. Rep., N. S., Exch., 105; 8 Exchequer Rep., 888; 21 Law Times Rep., 157. 1853.

151. **Preferred stock.** Where the contract for the purchase of land, by the Chesapeake and Ohio R. R. Co., provides that the purchase money is to be paid in eight per cent. preferred stock of the Chesapeake and Ohio R. R. Co., and the court in decreeing execution of the contract decrees that the company issue and deliver in payment of the purchase money, its stock guaranteed to pay eight per cent. thereon, it is error. *Dickinson v. Railroad Co.*, 7 West Va., 390. 1874.

152. **Public policy; competition.** An agreement between two railway companies that the one company will not carry traffic over a particular portion of its line, *held*, *obiter*, not illegal. *Lancaster and Carlisle R'y Co. v. Northwestern R'y Co.*, 2 Kay & Johnson (Eng. Ch.), 293. 1856.

153. — **legislation.** A contract not to oppose the passage of a railway bill in parliament is not illegal. So held where the projectors of a railway, pending a bill for incorporating them, entered into an agreement on behalf of the proposed corporation, in consequence of which the threatened opposition to the bill was withdrawn. *Edwards v. Grand Junction R. R. Co.*, 7 Simons (Eng. Ch.), 337, 1836; *Same v. Same*, 1 Mylne & Craig (Eng. Ch.), 650, 1836. The corporation, having received the benefit of such an agreement, cannot repudiate it. *Ib.*

154. — An agreement to pay a peer in parliament 5,000*l.* for withdrawing his opposition to a special act is against public policy, and a fraud upon the legislature. *Howden v. Simpson*, 2 Perry & Davison (Queen's Bench), 764. 1839. See, also, *Same v. Same*, 10 Adolphus & Ellis, 793. 1839. *Contra*, *Same v. Same*, 1 Eng. R. R. & Canal Cases, 347; *Simpson v. Howden*, 3 ib., 294. 1842.

155. — The S. E. R'y Co. was incorporated for the purpose of making and maintaining that railway, with power to raise moneys for the purposes of the act. The projectors of an intended Dover and Deal, etc., R'y

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had contemplated bringing a bill before parliament for the establishment of such railway, but were in doubt as to proceeding. *M.*, a person interested and having influence in the S. E. Co., undertook that, if the projectors of the Dover, etc., R'y would proceed in endeavoring to obtain their act, and if successful would hand over their scheme to the S. E. Co., that company, if the bill were rejected, would insure them against loss by such rejection and would pay their parliamentary expenses. No clause in the company's act empowered them so to apply their funds. The bill was proceeded with and rejected by parliament. In an action against *M.* on the above contract, *held*, by the court of exchequer chamber on error, that the stipulation by *M.* was a promise that the company should do an act which contravened public policy and a public statute, and that an action did not lie against *M.* upon such promise; and judgment, which had been given for the plaintiff below, was arrested by the court of error. *MacGregor v. Dover and Deal R'y Co.*, 18 Adolphus & Ellis, N. S., 618; 83 E. C. L., 618. 1852.

156. — A contract providing a compensation for obtaining legislation, or to prevent legislative investigation into the affairs of a railway corporation, is void; this principle applied and held to vitiate the defendant's claim to the land in controversy, and the complainant's title was quieted. *Usher v. McBratney*, 3 Dillon (U. S. C. C.), 385. 1874.

157. — not to construct side track. If the consideration, or any part of it, is illegal, no promise based upon such illegal consideration can be enforced. But if one gives a good and valid consideration, and thereupon another promises to do two things, one legal and the other illegal, he shall be held to do that which is legal, unless the two are so bound together that they cannot be separated, in which case the whole promise is void. *Pueblo and Arkansas Valley R. R. Co. v. Taylor*, 6 Colo., 1, 1881; 6 Amer. & Eng. R. R. Cases, 474.

158. — When the public interests are brought in conflict with the private interests of the company, or of private individuals with whom such companies deal, such private interests must yield to those of the public. *Ib.*

159. — No court will lend its aid to one who founds his cause of action upon an illegal or immoral act; and an agreement not to build a side track at a specified time is against public policy and void, and as it cannot, in this case, be separated from the other agreement, the whole contract must fall. *Ib.*

160. — pooling earnings. The proprietors of U. R'y, which was in course of formation, applied for an act authorizing the lease of their railway to the N. W. Co. Part of this line was common to the U. Co. and to a third, the S. B. R'y. The S. B. Co. opposed the bill, but ceased opposition in consideration of an agreement between the three companies. The agreement provided that during said lease the profits should be divided between the U. Co. and N. W. Co. They agreed not to compete for traffic with the S. B. line. *Held*, that the agreement was not a fraud against the parliament and not against public policy. *Shrewsbury and Birmingham R'y Co. v. London and North Western R'y Co.*, 17 Adolphus & Ellis, N. S., 652; 79 E. C. L., 653, 1851; *Same v. Same*, 21 Eng. Law & Equity, 319; 22 Law Jour. Rep., N. S., Ch., 682; 17 Jurist, 845, 1853.

161. — By certain articles of agreement made between the S. and B. R'y Co., the L. and N. W. R'y Co. and the S. U. R'y Co., reciting that the S. and B. R'y Co. had agreed to withdraw its opposition to a bill before parliament, authorizing a lease of the S. U. R'y Co. to the L. and N. W. R'y Co., and that it had been mutually agreed between the three companies that the covenants thereafter contained should be mutually entered into by them, on an act being obtained for authorizing such lease, it was witnessed (*inter alia*) that during the continuance of such lease separate accounts should be kept of all passengers, etc., conveyed on the S. and B. and S. U. railway lines; and that money received in respect of such traffic should be divided between the three companies in certain proportions; and further, that during the continuance of such lease the L. and N. W. and S. U. R'y Co. would not carry any passengers, goods, etc., or other matters and things, between certain points, nor would use a certain portion of the S. U. R'y line to compete for any traffic which properly belonged to the S. and B.

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R'y. *Held*, first, that this agreement was not void as a fraud upon the legislature; secondly, that it was not illegal as giving a monopoly, and depriving the public of the benefit of competition; thirdly, that the stipulation to divide the profits was not a fraud upon the shareholders of the respective companies. *Shrewsbury and Birmingham R'y Co. v. London and North Western R'y Co.*, 9 Eng. Law & Equity, 394; 21 Law Jour. Rep., N. S., Q. B., 89. 1851.

162. Purchase of railway judgments. In 1850 A. lent to B., who was largely interested in an embarrassed railroad, \$5,000 to buy certain judgments against the road, and B. having bought, in 1859 and the early part of 1860, judgments to the amount of \$31,000, assigned the whole of them to A. absolutely. Subsequently, that is to say in August, 1860, A. made a transfer (so called) of them to B., "upon B.'s payment of \$5,000, with interest from this date," and gave to B. a power of attorney of the same date, authorizing him, "for me and in my name," to dispose of them as he might see proper. *Held*, that the so-called transfer was executory, amounting only to an offer that if B. would pay the \$5,000, B. should become owner of the judgments; and that B. having, in May, 1861, gone south and joined the rebels there, and not come back till 1865, could not in 1865 file a bill, and, on an allegation that A. had collected the judgments, claim the proceeds, less the \$5,000 and interest. *French v. Hay*, 23 Wallace, 231. 1874.

163. Rescission. The rights of the purchaser of railway stock upon the rescission of the contract considered. *Gould v. Oneonta*, 3 Hun (N. Y.), 401. 1875.

164. Rights of third person for whose benefit a contract is made. When one who is not a party to a written agreement, but who is the person to be benefited by a performance of stipulations thereon, may maintain an action against the promisor, considered, in case of an agreement to pay certain railway bonds and coupons. *Opdyke v. Pacific R. R. Co.*, 3 Dillon (U. S. C. C.), 55. 1874.

165. Right of way; agreement to obtain right of way; damages. The measure of damages for breach of a contract to procure

certain right of way determined. *New Haven and Northampton Co. v. Hayden*, 117 Mass., 433, 1875; 8 Amer. R'y Rep., 54.

166. — breach; direct action for damages. Where a land owner consents that a railway company shall take possession of a right of way for its railway on and through his lands, under a written agreement; conditioned that the company should within a given time construct a side track, depot, and station buildings on the premises of the land owner, and furnish hedge plants to fence the railway, and pay the land owner for growing the hedge, and such railway company takes possession under the agreement, obtains the right of way thereby, and continues to use and occupy the premises of the land owner for such purpose, and fails and refuses to comply with the terms of the agreement upon which it made entry, took possession, and acquired the right of way, *held*, that the land owner can at once, upon breach of the contract, bring his action at law in the proper district court for his damages against the railway company, and need not resort to the tribunal prescribed by the statute to have his damages assessed for the right of way. *Kansas Pacific R'y Co. v. Hopkins*, 18 Kans., 494, 1877; 15 Amer. R'y Rep., 287.

167. — breach; judgment; lien. The plaintiff entered into a written contract with the defendant; by which he agreed to convey to it the right of way over a certain tract of land, in consideration of the payment of \$1, the fencing of the track through the land and the construction of a crossing for his use within a specified time. The road was built and afterward transferred by foreclosure to another company, but neither company ever complied with the terms of the contract. *Held*, a specific performance having been decreed, that the measure of plaintiff's damages for the breach of contract was the difference in the rental value of the property caused thereby. That the judgment for such damages would constitute a superior lien on the portion of the railroad located on the land covered by the contract. *Varner v. St. Louis and Cedar Rapids R'y Co.*, 55 Ia., 677, 1881; *Davies v. St. Louis, Kansas City and Northern R'y Co.*, 56 Ia., 192, 1881.

168. — conditions. Evidence considered

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and held to establish certain conditions upon which an agreement to convey right of way to a railway company was signed, and that such conditions had not been complied with. *Hastings and Avoca R. R. Co. v. Miles*, 56 Ia., 447. 1881.

169. — The absolute grant, by deed, of right of way to a railway company is not defeated by the failure of the company to comply with conditions on which the grant was obtained, there being no charge of fraud. *Galveston, Harrisburg and San Antonio R. R. Co. v. Pfeuffer*, 56 Tex., 66, 1881; 11 Amer. & Eng. R. R. Cases, 373.

170. — A deed for the right of way in "consideration that the company will locate its railroad on my lands in M. county," is a contract between the parties that the grantor has conveyed the right of way, and that the company will construct its road over the same. *East Line and Red River R. R. Co. v. Garrett*, 52 Tex., 133. 1879.

171. — condition subsequent. A conveyance of right of way will not be set aside in equity, merely on the ground that the grantee has failed to perform conditions subsequent contained in the deed. *Stringer v. Keokuk, Mt. Pleasant and Northern R. R. Co.*, 59 Ia., 277, 1882; 11 Amer. & Eng. R. R. Cases, 608.

172. — construction. In an agreement by one of several tenants in common with a railway company it was agreed to convey to the company a right of way over the party's land, a portion of which was described, and in the concluding clause it was provided: "It is understood that the right of way east of Stony Island avenue is to be procured free of cost to the party of the second part, except through one ten-acre tract, which is to be paid by the party of the second part." The lots over which the right of way was then laid and marked were east of the avenue named, and when the party of the first part, by a partition, had acquired such lots in severalty, so that the right of way was on his own land solely, held, that under the provision in his contract for procuring the right of way, the railway company might enforce a conveyance of the right of way from him. *Turpin v. Baltimore, Ohio and Chicago R. R. Co.*, 105 Ill., 11, 1882; 10 Amer. & Eng. R. R. Cases, 45.

173. — damages. H. and Y. and several other persons, calling themselves the Lancashire and North Yorkshire R. R. Co., introduced a bill into parliament for incorporating the company and making their railway, which was intended to pass through the plaintiff's estate and near his residence. The plaintiff prepared to oppose the bill, but afterwards desisted, in consequence of H. and Y. having agreed with him, on behalf of the company, that in case the company should obtain an act of incorporation they would pay the plaintiff 1,000*l.* for all lands required by them for making the railway, and 4,000*l.* for residential injury, and 25*l.* for his personal expenses, and also that they would pay the expenses of his solicitor in the business. Afterwards that company agreed to join with a rival company, calling itself the Liverpool, Manchester and Newcastle Company, in applying for an act for making a railway, the line of which, so far as the plaintiff's estate was concerned, was the same as the line of the Lancashire and North Yorkshire Company; and the two companies agreed to adopt the agreement with the plaintiff. The act passed, and by it the two companies were incorporated by the name of the Liverpool, Manchester and Newcastle R. R. Co. Held, that the incorporated company must be taken to be the parties on whose behalf H. and Y. entered into the agreement with the plaintiff. *Preston v. Liverpool, Manchester and Newcastle R. R. Co.*, 1 Simons, N. S. (Eng. Ch.), 586. 1851.

174. — The supreme court refused to disturb a verdict for defendant on the mere weight of the evidence, in an action upon a right of way contract, the execution of which was denied by the land owner. *Fort Wayne, Jackson and Saginaw R. R. Co. v. Husselman*, 65 Ind., 73. 1878.

175. — description. A deed of "one hundred feet in width, being fifty feet on each side of the line which may be hereafter established by said company for the route of its railroad, over and across the following described land," — describing specifically a forty-acre tract, — conveys a mere floating right which could only be rendered effectual and made to operate as a conveyance of title to any part of the actual location of the

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route across such tract of land, and until such location the title of the whole tract would remain in the grantor. *Detroit, Hillsdale and Indiana R. R. Co. v. Forbes*, 30 Mich., 165. 1874.

176. — An undertaking to remove a barn and sheds situate upon such forty-acre tract, in consideration of the giving of such deed, cannot be construed to be an exception or reservation from the operation of the deed, in the absence of any showing of the actual location of the route of the railway, or that it was so located as to include the ground where the barn and sheds stood; nor is such undertaking required to be in writing. *Ib.*

177. — ditches. Where a land owner granted the right of way to a railway company if it would construct ditches sufficient to carry off the water, and the company took possession and constructed its railway and used the same for seventeen years, *held*, that, in a failure to maintain sufficient ditches, the land did not revert to the land owner. *Texas and New Orleans R'y Co. v. Sutor*, 56 Tex., 496, 1882; 11 Amer. & Eng. R. R. Cases, 506.

178. — donation of right of way; escrow; condition. An agreement in writing, executed by a land owner, to give a right of way to a railroad company upon its compliance with a certain condition, the agreement being placed in the hands of a third party, not an agent of the company, who returned it after the company failed of compliance, did not entitle it to the right of way without compensation therefor. *Hibbs v. Chicago and Southwestern R'y Co.*, 39 Ia., 340, 1874; 9 Amer. R'y Rep., 180.

179. — estoppel. To defeat the claim of a land owner the railroad company offered in evidence an agreement purporting to be executed by fifty-seven persons, including the present claimant, securing to the company the right of way through the township in which the land was situate free of charge and expense. This agreement was not made directly to the company, but for its use and benefit, and contained a clause that it should not be delivered to the company until one hundred subscribers were secured thereto. This, it was insisted, estopped the land owner from claiming compensation and damages. *Held*, that in the absence of proof

that the company accepted the terms proffered in the agreement, or was in any manner influenced to alter its condition or govern its action thereby, such agreement could not operate as an estoppel *in pais*. *Rockford, Rock Island and St. Louis R. R. Co. v. Shunick*, 65 Ill., 223. 1872.

180. — license. Where a railway company, conveying a tract of land owned by it, reserved a strip of land on each side of its track, and another strip crossing the first, for railroad purposes, upon which another company, some sixteen years afterwards, laid the track of its road by permission, it was *held* that this reservation passed no title, legal or equitable, to the latter company as to any of the strip not actually occupied by it. *Illinois Central R. R. Co. v. Indiana and Illinois Central R'y Co.*, 85 Ill., 211. 1877.

181. — manner of construction of railway agreed upon. Lessees of premises occupied by them as a ropery agreed to withdraw their opposition to a bill in parliament for a railway which would intersect the ropery. The agreement, among other stipulations, provided that the railway should be so constructed as that, when finished, the level of the ropery should not be altered nor the surface of the ropery be in the least respect diminished. *Held*, that the railway company was bound to restore the surface so as to be available for all purposes to which it might have been applied before the construction of the railway, and not for the purposes of a ropery only. *Harby v. East and West India Docks R'y Co.*, 12 Eng. Law & Equity, 135; 1 De Gex, McNaghten & Gordon, 290. 1852.

182. — parol agreement. Where C. executed a written contract whereby he relinquished to defendant a right of way over his land, upon the consideration that the company would complete its road in one year from the date of the contract, and in an action thereafter brought by C. against the company for damages sustained by reason of the construction of the road over such right of way, a contemporaneous parol agreement was offered by C. that the company further agreed, as consideration for such right of way, to give him an annual pass for life over its road, and make him a deduction of \$10 on each car shipped by him

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thereon, and on failure to comply with these conditions, to permit him to retain his claim for damages,—*held*, the evidence was inadmissible. *Cornell v. St. Louis, Kansas and Arizona R'y Co.*, 25 Kans., 613. 1881.

183. — parol evidence. Where a bond obligated one of the parties, for an agreed consideration, to convey to the other a right of way for a railroad "as it shall be laid out," it was held that, in the absence of fraud or mistake, parol evidence was not admissible to show that the contract contemplated a line already established at the time of the execution of the instrument. *Applegate v. B. and S. W. R. R. Co.*, 41 Ia., 214. 1875.

184. — release. Where a party executes a contract with a railway company, agreeing to release and convey a right of way for its road over any lands owned by him, as soon as the road is located, he will not be entitled to any damages by the construction of the road over any of his lands. *Conwell v. Springfield and Northwestern R. R. Co.*, 81 Ill., 232. 1876.

185. — removal of buildings. A declaration upon a promise by defendant to move a certain barn and sheds of plaintiff from certain premises of plaintiff and put the said barn in good repair, in consideration that the plaintiff would convey to defendant the right of way for its track across said premises of plaintiff, which avers performance of the consideration and breach of the promise, held good on general demurrer. *Detroit, Hillsdale and Indiana R. R. Co. v. Forbes*, 30 Mich., 165. 1874.

186. — revocation. Where a railroad company obtains under its charter the consent of the owner, by deed, to enter on lands and construct its road over a located route, with covenant for further assurance by a formal conveyance, after entry, construction of the road, payment and satisfaction of the consideration, such land owner cannot, by notice, revoke his consent, and sue the company in trespass. *New Jersey Midland R'y Co. v. Van Syckle*, 37 N. J. Law, 496. 1874.

187. — The interest in land thus acquired, within the designated route, may be transferred to another railroad company into which the original shall merge, or consolidate with others, by legislative authority. *Id.*

188. — specific performance. A railway company which had projected and was promoting a new line of railway, being opposed by a land holder on the line, arranged, through a third party, who professed to be the agent of the company, to purchase his land at a certain price. The land owner accordingly withdrew his opposition, and the bill passed authorizing the construction of the new line. No steps were taken, however, to carry out the scheme, and the compulsory powers having expired, though the time for completing the line had not, the land holder filed his bill against the company for specific performance of the contract to purchase his land. *Held*, that there was no contract between the plaintiff and the company, for before it obtained its new act it could not enter into a contract; and as to its adoption of the contract made by its professed agent for its benefit, as a corporation subsequently established, there had been nothing done after obtaining the act which the plaintiff's withdrawal of opposition had enabled it to do, and therefore it could not be said to have adopted it. *Gooday v. Colchester and Stour Valley R'y Co.*, 15 Eng. Law & Equity, 596; 19 Law Times Rep., 334. 1852.

189. — death of party; specific performance. A land owner through whose land a railway company proposed to pass, agreed in May, 1864, to withdraw his opposition to its bill on the terms that the company would vary the course of its line and make certain bridges, works and approaches. The company gave a notice to treat, and on the 20th of March, 1867, it went into possession. On the 27th of May a further agreement was come to that the company should pay £2,250 for purchase money and compensation, and should construct the bridges asked according to an agreed plan. The company constructed the line as agreed upon, but did not complete the works, nor pay the purchase money, nor the interest, though completion of the works was demanded in July, 1868, and payment of interest in December, 1868. On the 6th of February, 1869, a substituted agreement was made between the land owner and the company, whereby it was agreed that an estimate should be made by the company's engineer of the cost of com-

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pleting the road, and submitted to A., the land owner's agent, "for approval; in case of difference the amount to be determined by B.;" the amount, "when agreed or determined," to be paid to the land owner "in discharge of all obligations" as to the road; and "the purchase to be completed forthwith." In December, 1871, A. died; and in May, 1872, the company, for the first time, sent in an estimate of the cost of completing the road. The purchase had not been completed, and neither the purchase money nor any interest had been paid. B. was living. *Held*, that the submission of the estimate to A. for approval was of the essence of the agreement of the 6th of February, 1869; and that, inasmuch as by his death the agreement was incapable of being performed in the manner and form therein specified, the court could not enforce performance of it. *Firth v. Midland R'y Co.*, Law Reports, 20 Equity Cases, 100, 1875; 13 Eng. (Moak), 651.

190. — to pay trespasser for right of way. In 1870 the Missouri River, Fort Scott and Gulf R. R. Co. was building a railroad toward Baxter Springs, but could not conveniently build it to Baxter Springs without crossing a certain quarter section of land owned by it, but in the possession of L., who was a mere trespasser. L. opposed the building of the road, and threatened violence and legal proceedings if any attempt should be made to build the road across the land. The defendants were citizens of Baxter Springs, and were desirous to have the road built, and, knowing of said threats, they entered into the following contract, to wit: "That, in consideration of one dollar paid to (the defendants) said parties of the second part by (L.) said first party, and in further consideration that the said party of the first part will permit the Missouri River, Fort Scott and Gulf R. R. Co. to build said railroad through 'said land' without hindrance or obstruction, the said parties of the second part hereby agree to pay to the party of the first part, on demand, all damages which the commissioners of Cherokee county may assess to be done to said land by the building of said railroad, without any appeal whatever." The railroad company then built its road across said land to Bax-

ter Springs without any further opposition from L. Said commissioners then assessed the damage done the land at \$650.40. The defendants then paid \$140 thereof, and the balance still remains unpaid. L. then sued the defendants for the balance, and they set up the defense that there was no sufficient consideration for their agreement. *Held*, that the desistance of L. from further opposition to the building of said road across said land was not a sufficient consideration for the defendants' contract, for the reason that the railroad company had an undoubted right to build its road across its own land, without any person paying L. therefor. And further *held*, that the contract was unconscionable. *Botkin v. Livingston*, 21 Kans., 232. 1878.

191. — ultra vires. A railway company promoting in parliament a bill for the extension of its line, which extended line would pass through the lands of the plaintiff, covenanted with him as follows: "In the event of the bill hereinbefore mentioned being passed in the present session of parliament, the said company shall, *before it shall enter* upon any part of the lands of the said Sir T. R. G. (plaintiff), pay to the said Sir T. R. G., his heirs or assigns, the sum of 4,900*l.*, purchase money, for any portion of his lands, not exceeding forty-three acres, which the said company may, under the powers of its act, require and take for the purposes of this undertaking. In addition to the purchase money as aforesaid, the said company shall pay to the said Sir T. R. G., his heirs or assigns, *before it shall enter* upon any part of the said land, the sum of 7,100*l.* as landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands, not exceeding forty-three acres to be taken by it." *Held*: 1. That the company was not bound to pay either of these sums unless it entered upon some part of the plaintiff's lands. 2. That an absolute covenant by the company to pay these sums to the plaintiff, in a reasonable time after the passage of the act, would have been *ultra vires* and void. *Gage v. Newmarket R'y Co.*, 18 Adolphus & Ellis (N. S.), 457; 83 E. C. L., 456. 1852.

192. Sale. A sale of specific articles by weight, the price being agreed upon, may be

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a complete sale, although the articles have not been weighed. *Wabash, St. Louis and Pacific R'y Co. v. Shryock*, 9 Bradwell (Ill.), 323. 1881.

193. — A contract to deliver coal in October held to be a time essence contract, and that a demand could not be made and enforced upon the contract in the following February. *Higgins v. Delaware, Lackawanna and Western R. R. Co.*, 60 N. Y., 553, 1875; 10 Amer. R'y Rep., 137.

194. — A. entered into a contract with B. and others, by which they agreed to purchase a steamboat for \$15,000, "provided, upon trial, they are satisfied with the soundness of her machinery, boilers," etc. In an action by A. to recover damages for a breach of the contract, *held*, that no recovery could be had unless it were shown that the defendants were satisfied with the boat; whether or not they ought to have been satisfied is immaterial. *Gray v. Central R. R. Co. of New Jersey*, 11 Hun (N. Y.), 70. 1877.

195. — Under a contract for the delivery of a certain number of posts of a specified quality and size, the party to whom the posts are to be furnished is not bound to receive a part of the posts contracted for. *Rockford, Rock Island and St. Louis R. R. Co. v. Lent*, 63 Ill., 288. 1872.

196. — sale of bonds. Evidence held sufficient to show that the president of a railway company had authority to make a contract for the sale of bonds. *Seligman v. South and North Ala. R. R. Co.*, 67 N. Y., 584. 1876.

197. — A declaration alleging that the defendant by a written agreement was to deliver \$100,000 in bonds to the plaintiff on or before a specified day, upon condition that plaintiff should deliver to defendant a bond in the same amount, without also averring that plaintiff executed its bond and tendered it, is bad on demurrer. An allegation that plaintiff was ready and willing to execute such bond is not sufficient. *Alexandria R. R. Co. v. National Junction R. R. Co.*, 1 MacArthur (District of Columbia), 203. 1873.

198. — Where a contract is entered into with a railway company for a certain number of its bonds secured by mortgage, in construing the same it should be read as if

the bonds and mortgage were set out in the contract. *Galena and Southern Wisconsin R. R. Co. v. Barrett*, 95 Ill., 467, 1880; 2 Amer. & Eng. R. R. Cases, 520.

199. — sale of railway stock; damages. In an action for the non-delivery of shares on a given day, pursuant to contract, the proper measure of damages is the difference between the contract price and the market price on the day when the contract was broken. *Shaw v. Holland*, 15 Meeson & Welsby (Exchequer), 136. 1846.

200. Seal of corporation. A court of equity will not declare a contract between two corporations, otherwise valid, void because the seals of the corporations are not affixed to it; but if necessary, will rather compel the parties to affix their seals. *Mo. River, Ft. Scott and Gulf R. R. Co. v. Comm'rs Miami Co.*, 12 Kans., 432, 1874; 8 Amer. R'y Rep., 261.

201. — A railway company, duly incorporated by act of parliament, entered into an agreement, *not under its seal*, with a contractor, that he should execute certain works upon its railway, for the purpose of changing the system of locomotion which it then employed, the rope and stationary system, to the ordinary locomotive principle. The contractor, in pursuance of the agreement, entered upon the works, and performed a portion of them; but before they were completed he was dismissed by the company. *Held*, that he could not recover the value of this work. The corporation can only contract under seal. *Diggle v. London and Blackwall R'y Co.*, 5 Welsby, Hurlstone & Gordon (Exchequer), 442, 1850; 6 Eng. R. R. & Canal Cases, 590.

202. Services payable in stock. Plaintiff's testator performed certain services for a company organized to build a railroad. At a meeting of the board of directors it was resolved that for his past services he should receive a specified sum payable in stock of the company, and for his future services at a certain rate payable in the same stock. The terms of compensation were accepted by the testator. At the time there was no stock issued, and all parties believed that it would be, when issued, of par value. *Held*, that the payment of such services was to be in stock of the company estimated at its

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nominal or par value, and not at its market value. *Bates v. Cherry Valley, Sharon and Albany R. R. Co.*, 3 Thompson & Cook (N. Y. Supreme Ct.), 16, 1874; affirmed, 59 N. Y., 641, 1874.

203. Stage line; exclusive rights. A contract provided that "Frye agrees to run a stage line from Dexter to Greenville, for the conveyance of travel coming from or going to the Maine Central R. R., the time of leaving and arriving to be as follows: . . . The Maine Central R. R. Co., in consideration of the above, agrees to give Frye the exclusive right of ticketing between Dexter and Greenville for five years from July 1, 1872, at rates now being settled by." Annexed to the plaintiff's agreement was a table of time of leaving, and returning to Dexter, Greenville and Kineo. *Held*, that the terms of the contract between these parties, and the business carried on under it, are not such that the plaintiff is entitled to the damages which he suffered in the steamboat business between Greenville and Kineo by reason of its breach. The transportation of the passengers by the boat was not so connected with that stipulated for in the contract by the reference thereto in the contract itself, or by the natural course of business, that the profits accruing on that part of the line, and the damages likely to result there, as well as between Dexter and Greenville, from a breach of the contract, can be deemed to have been in the contemplation of both parties at the time they made the contract. *Frye v. Maine Central R. R. Co.*, 67 Me., 414, 1877; 16 Amer. R'y Rep., 363.

204. Specific performance. The fact that the time for compulsory taking of land has expired is no defense to the specific performance of a previous contract to take by purchase. *Webb v. Direct London and Portsmouth R'y Co.*, 5 Eng. Law & Equity, 151; 15 Jurist, 697. 1851.

205. — An agreement was entered into on behalf of, and was confirmed by, a railway company, in consideration of a land owner's opposition to the bill being withdrawn, to pay him 4,500*l.* as the purchase money of land, not exceeding eight acres, to be taken by the company for the formation of its railway, and for consequential damages to

the landlord's property. The railway was abandoned, and the land owner filed a claim for specific performance, and the same was decreed by the court below; but, on appeal, *held*, that the plaintiff had means of complete redress at law, and that the claim must be dismissed. *Webb v. Direct London and Portsmouth R'y Co.*, 9 Eng. Law & Equity, 249; 16 Jurist, 323; 21 Law Jour. Rep., N. S., Ch., 337. 1851.

206. — The B. and C. R. R. Co. agree with plaintiff to give him for fourteen acres of land 20,000*l.*, payable in instalments; the C. and B. R. R. Co. start a rival line, and both companies go to parliament. In committee it is agreed that the merits of both lines shall be referred to two members of the committee, and the solicitors of the rival companies at the same time sign a contract by which it is stipulated that the adopted company shall take the engagements with land holders into which the rejected company may have entered; and to this agreement the sanction of two members of each company, and also the plaintiff, is subsequently obtained, and a written memorandum of approval is made. The C. and B. Company is adopted and incorporated. Its line will require sixteen acres of plaintiff's land in a different place. The plaintiff files a bill against the C. and B. Company, stating these facts, and seeking to compel it to perform the agreement made between him and the B. and C. Company, and seeking to restrain the C. and B. Company from entering upon any of his land until after payment of the first instalment, which is due; and from proceeding after subsequent instalments become due till such instalments shall have been paid. A general demurrer to the bill overruled. *Stanley v. Chester and Birkenhead R. R. Co.*, 3 Mylne & Craig (Eng. Ch.), 773, 1838; *Same v. Same*, 9 Simons (Eng. Ch.), 264, 1838. See, also, *Greenhalgh v. Manchester and Birmingham R. R. Co.*, 9 Simons (Eng. Ch.), 416. 1838.

207. — Specific performance was refused of a contract to build and equip a railroad, although the contract price was to be paid in the stock and bonds of the company, and the estimates, etc., were to be made by the company. The company declared its inability to comply with the requirements of a

Strikes — Ties.

supplement to the act (a general law) under which it was incorporated, and the penalty for non-compliance therewith was, by the supplement, declared to be the forfeiture of its charter. It therefore, and merely for that reason, declined to proceed further under the contract. *Danforth v. Philadelphia and Cape May Short Line R'y Co.*, 30 N. J. Eq., 12, 1878; 18 Amer. R'y Rep., 66.

208. Strikes. Where the fulfilment of a contract to deliver coal was prevented by a strike occasioned by a reasonable reduction in wages, *held*, that the contractor was excused by a condition in the contract exempting it in case of strikes. *Delaware, Lackawanna, etc., R. R. Co. v. Bowns*, 58 N. Y., 573, 1874; reversing *Same v. Same*, 36 N. Y. Superior Ct., 126. 1873.

209. — A contract to furnish coal provided that there should be no damages thereon for delays caused by strikes of the miners. *Held*; that a reasonable reduction in wages, resulting in a strike, would not render the contracting party liable. *Delaware, Lackawanna and Western R. R. Co. v. Bowns*, 58 N. Y., 573. 1874.

210. Terminal facilities. For a consideration, graduated by the amount of business done, the E. R. Co. granted to the N. J. M. R. Co. necessary terminal facilities for passengers, baggage, mail and express goods, at the passenger station of the E. R. Co. at N. Y. and J. C., etc., and the right to use its turn-tables, yards, depots and engine-houses at L. D., and agreed to furnish suitable offices for the local agents and clerks of the N. J. M. Co. at C. street in N. Y. *Held*, that the expenses incident to furnishing the facilities stipulated for were to be borne entirely by the E. R. Co. *Elmira Rolling Mill Co. v. Erie R'y Co.*, 28 N. J. Eq., 400, 1877; 14 Amer. R'y Rep., 199.

211. Ties. In an action to recover damages for refusing, on the part of the defendant, to take railroad ties tendered for delivery under a contract to furnish oak ties, there was evidence that the ties so tendered did not correspond with the specifications of the contract. Defendant asked the court to charge that if the jury believed the plaintiff had been delivering, and attempting to deliver, inferior ties of a different kind from those specified, and that defendant in refus-

ing to take ties had reference to such inferior ties, plaintiff could not recover even if the words of refusal might bear a broader construction. *Held*, that the instruction ought to have been given. *Allegheny Valley R. R. Co. v. Steele*, 1 Pennypacker (Pa.), 312. 1881.

212. — An account for cross-ties delivered under a contract, the whole being due, is an entire demand, incapable of division for the purpose of bringing separate suits therefor. *Macon and Augusta R. R. Co. v. Garrard*, 54 Ga., 327. 1875.

213. — Where a contract for the sale and delivery of railroad ties in the beginning purports to be entered into by the president of a railway company, and recites that the other party is to furnish the ties to the company, and it is signed in the name of the company by its president, it will be construed as obligating the company to pay the price, although the president, as agent, promises, in the contract, to make payment. *Havana, Rantoul and Eastern R. R. Co. v. Walsh*, 85 Ill., 58. 1877.

214. — **confusion of goods.** The question of confusion of goods determined under the facts of the case. *Chandler v. De Groff*, 27 Minn., 208. 1880.

215. — **inspection of ties; waiver.** The contract between plaintiffs and a railway company provided that plaintiffs should receive certain specified sums for ties and timber, delivered along the line of the road, subject to the inspection and acceptance of the chief engineer of the company. *Held*, that such proviso was for the benefit of the company, and might be waived by it, and if any other officer than the chief engineer, by direction of the company, inspected and accepted the ties and timber, the delivery was complete and the title passed to the company, and this though plaintiffs never consented to an inspection by such officer. *Hobart v. Beers*, 26 Kans., 329. 1881.

216. — **when title passes.** H. & S., owning ties along the line of road of the St. Jos. and Denver R. R. Co., made a contract with said company by which the latter was authorized to take as many of said ties as it needed for the repair of its track, in which contract it was stipulated that the ties were to be counted and accounted for after they were placed under the track, and that the

Transfer of Railway — Use of Railway.

title should not pass to the company until after they were under the rail. *Held*, that such stipulation as to the time of passing the title was valid, and no creditor of the company having notice of such contract could, prior to such time, acquire any title to such ties as against H. & S. by a levy and sale on an execution against such company, although the employes of the company had taken possession of the ties and moved them to different places along the line of the road. *Owens v. Hastings*, 18 Kans., 446. 1877.

217. Transfer of railway. The transfer of the assets of one corporation to another does not establish any legal identity between them, so as to render the successor liable for the contracts of the assignor. *Tuwas and Bay County R. R. Co. v. Iosco Circuit Judge*, 44 Mich., 479, 1880; 11 Amer. & Eng. R. R. Cases, 584.

218. Trustee of bondholders. An action of *assumpsit* against a railway company cannot be maintained upon a written contract signed by and in the name of the trustees of the mortgage bondholders of the railway. *Chaffee v. Rutland R. R. Co.*, 58 Vt., 345, 1881; 4 Amer. & Eng. R. R. Cases, 212.

219. Construction of tunnel; assignment of contract. A. and B. having entered into a joint agreement with a railway company to execute a contract called "The Morley Contract," for the construction of a tunnel upon the line, A. assigned all his right and interest in the contract to B., and the latter agreed to pay A. a given sum "on the completion of the said contract." After this agreement had been entered into between A. and B., it became necessary to alter the levels of the line, and B. by agreement with the company abandoned the contract, and another was entered into between the company and other persons, under which the tunnel, at the altered level, was completed. *Held*, that A. was not in a position, upon the completion of the substituted contract, to maintain an action against B. for the payment of the sum stipulated to be paid by his agreement with A. *Humphreys v. Jones*, 5 Welsby, Hurlstone & Gordon (Exchequer), 952. 1850.

220. Use of railway; contract not ultra vires. Two railway companies entered into

a *bona fide* contract by deed, by which it was provided that the defendant might, for twenty-one years, pass over the railways of the plaintiff, and have free use of its works and conveniences for the purpose of carrying coal, upon payment of certain tolls and under certain conditions; that is to say, when the quantity of coal carried over any part of the plaintiff's railways to the defendant's railway, and thence south of Doncaster, together with the quantity of coal carried over the plaintiff's railways, by or for the defendant, or by any arrangement with it, to any other railway, for transit to the south of Sheffield or Rotherham, should not amount to one hundred and twenty-five thousand tons in the period of six calendar months, then the defendant should pay to the plaintiff such toll for such period of six calendar months as would, with any clear profit which might be made by the plaintiff for the same period, after payment of all annual and half-yearly charges for interest and outgoings, and all expenses of management or otherwise, be sufficient to enable the plaintiff to pay such dividends as might become payable in respect of any guaranteed or preferred stock of the plaintiff already issued, or hereafter to be issued, with the consent of the defendant, and also a clear net dividend at the rate of 3*l.* per cent. per annum, for such period of six calendar months, upon the ordinary capital stock of the plaintiff, with the consent of the defendant; and when the quantity of coal for any such period of six calendar months should exceed one hundred and twenty-five thousand tons, such sum as would make up, in manner before mentioned, the dividend upon the preferred stock, and 3*l.* 5*s.* per cent. upon the ordinary stock; and when the quantity of coal, during the like period of six calendar months, should exceed one hundred and fifty thousand tons, and not one hundred and seventy-five thousand tons, such sum as would make up in the like manner the dividend upon the preferred stock, and 3*l.* 10*s.* per cent. on the ordinary stock, and so on progressively up to the carriage of four hundred thousand tons, during any such period of six calendar months, in which case the defendant was to pay the plaintiff such sum as, together with the clear

Vendor and Purchaser — To Take Land on Formation of Company.

profits made by the plaintiff during the same period, would pay the dividend upon the preferred stock, and 6l. per cent. upon the ordinary stock. It was also provided that if the payment made by the defendant for any period of six months once made up 4l. 10s. per cent. on the ordinary stock of the plaintiff, it should never afterwards recede. *Held*, in an action to recover the sum payable under the contract, per Parke, B., and Platt, B. (Pollock, C. B., *dubitante*, and Martin B., *dissentiente*), that this was a legal contract, and not beyond the powers of the respective companies, the payments to be made being within the meaning of the word "tolls," in s. 87 of the Railway Clauses Consolidation Act (8 Vict., c. 20). *South Yorkshire Ry Co. v. Great Northern Ry Co.*, 22 Eng. Law & Equity, 531; 22 Law Jour. Rep., N. S., Exch., 305. 1853.

221. Vendor and purchaser. A railway company having contracted with the ground landlord for the purchase of freehold house property, entered into possession and turned out the weekly tenants to whom the property was sublet by lessees under the ground landlord. After the weekly tenants had been turned out, the property was greatly damaged by strangers, who entered forcibly and pulled some of the houses to pieces. *Held*, that the damage, to the deterioration of the property, having been occasioned by the act of the railway company in entering upon the houses and turning the tenants out of possession, they must pay the purchase money into court without being allowed the option of giving up possession. *Pope v. Great Eastern Ry Co.*, Law Reports, 3 Equity Cases, 171. 1866.

222. Voidable contract; failure to repudiate. The plaintiff and defendant, by their respective boards of directors, entered into a contract whereby the plaintiff agreed to supply the defendant with all the rolling stock required in the operation of its railway for the period of seven years, at an agreed rental to be paid monthly. The five persons composing the plaintiff's board of directors were members of the defendant's board, which consisted of thirteen persons. At the meeting of the defendant's board, at which the terms of said contract were agreed upon and confirmed, there were

present only eight directors, two of whom were directors of the plaintiff. The plaintiff supplied the rolling stock as agreed, and the defendant received and used the same in the operation of its railway for the period of nearly two years and a half, when the contract was terminated. *Held*, if it be assumed that the contract was voidable, in equity, at the election of the defendant within a reasonable time after the same was made, for want of a quorum of directors at the meeting at which the contract was agreed upon and confirmed, who were not directors of the plaintiff, the delay in exercising the election to avoid it operated as a waiver of the right so to do. *United States Rolling Stock Co. v. Atlantic and Great Western R. R. Co.*, 34 Ohio St., 450, 1878; 21 Amer. Ry Rep., 3.

223. Water; furnishing water for railway; breach; damages. Under a declaration for the breach by a railroad company of a contract to use and pay monthly for water, in consideration that the plaintiff would build and keep a tank, alleging that all the materials were put up only for the advantages to accrue from said contract, and are a total loss, being of no value for any other purpose, the plaintiff may show a partial loss; such as deterioration in value. *New Orleans, Jackson, etc., R. R. Co. v. Echols*, 54 Miss., 264. 1876.

224. — Where, to carry out a contract to furnish water to a railroad company, a party purchases articles which, under the contract, are to remain his own, if the company abandons the contract, leaving the property uninjured, except by depreciation from change of locality, he is not bound to sell, but may retain the property and recover damages for the breach; the measure of damages in such case being the difference between the cost of the articles and their present market or actual value. *Id.*

225. Wharfage. The contract with the city of New Orleans did not authorize the plaintiff to collect wharfage dues for piers not built or furnished by the city. *Ellerman v. Morgan's R. R. Co.*, 34 La. An., 698. 1882.

226. To take land on formation of company; failure to build road. H. and Y., projectors of a railway company, entered

Assent of Shipper—Negligence.

into a treaty with the plaintiff (a land owner), whereby the latter agreed not to oppose their bill in parliament, and an agreement was executed by them (as the executive directors of the railway company), by which the company, upon its incorporation, was to pay to the plaintiff 1,000*l.* for land of which he was the freeholder, and which was required for the purpose of making the railway, and 4,000*l.* for residential damage. A stipulation was also made that the company was to make a tunnel through part of the plaintiff's property, and a station was to be erected on another part. The company was incorporated, but not being able to raise sufficient funds, no attempt was made to make the railway, and the money subscribed was returned to the shareholders. *Held*, upon the construction of such agreement, that the contract was conditional upon the making of the railway, and therefore that the plaintiff was not entitled to the money payable thereunder. *Preston v. Liverpool, etc., R'y Co.*, 35 Eng. Law & Equity, 92. 1856.

227. With promoters prior to incorporation. Whenever a third party enters into a contract with the promoters of a railroad, which is intended to inure to the benefit of the company, and it takes the benefit of the contract, it will be bound to perform it. *Little Rock and Fort Smith R. R. Co. v. Perry*, 37 Ark., 164, 1881; 9 Amer. & Eng. R. R. Cases, 610.

CONTRACT LIMITING LIABILITY OF CARRIER.

See BILL OF LADING; CARRIAGE OF MERCHANDISE; CARRIAGE OF LIVE STOCK; CARRIAGE OF PASSENGERS; CONNECTING LINES; CONTRACT; DAMAGES; INJURY TO PASSENGERS.

1. Assent of shipper. Possession by a shipper of a carrier's receipt for the property, containing special terms, is *prima facie* evidence of his assent to them, and in most cases may be conclusive. *Morrison v. Phillips and Colby Construction Co.*, 44 Wis., 405, 1878; 19 Amer. R'y Rep., 312.

2. Bill of lading. Where the plaintiff's evidence tended to prove that the goods

were shipped under a previous parol contract, without special exemptions in favor of the carrier, and that, after the goods were in transit, the bill of lading containing such exemptions was handed to the shipper, who, without examination or objection, forwarded it to the consignee, who made use of the same to receive and sell the goods not lost, and accounted to the shipper for the proceeds, *held*, that it was error to charge the jury that such acts of the consignor and consignee were *conclusive* on the former, and bound him by the conditions contained in the bill, where it appears he had no knowledge of such conditions, and never in fact assented to them. *Gaines v. Union Transportation and Insurance Co.*, 28 Ohio St., 418, 1876; 14 Amer. R'y Rep., 158.

3. — If the contract of a railroad company, as expressed in its bill of lading for shipping goods, leaves it in doubt whether the company was excepted from liability for loss happening by fire, the doubt must be resolved against the company. *Little Rock, Mississippi River and Texas R'y Co. v. Talbot*, 39 Ark., 523. 1882.

4. Burden of proof. When the risk or accidents for which a common carrier is liable are limited by a special contract, the burden of proof rests upon the carrier to show not only that the cause of the loss was within the terms of the limitation, but also that on his own part there was no negligence. *Alabama, etc., R'y Co. v. Little*, 12 Amer. & Eng. R. R. Cases (Ala.), 37. 1883.

5. Connecting lines. A common carrier may receive a parcel to carry it as far as he goes, and then to send it further; and such carrier may, by special contract, limit his common law liability, but cannot exempt himself from liability for his negligence. *Snider v. Adams Express Co.*, 63 Mo., 376, 1876; 20 Amer. R'y Rep., 435.

6. Implication. A contract limiting the liability of a carrier need not be by express words; it may be implied from all the circumstances, the acts of the parties, the course of business, the regulations known to shippers, etc. *Elkins v. Empire Transportation Co.*, 81½ Pa. St., 315. 1876.

7. Negligence. The receipt also contained a stipulation that the company should "not be liable for any loss or damage of any box,

Assignment of Contract — Debts of Contractors.

package or thing for over fifty dollars, unless the just and true value" was therein stated. *Held*, that this did not include a loss occasioned by the company's negligence. *Westcott v. Fargo*, 61 N. Y., 542. 1875.

8. — A stipulation by a carrier for exemption from the consequences of his own negligence is invalid. *Welch v. Boston and Albany R. R. Co.*, 41 Conn., 333, 1874; 6 Amer. R'y Rep., 95.

9. — A contract limiting a carrier's liability will not excuse negligence unless it is clear and unmistakably so intended. *Nicholas v. N. Y. Central and Hudson River R. R. Co.*, 89 N. Y., 370, 1882; 9 Amer. & Eng. R. R. Cases, 103.

10. — neglect of persons other than the carrier. A common carrier who has not limited his responsibility is responsible for losses, whether occurring on vehicles controlled by himself exclusively or belonging to, and controlled by, others, because he is an insurer for the safe delivery of the article which he has agreed to carry. But when he has limited his liability so as to make himself responsible for ordinary care only, and the shipper, to recover against him, is obliged to aver and prove negligence, it must be his (the carrier's) negligence or the negligence of his agents, and not the negligence of persons over whom he has no control. *Bank of Kentucky v. Adams Express Co.*, 1 Flippin (U. S. C. C.), 242. 1872.

11. Power to make such contract. Where railroad companies, as common carriers, receive goods marked for a particular place, they are bound, by the common law, to deliver at that place, but they may restrict this liability by a contract, fairly and understandingly made; and, when so made, if in the form of a bill of lading or otherwise, and the terms understood and accepted by the shipper, it becomes the contract of the parties. *Field v. Chicago and Rock Island R. Co.*, 71 Ill., 458. 1874.

12. Usage. Neither usage nor custom, though known to the shipper, which he has not clearly assented to as a condition of the contract of shipment, can be set up to absolve a carrier from his common law liability. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Barrett*, 36 Ohio St., 448, 1881; 3 Amer. & Eng. R. R. Cases, 256.

CONTRACTORS.

See CONSTRUCTION OF RAILWAYS; CONTRACTS; EMINENT DOMAIN; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; WHARVES.

1. Assignment of contract. Where a railway contractor has assigned his contract to the superintendent of the company, and the latter has assumed his debts to laborers, the company's liability, if any, for a labor debt, does not rest on Comp. L., §§ 2393-5, but is at common law on a special contract; and the declaration must so aver the cause of action. *Bottomley v. Port Huron and Northwestern R'y Co.*, 44 Mich., 542. 1880.

2. Award. An award to a contractor held not to give the contractor such a vested right as to preclude the payment to a subsequent contractor who actually performed the work. *Mayor, etc., of New York, In re*, 90 N. Y., 390; 10 Amer. & Eng. R. R. Cases, 125. 1882.

3. Breach of contract. Where a party employed to do certain work performs part and leaves part uncompleted, the other party will have the right to retain out of his pay, for the work done, a reasonable sum to complete the same. *Western Union R. R. Co. v. Smith*, 75 Ill., 493. 1874.

4. Bridge builders; statute. Proof that a railway company paid a bridge builder for work done on one of its bridges upon estimates made by the company's agents as the work progressed, is sufficient proof from which a finding may be made that such bridge builder was a "contractor" within the meaning of ch. 136 of the laws of 1872. *Atchison, Topeka and Santa Fe R. R. Co. v. McConnell*, 25 Kans., 370. 1881.

5. Debts of contractors. A railway company contracted with certain parties to construct its road and appurtenances. These contractors, through their superintendent, hired the plaintiff to work upon a freight house they were building for the company. A poisonous mixture, in which corrosive sublimate was an ingredient, was applied to the timber to prevent decay. The plaintiff was injured by breathing the exhalations of this substance and by handling the timber to which it had been applied. *Held*, that the railway company was not liable to the plaintiff for the injury he received, but that the contractors were solely responsible, and

Debts of Contractor — Injury to Employees.

were not in this respect the servants of the company. *West v. St. Louis, Vandalia and Terre Haute R. R. Co.*, 63 Ill., 545, 1872; 7 Amer. R'y Rep., 50.

6. — If a party, at the request of a railway company, takes up certificates of indebtedness issued to it to its laborers for work, and to procure board, and to enable boarding-house keepers to procure groceries and provisions for hands engaged in the construction of the road, with an agreement to settle with him for the same, such party will be entitled to recover of the company the amount of such advances. *Cairo and Vincennes R. R. Co. v. Fackney*, 78 Ill., 116. 1875.

7. — Where one railway company contracts with another railway company to build its road, the failure of the former company to take a bond under § 25, Comp. L. 1879, will not render it liable for debts for goods purchased by a subcontractor. *St. Louis, Wichita and Western R'y Co. v. Ritz*, 11 Amer. & Eng. R. R. Cases (Kans.), 35. 1883. See *Wells v. Mehl*, 25 Kans., 205. 1881.

8. **Debts of contractor; deductions from pay-rolls.** Where a debtor abandons his contract, and the owner, being indebted to the contractor for work done, pays the laborers, deducting what they owe A., then pays A., deducting what he owes B., all parties thus paid acceding to the arrangement, there is an implied undertaking on the part of the owner to pay B. the amounts thus retained, and B. has a right of action therefor upon the implied promise thus made for his benefit. *Gibson v. St. Louis, Kansas City and Northern R'y Co.*, 76 Mo., 549. 1883.

9. — A railroad company having become liable to pay the wages of workmen employed by contractors (Wagn. Stat., 302, § 10), deducted on its pay-rolls charges for sundry goods theretofore furnished the men by a merchant under an agreement entered into by him with the contractors. On the rolls, and pursuant to the agreement, the amounts purchased were entered as payments made on the wages, and as due from the contractors to the merchant. *Held*, that, being a stranger to the agreement, the company was not liable to the merchant under it for such advances; and its deductions of the amounts due the merchant from the wages of the men would

not, of itself, raise an *assumpsit* in his favor against it. And it would be liable, notwithstanding, to the employes for the unpaid balances. But they having acquiesced in that mode of settlement, the merchant could recover those sums from the company on an implied undertaking to pay the same. *Schuster v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 60 Mo., 290. 1875.

10. — Where a contractor abandons his contract, and the owner, being indebted to the contractor for work done, pays the laborers, deducting what they owe A., then pays A., deducting what he owes B., all parties thus paid acceding to the arrangement, there is an implied undertaking on the part of the owner to pay B. the amounts thus retained, and B. has a right of action therefor upon the implied promise thus made for his benefit. *Gibson v. St. Louis, Kansas City and Northern R'y Co.*, 7 Mo. App., 586. 1879.

11. **Delay.** The failure to pay monthly, as agreed, will not of itself, and in the absence of any showing that any delay was authorized by the company, entitle the contractors to recover extra compensation for the labor performed on account of the delay occasioned by such default in payment, and the consequent increased cost of the work. *Grand Rapids and Bay City R. R. Co. v. Van Dusen*, 29 Mich., 431. 1874.

12. — Where delay was caused by a decrease of the force of men employed, at the request of the treasurer of the company, who was one of the committee that had executed the contract on its behalf, and the only one of them who had given any personal directions to the contractors, and upon his statement that the company was unable to collect money fast enough to pay according to the contract, the contractors would have a right to assume, in the absence of any notice to the contrary, that he was authorized to give such directions, and they were justified in acting accordingly. *Ib.*

13. **Injury to employes.** In an action by an employe against a contractor to recover damages for injuries suffered by the former whilst in the employment of the latter, one paragraph of the complaint alleged that the defendant, being a contractor engaged in the construction of a railway, employed the plaintiff, a minor, of the age of but fifteen

Liability for Acts of Contractor — Measurements.

years, to assist in certain non-hazardous work; but that the defendant, without giving to the plaintiff sufficient caution, warning or instruction, placed him in control of a wild, fractious and ungovernable horse, in a narrow, unsafe and dangerous space between two trains of cars moved by steam power in opposite directions, upon a high embankment; and that the plaintiff, whilst exercising due care and engaged in such hazardous employment, was thrown beneath, and injured by, one of said trains. *Held*, on demurrer, that the paragraph was sufficient. *Hill v. Gust*, 55 Ind., 45. 1876.

14. — H. and M. agreed with the defendant to perform certain work for it, the contract providing that the defendant should not be liable for any injury sustained by the contractor, his subcontractor, workmen or laborers by reason of the negligence of the defendant, its agents or servants, in operating the railroad. The plaintiff, an employee of H. and M., was injured while working upon the track, and this action was brought by him to recover damages therefor. *Held*, that, as the plaintiff was not a party to the contract, and was not shown to have had knowledge thereof, he was not bound by the provisions contained therein, and that defendant was liable for the injuries sustained by him. *Ominger v. New York Central and Hudson River R. R. Co.*, 4 Hun (N. Y.), 159. 1875.

15. — The agreement between the principal and contractor contained the following clause: "It is further agreed that if, at any time, the contractors are not employing men, tools, implements and machinery, in kind and quantity, to the entire satisfaction of the chief engineer of the company, and necessary, in his opinion, to prosecute the work with due diligence and expedition. . . . And if, upon receiving written notice to that effect," etc., . . . "the company shall have the right to declare the contract annulled," etc., *held*, that the principal did not possess such a right of selection of the contractor's servants as to make him responsible for their negligent acts. *Burmeister v. N. Y. Elevated R. R. Co.*, 47 N. Y. Superior Ct., 264. 1881.

16. — Damages were awarded to a boy against his employer, a railway contractor,

for injuries sustained in making a railway, it being shown that the defective condition of a drag upon a wagon was the cause of the accident, and that for this the master was responsible. *Matthews v. McDonald*, 3 Scotch Session Cases (3d series), 506. 1885.

17. — One D. contracted with defendant to transfer from vessels to cars all the railroad iron brought to the dock at A. for a specified time and for a specified price, defendant to furnish a derrick to be used for the purpose. Defendant furnished a derrick suitable and safe at the time for use. Plaintiff was employed by D. to assist, and was injured by a fall of the derrick. In an action to recover damages for the injury, *held*, that if D. was chargeable with negligence in omitting to inspect and repair the derrick, defendant was not responsible therefor; that in the absence of a contract to that effect no duty on the part of defendant to keep the derrick in repair could be implied; that the rule requiring a master to furnish safe and suitable machinery for the use of his servants did not apply, as plaintiff was not the servant of defendant; and that, therefore, a charge that in the absence of a special agreement defendant was bound to keep the derrick in repair was error. *King v. N. Y. Central and Hudson River R. R. Co.*, 66 N. Y., 181, 1876; reversing *Same v. Same*, 4 Hun (N. Y.), 769, 1875. See *Same v. Same*, 72 N. Y., 607. 1878.

18. Liability for acts of contractors. The general principle established by the decision in *Painter v. The City of Pittsburgh*, 10 Wright, 213, that a municipal corporation is not responsible for injury occasioned by the negligence of contractors with it, or of their agents and servants, but the remedy for such an injury is against the contractors alone, applies also to private corporations. *McMasters v. Pa. R. R. Co.*, 3 Pittsburgh, 1. 1865.

19. Measurements. Where a contract for grading and work on a railroad provided that the work should be done under the direction and supervision of the chief engineer of the company and his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of work should be determined, and whose decisions should be conclusive, *held*, that a

Negligence — Trespass.

measurement by an assistant engineer, estimating the embankments made by the contractors, was not conclusive upon the employer that the work was done according to the contract, and that the contractors were entitled to pay for the price thereof. *Snell v. Brown*, 71 Ill., 133. 1873.

20. Negligence. Where a railroad corporation lets the contract for building its entire road to a contractor for an agreed price, and the contractor sublets a portion of his contract to a subcontractor, and during the progress of the work, through carelessness of the workman in blasting rock, an injury is done the plaintiff, the railroad corporation is not liable therefor. *McCafferty v. Spuyten Duyvil and Port Morris R. R. Co.*, 43 Howard's Practice (N. Y.), 44; 61 N. Y., 178. 1874.

21. Operation of trains. Sections 1166 and 1167 of the Code of Tennessee, touching the liability which railway companies incur by failing to observe certain precautions in running their trains, do not apply to contractors engaged in constructing a railroad. *Griggs v. Houston*, 104 U. S., 538, 1881; 8 Amer. & Eng. R. R. Cases, 359.

22. Partnership; covenant. In an action upon a covenant, contained in an agreement between the covenantor and "S. and such other parties as he may associate with him under the name of S. & Company," signed and sealed by the covenantor, and signed "S. & Co." by the hand of S., acting in behalf and by authority of the partnership, to pay to "the said S. & Company, parties of the second part," for work to be done by them, all those who are partners at the time of the signing of the agreement may join. *Seymour v. Western R. R. Co.*, 106 U. S., 320. 1882.

23. Payment; bonds. Where several persons, either as copartners or joint contractors, had done work under contract with a railway company, a payment made to one of them in township aid bonds binds the others if, with full knowledge of the facts, they fail to repudiate the payment and make a distinct claim upon the company. *Michigan Air Line R'y Co. v. Mellen*, 44 Mich., 321, 1880; 5 Amer. & Eng. R. R. Cases, 245.

24. Subcontractor; agreement to pay wages. Cause reversed upon the evidence,

in an action by a subcontractor against a railway company for wages, upon an alleged parol promise of payment by the company. *Denver, South Park and Pacific R. R. Co. v. Reed*, 6 Colo., 330. 1883.

25. Subcontractor; agreement to pay money collected of company. B. contracted with a railway company to build its road, and sublet certain sections to C. & Co., the work to be paid for according to the estimates of the division engineer. After the work was completed by C. & Co., B. refused to pay the balance claimed by C. & Co., on the ground that the engineer's estimates showed that they had been paid in full for all their work. C. & Co. then sued B. in Connecticut, to recover what was due them on the contract, but afterwards suspended that action under a contract with B., by which he agreed to prosecute an action against the railway company, with the assistance of C. & Co., and pay them all that he recovered on their sections. B. recovered a large sum from the company, but still refused to pay C. & Co., on the ground that they were already overpaid, and that he had recovered nothing on their sections; C. & Co. then brought this action. The court below refused to submit the evidence of the new contract to the jury and to charge that the plaintiffs were entitled to recover from B. whatever he recovered from the company on the plaintiffs' sections, and directed a verdict for the defendant. *Held*, to be error. *Collins v. Barnes*, 83 Pa. St., 15. 1876.

26. Trespass. A railway company is liable for the trespass of hands employed by its contractors while engaged in the construction of its road; and where the fact appears that the trespass consists in entering upon the plaintiff's land and digging up the soil, and making embankments, it is not error to refuse evidence that the company had nothing to do in employing the hands doing the work. *Cairo and St. Louis R. R. Co. v. Woosley*, 85 Ill., 370. 1877.

27. — Where the contractors of a railway company are guilty of trespasses upon the land of another, in constructing the road, the company will be liable for their acts; and if the injury is wanton or wilful the company may be required to respond in ex-

Miscellaneous.

emplary damages. *Rockford, Rock Island and St. Louis R. R. Co. v. Wells*, 66 Ill., 321. 1872.

28. Trover and conversion by; liability of company. B. having contracted with a railway company to set up the fencing of its line, employed G. to supply posts and rails for a part of the line. B. became bankrupt, and a quantity of the unfixed fencing was removed by G.'s direction to an adjacent field and sold to the plaintiff. This fencing was afterwards carried back to the railway by laborers, acting under the direction of an overlooker of the company. G. asked the men upon what authority they removed the fencing, and was told to apply to the engineer of the company. G. afterwards saw one of the directors of the company, who told him to attend a meeting of the company. G. was at the office of the company for that purpose, and was told by the same director that there was a prospect of an amicable arrangement with B., and that all claims on the line would be paid. A demand was afterwards made upon the secretary of the company, who stated that he was not the party on whom the demand ought to be made. *Held*, in trover against the company, that there was no evidence of a conversion by it. *Glover v. London and North Western R'y Co.*, 5 Welsby, Hurlstone & Gordon (Exchequer), 66. 1850.

CONTRIBUTION.

1. Liability of servant to employer. An employe is liable to an action at the suit of his employer, when a third person has brought an action and recovered damages against the master for injuries sustained in consequence of the servant's negligence or misconduct. The employe is liable for the costs and counsel fees in such suit, incurred in the defense, he having been notified of its pendency, and having requested his master to defend. *Grand Trunk R'y Co. v. Latham*, 63 Me., 177. 1874.

CONTRIBUTORY NEGLIGENCE.

See INJURIES TO EMPLOYEES; INJURIES TO DOMESTIC ANIMALS; INJURIES TO PASSENGERS; INJURIES TO PERSONS ON THE TRACK; NEGLIGENCE.

CONTINUANCE.

1. Personal injury. In case of an injury to the person, it is good ground for a continuance that a sufficient time has not elapsed from the receipt of the injury to calculate the damages, and to ascertain whether the injuries will be permanent. *Speers v. Great Western R'y Co.*, 6 Upper Canada Practice Reports, 170. 1874.

CONVERSION.

1. Coupon bonds; measure of damages. The plaintiff had executed its negotiable coupon bonds, which, by their terms, bore interest at the rate of six per cent., and had deposited them in escrow, to be delivered to defendant only upon the performance of certain conditions. The defendant had wrongfully procured the delivery of the bonds, without the performance of the conditions, and had sold and disposed of them for a valuable consideration. *Held*, that the measure of plaintiff's damages (the bonds still outstanding) is the amount of the bonds so procured and negotiated, at the time of the recovery, interest being computed at the rate of six per cent. upon the principal of the bonds to the date of judgment, and also upon coupons maturing before judgment, at the legal rate of seven per cent., from the time of their maturity until judgment. *City of Winona v. Minnesota R'y Construction Co.*, 29 Minn., 68. 1882.

CONVEYANCE.

See HUSBAND AND WIFE.

1. Alteration of deed. Where an alteration is made in the description of land in a deed before the execution and delivery of the deed, it will be valid; and in this case the evidence was deemed sufficient to establish that fact. *Cairo and St. Louis R. R. Co. v. Parrott*, 92 Ill., 194. 1879.

2. Consideration. The benefit to be derived from the construction of a railway is sufficient consideration to sustain a grant of the right of way. *Fazende v. Morgan*, 31 La. An., 549. 1879.

Contract to Stop Trains — Corporation.

3. Contract to stop trains; contract for switch. Where a deed for right of way expressed the consideration and condition to be that the railway company should build, and forever maintain, a switch to a mill on the land, held, that this was a covenant real and runs with the land. *Lydick v. Baltimore and Ohio R. R. Co.*, 17 West Va., 427, 1880; 11 Amer. & Eng. R. R. Cases, 336.

4. — If an intermediate owner of the mill had agreed to release the railroad company from building and maintaining such switch, and the company in consideration thereof had agreed to stop at specified times its freight trains at the door of such mill for its accommodation, a subsequent owner could have this modified contract specifically enforced by a court of equity, but he could not sue upon it at law; but if such contract was made by the plaintiff instead of by an intermediate owner of the mill, he might sue upon it at law. *Ib.*

5. Description; buildings to be erected. Whether, at a given location, dwelling houses for employes are necessary buildings to a railroad company, is a question of fact, not of law. The uncertainty of a deed as to what precise part or parts of a large tract might be appropriated as sites for buildings may be aided by actual appropriation and long enjoyment. The deed conveyed all land "necessary for workshops, warehouses or other buildings." *Ga. R. R. Co. v. Hart*, 60 Ga., 550. 1878.

6. — The tangible property of a corporation does not pass as an incident on the sale of its franchise. *St. Louis Bridge Co. v. Curtis*, 103 Ill., 410. 1882.

7. Condition. Whether a condition in a deed is a condition precedent or subsequent is a question of intention to be gathered from the whole instrument. *Jones v. Chesapeake and Ohio R. R. Co.*, 14 West Va., 514. 1878.

8. — location of depot; condition. A person having subscribed a large amount to the capital stock of a railroad company entered into a written contract with the company by which it was agreed that the subscription might be paid in fifteen acres of land to be laid off in an oblong square along the road according to boundaries given, a deed to be made by the subscriber to the

railroad company "whenever the land is run off and its boundaries definitely located," the contract adding that "it is understood" the company "is to locate" its depot on the land. Afterwards, a plat of the land having been made, a deed was executed by the subscriber, and left, with the plat, in the hands of a third person, "not to be delivered until the depot was located and its erection so substantially commenced as would insure its completion;" no depot was built, and the road has passed into the hands of another company. Held, that the location and building of a depot was not a condition precedent or subsequent, and that the creditors of the company with whom the contract was made could subject the land, as the land of the company, to the satisfaction of their debts, but that the heirs of the subscriber, he having died, were entitled to damages for the failure to locate the depot on the land, to be recompensed out of the proceeds of the land. *Ramsey v. Edgefield and K'y R. R. Co.*, 3 Tenn. Ch., 170. 1876.

9. Construction. Description in a deed construed, with reference to a line of railway. *Grand Trunk R'y Co. v. Dyer*, 49 Vt., 74. 1876.

10. — Various conveyances of water lots on the eastern shore of North river construed. *Knickerbocker Ice Co. v. Forty-second St. R. R. Co.*, 48 N. Y. Superior Ct., 489. 1883.

11. Corporation; deed. A deed in which a corporation is declared, in the body of it, to be the grantor, and signed by "John Newell, V. President," attested by the seal of the corporation, is *prima facie* well executed, and is the deed of the corporation. *Sawyer v. Cox*, 63 Ill., 180. 1872.

12. — A deed executed by the president of a railway company in due form, under the seal of the corporation, and delivered, will be presumed to have been authorized by the directors; and the mere fact that such authority is not found on their minutes will not rebut the presumption. *Cincinnati, Hamilton and Dayton R. R. Co. v. Harter*, 26 Ohio St., 426, 1875; 13 Amer. R'y Rep., 386.

13. — A deed running in the name of C. and F. R. R. Co. (a corporation), as grantor, and signed M. Brayman, president C. and F.

Covenant — Fraud.

R. R. Co.; G. R. Teasdale, secretary C. and F. R. R. Co., is the deed of the corporation. *Chouteau v. Allen*, 70 Mo., 293. 1879.

14. — contract in violation of by-law. A purchaser of land from a corporation, being a stranger to the corporation, is not bound to know that there is a by-law of the company requiring an order of the board of directors to authorize a sale of land owned by the company. So, where such purchaser receives a bond from a corporation for a deed for land purchased, he will be entitled to the deed according to the provisions of the bond, notwithstanding there was no order of the board of directors authorizing the sale. *Wait v. Smith*, 92 Ill., 385. 1879.

15. Covenant; warranty. A warranty against troubles "arising from the acts and promises of the grantor only," construed. But in case of eviction the vendor was held to refund the consideration, though the special warranty was not broken. C. C., 2505. *New Orleans and Carrollton R. R. Co. v. Jourdain*, 34 La. An., 648. 1882.

16. Depot grounds; forfeiture. A conveyance of lands for depot grounds provided that "in case of failure to erect buildings and occupy the grounds" for that purpose the land should revert to the grantors. After thirty-three years' use, the location was abandoned. Held, that the condition was performed and there was no forfeiture. *Jeffersonville, etc., R. R. Co. v. Barbour*, 89 Ind., 375, 1883; *Same v. Same*, ib., 602, 1883.

17. — Conditions subsequent are not favored in law. *Ib.*

18. Description. In an action of ejectment plaintiff claimed under a deed to a railroad company, which, after describing the premises conveyed as bounded on the southerly side by the lands of a third party, declared it to be the intention to convey a strip two rods in width on the south side of the center line of the railroad. The land in controversy lay south of a line two rods south of such center line. It did not appear that, at the time of the conveyance, the northerly line of the lands of the third party referred to were marked by a fence or any fixed monument. Held, that the center line of the railroad, as fixed and located when the grant was made, should control, and that the distance designated limited the ex-

tent of the grant. *Buffalo, New York and Erie R. R. Co. v. Stigeler*, 61 N. Y., 348. 1874.

19. — Whenever it is apparent that a grantor in a deed has used a technical word to express an idea different from its technical signification, the court will give it the construction intended by the grantor. *Central Pacific R. R. Co. v. Beal*, 47 Cal., 151. 1873.

20. — It is no objection to a deed that it does not describe the land conveyed, if it refers for description to the book and page of a record where another deed is recorded which does describe it. *Clamorgan v. Baden and St. Louis Ry Co.*, 72 Mo., 139. 1880.

21. Fraud; delay; laches. In 1853, the G. Co., of which A. was treasurer and B. a director, became hopelessly insolvent. In April, 1862, A. obtained a judgment against the corporation for about \$26,000, upon which execution was issued, levied and satisfied by the sale of its franchise for the term of ninety-nine years to the E. Co., which was chartered in March, 1862, and in which A. and B. were stockholders, A. owning at the first issue nearly all the shares of stock. In July, 1862, B., having been so authorized at the annual meeting of the stockholders of the G. Co., held in May, 1862, made a conveyance of all its real estate, railway franchise, rights and privileges, and the right of redeeming the same to the E. Co., in consideration of \$13,085; and at a subsequent annual meeting of the G. Co., held in May, 1865, the conveyance was ratified and confirmed as its free act and deed. In 1866, the B. and W. R. R. Co., under the statutes of 1866, ch. 278, took certain railway property. "being all the property of the E. Co.," which had greatly increased in value; and a jury in 1867 assessed the damages for such taking at \$536,260, and judgment was rendered for the E. Co. for \$235,566, being the amount of the verdict after deducting certain incumbrances assumed by the B. and W. R. R. Co. In May, 1869, the E. Co. authorized the conveyance of all its corporate property to the B. and A. R. R. Co., the successor of the B. and W. R. R. Co., and such conveyance was duly executed. In 1865, the holder of certain unsecured bonds of the G. Co., which were dated January 1, 1850, and became due on July 1, 1855, and were

Highway Purposes — Right of Way Deed.

unpaid, brought suit thereon, which was still pending when such holder, in 1869, brought a bill in equity against the above corporations and A. and B., to reach and apply a sum of money in the possession of the B. and A. R. R. Co., and alleged to belong to the G. Co., on account of fraud on the part of A. and B. in payment of his bonds. *Held*, that such holder had been guilty of laches and unreasonable delay, and that the bill could not be maintained. *Royal Bank of Liverpool v. Grand Junction R. R. and Dept Co.*, 125 Mass., 490. 1878.

22. Highalizing purposes; forfeiture. A. granted a strip of land in 1803 to a turnpike company, on condition that it should be used for a highway and no other purpose, and provided that, if the land should not be used for such purpose, it should revert to A., his heirs or assigns. *Held*, that the subsequent transfer of a part of the tract to a railway company for its railway did not create a forfeiture under the deed. *Alexandria and Washington R. R. Co. v. Chew*, 27 Grat-tan (Va.), 547. 1876.

23. Legalizing acts. Act 89, of 1875, in legalizing the conveyances of corporations made in good faith, though not according to law, does not make them presumptive evidence of the rightful character of the sale. A deed in proper form and a sale in good faith for value must be clearly proven. *Marquette, Houghton and Ontonagon R. R. Co. v. Atkinson*, 44 Mich., 166, 1880; 21 Amer. R'y Rep., 240.

24. Notice. A deed referring upon its face to a railway and depot upon the premises is sufficient to put the grantee upon notice of the rights of the railway company. *Riley v. Southwestern R. R. Co.*, 63 Ga., 325, 1879; 1 Amer. & Eng. R. R. Cases, 345.

25. — subject to right of way; notice. Premises adjacent to a railway were conveyed to plaintiff "subject to any right of way said railroad may own over the same." The railroad company had previously become entitled to thirty-five feet in width from the center line of its track as right of way, but there was nothing of record showing the extent of such easement. The railroad was in operation at the time, and a fence had been constructed on one side near the track. *Held*, that plaintiff was advised,

by the presence of the railroad and the recitals in the conveyances, that the railroad company claimed a right of way over the premises, and by inquiry could have learned the extent of the right; and that she must be regarded as having notice of all the facts which due and timely inquiry would have elicited. *Slocumb v. Chicago, Burlington and Quincy R. R. Co.*, 57 Ia., 675. 1882.

26. Personal property; description; railroad ties. A deed describing the property conveyed as "the following articles of personal property, to wit, three hundred railroad ties," to be delivered at a certain price, is not sufficiently definite to pass the title. *Stephenson v. Seaboard and Roanoke R. R. Co.*, 86 N. C., 455, 1882; 11 Amer. & Eng. R. R. Cases, 299.

27. Reservation; waterway. This clause in a deed of land to a railway company, "reserving to myself the right of passing and repassing and repairing my aqueduct logs forever, through a culvert six feet wide and rising in height to the superstructure of the railroad, to be built and kept in repair by said railroad company," operates as a reservation, and not as an exception, and vests in the grantor an estate for life only. *Ashcroft v. Eastern R. R. Co.*, 123 Mass., 196. 1879.

28. Recital; easement. A deed contained a recital that "the above piece of land is covered by the North Branch Canal basin and embankment;" *held*, that while this was some evidence that the land belonged to the state it was not conclusive, and that the parties thereto were not thereby estopped from showing that the land embraced in the deed, although covered by the overflow of the canal, was, in fact, never appropriated for permanent use as a part thereof. *Pennsylvania and New York Canal and R. R. Co. v. Billings*, 94 Pa. St., 40, 1880; 10 Amer. & Eng. R. R. Cases, 72.

29. Right of way deed. Where a deed was executed by the complainant to a railroad company, conveying to it the right of way through the complainant's land, without embracing any conditions or stipulations as to stock-gaps or bridges, a bill to enforce the erection of the same was properly dismissed. *Cook v. North and South R. R. Co.*, 50 Ga., 211. 1878.

Right of Way Deed.

30. — Where a grant of a right of way is in gross, it will be personal to the grantee, and incapable of assignment; but if it is appurtenant to other lands, or an estate, it is the subject of transfer, and will pass by a conveyance of the estate to which it is appurtenant. *Louisville and Nashville R. R. Co. v. Koelle*, 104 Ill., 455, 1882; 11 Amer. & Eng. R. R. Cases, 301.

31. — after-acquired title of grantor. Where a conveyance was made by one holding simply under the pre-emption laws of the United States, his subsequently acquired legal title by patent would inure to the benefit of the company. *Indianapolis, Peru and Chicago R'y Co. v. Rayl*, 69 Ind., 424, 1880; 3 Amer. & Eng. R. R. Cases, 182.

32. — conditions; estoppel. The owner of certain land consented to its occupation for the construction of a railroad, and executed a conveyance granting the right of way over the same, conditioned that the company should, within a given time after its completion, place fences and cattle-guards, adjoining the grantor's land, as required by law. The deed was delivered to the agent of the company, with the understanding, however, that it was not to be delivered to the company till it complied with its terms. The corporation went forward, without objection from the grantor, and completed the road, and made expensive and permanent improvements upon it, but failed to erect the fences and cattle-guards. The deed was never delivered to the company, and the grantor brought suit in ejectment. *Held*, that the grantor might have insisted on the payment of damages as a condition precedent to building of the road, or upon the building of fences, etc., in the first instance; but that the conditions were subsequent, and not precedent; that the entry under license was lawful; and that, by reason of his conduct, he was estopped from maintaining ejectment. *Baker v. Chicago, Rock Island and Pacific R. R. Co.*, 57 Mo., 265, 274, 1874; 9 Amer. R'y Rep., 163.

33. — description. Where a grant of a right of way from a railroad track to certain coal mines refers to it as having been located by an engineer, the location thus referred to becomes a part of the deed,—a descriptive part of the subject of the conveyance,—the

same as if the plat thereof had been set out in full in the deed. *Louisville and Nashville R. R. Co. v. Koelle*, 104 Ill., 455, 1882; 11 Amer. & Eng. R. R. Cases, 301.

34. — A deed “of the right of way” to a railroad, with nothing to define its extent in width, where the charter does not define the extent of the right of way, is too indefinite to constitute claim and color of title under the seven years' limitation law of the state for one hundred feet, where actual possession was not had to that extent for seven years. *Wray v. Chicago, Burlington and Quincy R. R. Co.*, 83 Ill., 434. 1877.

35. — So, a master's deed on foreclosure of a mortgage, describing the premises as a road of a railway company “west of the Illinois river, and all branches thereof which had been constructed before, etc., and which has since been constructed and built, including the right of way and the lands occupied thereby,” etc., where there was no occupancy to the extent of one hundred feet for seven successive years before suit brought, is not sufficient as color of title. *Ib.*

36. — estate granted. A deed to a railway company conveying no land, but only the right to contract, maintain and use, in, through, upon and over certain lands, all such railroad tracks, depots, warehouses, etc., as the company should find necessary or convenient for transacting its business, and to keep thereon, without disturbance, all property belonging to or in the possession of the company, to have and to hold the said rights and easements so long as the same should be used for such purposes, and for no other, even forever, passes only an easement which is a freehold or inheritance, though only a bare or qualified fee, which may be defeated. *Wiggins Ferry Co. v. Ohio and Mississippi R'y Co.*, 94 Ill., 83. 1879.

37. — location by engineer. A deed for right of way of a sufficient space, “as designated by the chief engineer of the state,” is binding upon the grantor for the right of way as designated by the engineer or his assistant under his authority. If the engineer abuses his powers objection should be made at the time. Thirty years' delay is unreasonable. *Dougherty v. Western and Atlantic R. R. Co.*, 53 Ga., 304. 1874.

Collision — Right of Compensation for Inquest.

38. — reservation of right to mow the land. Plaintiff, through whose farm a railroad ran, conveyed to the company in fee a strip thereof, subject to the following reservation or condition: "Said parties of the first part also to have the privilege of mowing and cultivating the surplus grounds of said strip of land not required for railroad purposes." Subsequently the farm was sold upon the foreclosure of a mortgage and conveyed to the defendant's grantor, the deed excepting and reserving the said strip, "containing six acres and eighteen one-hundredths of an acre of land, more or less, which is reserved as conveyed to said" company. Held, that the right to mow and cultivate the strip was not reserved as appurtenant to the farm of which it formed a part, but was a personal reservation or license in favor of the plaintiff. *Pierce v. Keator*, 9 Hun (N. Y.), 532. 1877.

39. Seal of corporation. Where the signature of the officer executing a deed in behalf of a corporation is properly authenticated, the seal of the corporation affixed will be presumed to be genuine. *Chicago, Burlington and Quincy R. R. Co. v. Lewis*, 53 Ia., 101. 1880.

40. Swamp lands. In 1856 the county of Mills issued a certificate of purchase, which entitled the holder, upon full payment, to a deed from the county to a certain tract of land inuring to it under the swamp land grant. In 1870, while such certificate was still outstanding, the county conveyed the lands to the defendant, and possession was taken and has since been held thereunder. The plaintiff subsequently acquired the certificate and obtained thereon a deed from the county to the lands. Held, that such deed did not convey the legal title, which passed by the previous conveyance to the defendant, but that the holder of the certificate held a mere equity, which would not support an action at law against the legal title. *Pendergast v. Burlington and Missouri River R. Co.*, 53 Ia., 326. 1880.

CORONER'S INQUEST.

1. Collision. A coroner's inquisition, touching the death of V., found, as to the cause of death, that "a certain locomotive

steam-engine numbered 48, with a certain tender attached thereto, and worked therewith, and also with divers, to wit, three carriages, used for the conveyance of passengers for hire, on a certain railroad or tram-way called 'The Midland Railways,' there situate, and which said carriages respectively were then and there attached and fastened together, and to the said tender, and were then and there propelled by the said locomotive steam-engine, and which said locomotive steam-engine, tender and carriages were then and there moving and traveling along the said railroad or tram-way towards the town and county of the town of Nottingham. And the jurors aforesaid, upon their oaths aforesaid, do further say that, whilst and during the time that the same locomotive," etc., averring a collision with a train in which V. was traveling, and ascribing his death to the collision, but not so as to be intelligible without the earlier part of the finding. The court quashed the inquisition, holding that the words "and which said locomotive engine, tender and carriages," could not be rejected as surplusage for the purpose of rendering the previous words sensible. *Queen v. Midland Ry Co.*, 8 Adolphus & Ellis (N. S.), 537; 55 E. C. L., 586. 1846.

2. Deodands. Four deodands having been estreated into the court of exchequer, under the 3 and 4 Will. 4, c. 99, s. 29, upon four coroners' inquisitions, which found that the deaths of four persons were respectively caused on a certain day, by a certain steam-engine, and each imposed a deodand of 125l. on the engine, the court refused to stay proceedings on the inquisitions on payment of one deodand of 125l., but left the defendant to its remedy by traversing, or quashing the inquisition. *Attorney-General v. Eastern Counties Ry Co.*, 3 Eng. R. R. & Canal Cases, 145. 1842.

3. Jurisdiction. The coroner of a borough has no jurisdiction to take an inquisition in a case of accidental death, where the cause of death arose out of the borough, though the death took place within it. *Regina v. Great Western Ry Co.*, 3 Eng. R. R. & Canal Cases, 161. 1842.

4. Right to compensation for inquest; "coroner's quest law." The coroner has no

Corporate Existence — Powers.

vested right to hold an inquest over the bodies of persons found dead in his county, and to charge the county therefor, when the public laws of the state do not require such action. The coroner sued the railway company for removing the bodies from the county and thus preventing him from holding the inquest and receiving compensation therefor. *Freyer v. Central R. R. and Banking Co.*, 50 Ga., 581. 1874.

CORPORATIONS.

[The various matters pertaining to railway corporations will be found distributed throughout this book under other headings. Only such matters are compiled under the present title as could not be appropriately assigned elsewhere.]

1. Corporate existence; admission. A corporation, by appearing to a suit, thereby admits its corporate existence. *Missouri River, Fort Scott and Gulf R. R. Co. v. Shirley*, 20 Kans., 660. 1878.

2. — evidence of corporate existence. A railway company having completed its line, and being engaged in operating it, must be deemed, in suits brought by it, a corporation *de facto*, and a private individual thus sued cannot contest its legal organization. *Wilcox v. Toledo and Ann Arbor R. R. Co.*, 43 Mich., 584, 1880; 21 Amer. R'y Rep., 161.

3. — how attacked. Where a railroad company has been a corporation *de facto*, from the date of its organization, its existence and its ability to contract cannot be called in question in a suit brought upon evidence of debt given to it. *Comm'rs of Douglas County v. Bolles*, 94 U. S., 104, 1876.

4. — Upon a bill between corporations to restrain the defendant from unwarrantably interfering with the rights, privileges and property of the complainant, upon charges preferred by each against the other, the successive steps in the organization of each will not be investigated for the purpose of determining whether the corporations legally exist. Such charges may be more properly investigated in a proceeding by *quo warranto*. *Denver and Swansea R'y Co. v. Den-*

ver City R'y Co., 2 Colo., 673, 1875; 20 Amer. R'y Rep., 339.

5. Debts; where there are no lien debts enforced at law. A private corporation is a trustee of its property for the payment of its creditors, and afterwards for the benefit of its stockholders. During its existence and operation, its general creditors have no lien which will entitle them to sue it in a court of equity; but its property can be subjected to the payment of its debts by actions at law. *Montgomery and West Point R. R. Co. v. Branch*, 59 Ala., 139. 1877.

6. Expenses prior to incorporation. Where a local committee is formed for the purpose of forwarding the project of an intended railway, they are the persons liable for the salary of the secretary, etc., unless it be shown that the secretary agreed to look to some other fund for payment. *Kerridge v. Hesse*, 9 Carrington & Payne, 200; 38 E. C. L., 126. 1839.

7. Powers; erection of buildings. A provision in an act for making a railway, that certain land to be purchased by the company should be appropriated to and used solely for the purposes of the railway and the buildings connected therewith (except such part as might be required by the board of ordnance, or for widening approaches to the station), and should not be used or employed for erecting thereon any coke ovens, or for any other purposes (the necessary railway purposes only excepted), by which any nuisance might be created, or the other property of the vendors in any way damaged, was *held* to refer to the use of the land, or the mode in which it was to be laid out or applied, and not to refer specifically to the use of the buildings which might be erected upon the land. *Warden of Dover Harbor v. South Eastern R. R. Co.*, 9 Hare (Eng. Ch.), 489. 1852.

CORPORATE POWERS.

See BAGGAGE; CHARTER; CONNECTING LINES; EMINENT DOMAIN; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; MUNICIPAL CORPORATIONS; REAL ESTATE; SUBSCRIPTIONS BY CITIES; SUBSCRIPTIONS BY COUNTIES; SUBSCRIPTIONS BY INDIVIDUALS.

Administrator — Witnesses.

COSTS.

See **APPEAL**; **EMINENT DOMAIN**; **MASTER IN CHANCERY**.

1. Administrator. An administrator suing a railway company in his fiduciary capacity is not personally liable for costs. *Cavanaugh v. Toledo, Wabash and Western R'y Co.*, 49 Ind., 149. 1874.

2. Admiralty. A court of admiralty may, at the instance of a party and without letters of request, enforce a decree *in personam* for the payment of costs rendered by an admiralty court in another district. *Pennsylvania R. R. Co. v. Gilhooley*, 9 Federal Reporter, 618. 1881.

3. Extra allowance. The money value of the right to build a railway by a particular route cannot be measured by the expense of that particular line as compared with another. Such comparison does not furnish sufficient proof of the money value of the right to enable the court to pass upon an extra allowance. *People v. Genessee Valley R. R. Co.*, 30 Hun (N. Y.), 565. 1883.

4. — Practice upon extra allowance considered. *Stuckle v. Tehuantepec R'y Co.*, 30 Hun (N. Y.), 84. 1888.

5. Lease. The question of costs determined in an action against a railway company and its lessee for a personal injury. *Abbott v. Johnstown, Gloversville and Kingsboro R. R. Co.*, 24 Hun (N. Y.), 135. 1881.

6. Motion for new trial. Where a motion of plaintiff for new trial is dismissed upon an agreement of the defendant to pay the plaintiff, the costs of the motion will be taxed to the plaintiff. *Greer v. Southwestern R. R. Co.*, 58 Ga., 266. 1877.

7. Retrial because the judge was a stockholder of defendant. After an action had been tried, and a verdict rendered for the plaintiff, and before entry of judgment, it was discovered that the judge was disqualified, being one of the executors of an estate holding stock in the defendant's corporation. The action was retried before another judge, and the plaintiff again recovered a verdict. *Held*, that the plaintiff was entitled to tax costs for two trials. *Oregin v. Brooklyn Crosstown R. R. Co.*, 19 Hun (N. Y.), 349. 1879.

8. Security. The supreme court has no original jurisdiction to require from the ap-

pellant, who has removed to another state, security for the costs of his appeal. *C. C. and A. R. R. Co. v. Earle*, 13 So. Car., 44. 1879.

9. — The surety on a cost bond is liable for costs on appeal. *Forty-second St., etc. R. R. Co. v. Guntzer*, 35 N. Y. Superior Ct., 567. 1873.

10. Statute. All statutes in reference to costs must be strictly construed. An officer cannot legally claim remuneration unless the statute has expressly conferred the right. *Shed v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 67 Mo., 687. 1878.

11. Taxation. Manner of taxation of costs determined. *Houston and G. N. R. R. Co. v. Jones*, 46 Tex., 133, 1876; 13 Amer. R'y Rep., 294.

12. Title to land. Case adjudged upon the question of costs in a suit involving the title to land. *Kelly v. New York and Manhattan Beach R'y Co.*, 19 Hun (N. Y.), 363. 1879.

13. Trustee. When a trustee during the pendency of an action brought by him receives and voluntarily disburses money belonging to the estate, and the defendant thereafter recovers a judgment against him for costs, the court may, if the trustee has no money wherewith to pay the judgment, allow a judgment against him personally. *Butler v. Boston and Albany R. R. Co.*, 24 Hun (N. Y.), 99. 1881.

14. Witnesses; adjournment. Where a trial is adjourned, the witnesses are entitled to mileage for returning a second time to court during the term. *Union Pacific R'y Co. v. Harris*, 29 Kans., 275. 1883.

COTTON.

See **CARRIAGE OF MERCHANDISE**; **FIRES**.

COUNTY.

See **SUBSCRIPTIONS BY COUNTIES**.

COUPONS.

See **MORTGAGE**; **TICKETS**.

Miscellaneous.

COVENANT.

See CONVEYANCE.

1. Breach; failure of title. While the general rule is, that the grantee must make the most of the title he has acquired, and yield possession only to a hostile assertion of a paramount title by suit to recover the land, or in pursuance of a demand for the possession under a claim thereto, or upon a distinct hostile assertion of title, yet, where the title to the land in controversy is in the United States, and liable to entry and settlement under the homestead laws of the government to all who possess the proper qualification, that of itself is such a hostile assertion of the paramount title as will authorize the grantee to voluntarily submit to it. *Kansas Pacific R'y Co. v. Dunmeyer*, 19 Kans., 539. 1878.

2. Incumbrance; railway right of way. A knowledge of the existence of the incumbrance by the covenantee at the time the covenant is entered into will not relieve the covenantor from his liability on the covenant. Where the incumbrance on land is a railroad passing over it, the damages for this breach of the covenant against incumbrances are the value of the land as increased or diminished by special damages or benefits resulting therefrom. *Williamson v. Hall*, 63 Mo., 405. 1876.

3. — damages. In a suit for breach of covenant against incumbrances, if the incumbrance has inflicted no actual injury on the plaintiff, and he has paid nothing towards removing or extinguishing it, he can recover only nominal damages; if he has removed and paid it off, he can recover what he paid for that purpose, if it be a reasonable and fair price; if he has sustained actual injury, the damages are to be proportioned to the actual loss sustained, and if it be of such a character that it cannot be extinguished, as an easement or servitude, the damages are to be estimated according to the injury arising from its continuance. *Kellogg v. Malin*, 62 Mo., 429. 1876.

4. — In a suit for breach of covenant against incumbrances by reason of a right of way by a railroad, evidence of the enhanced value of the land by reason of the

railroad, or of privileges accorded by the railroad, is inadmissible. *Id.*

5. Seizin. When there has been neither actual eviction nor *ouster in pais*, under a paramount title, nominal damages only can be recovered for breach of a covenant of seizin. *Conklin v. Hannibal and St. Joseph R. R. Co.*, 65 Mo., 533. 1877.

CREDITOR'S BILL.

1. Decree. A decree under a creditor's bill bars all parties thereto. A party, after the decree, but before distribution of the proceeds, cannot by amendment set up an additional claim as a preferred claim. *Clews v. Brunswick and Albany R. R. Co.*, 50 Ga., 522. 1874.

CRIMINAL LAW.

See HIGHWAYS; INDICTMENT; INJURIES TO PASSENGERS; INJURIES CAUSING DEATH; NUISANCE.

1. Burglary in railway car. Where the charge is burglary by breaking into the car of a railway company, designated by its corporate name, but the indictment contains no averment that the company was incorporated, the accused cannot avail himself of the defect, if defect it be, in view of the Code of Criminal Procedure (63 Ohio L., 301, § 90; 74 Ohio L., 334). *Burke v. The State*, 34 Ohio St., 79, 1877; 21 Amer. R'y Rep., 77.

2. — If it be alleged that a burglary was committed in the car of a railroad company, the corporate character of the company is sufficiently shown by proof that it was, at the time of the burglary, a corporation *de facto*. *Id.*

3. — indictment. In an indictment for burglary from a railway car, the ownership of the property may be charged as unknown, and that the car was in the care, possession and custody of the C., B. and Q. R. R. Co. Code, § 4203. *State v. McIntire*, 59 Ia., 264, 267. 1882.

4. Bridges; indictment. A corporation may be indicted for breach of duty in failing to construct a bridge. *Regina v. Birmingham and Gloucester R'y Co.*, 9 Carrington & Payne, 469; 38 E. C. L., 278. 1840.

Constitutional Law — Larceny from Railroad Car.

5. Constitutional law. The statute of 1866, requiring conductors to stop their passenger trains for five minutes at every way station, is constitutional. *Davidson v. State*, 4 Tex. Court of Appeals, 545. 1878.

6. — The gist of the offense is not the failure to stop for five minutes, but the passage of wayside stations without stopping at least five minutes thereat. *Davis v. State*, 6 Tex. Court of Appeals, 166. 1879.

7. False pretenses; railway ticket. A railway ticket is a chattel of value, and it is a misdemeanor to obtain the same by false pretenses. 7 and 8 Geo. 4, c. 29, § 53; *Regina v. Boulton*, 3 Cox's Criminal Cases, 576. 1849.

8. Gauge, change of; indictment. An indictment under the Act 1874-75, chap. CLIX., against the Richmond and Danville R. R. Co. (changing the gauge of railroads), cannot be sustained, because that act impairs the obligation of the contract between the state and the defendant railroad company, as assignee of the North Carolina R. R. Co. *State v. Richmond and Danville R. R. Co.*, 73 N. C., 527. 1875.

9. Hackmen. A railroad company may make and enforce by its agents reasonable and necessary rules for the transaction of its business, and for the proper and orderly management of its depot and other buildings open to the public. These rules, however, must be reasonable and such as do not unnecessarily infringe upon the rights of the public and others having or carrying on business in connection with railroad traffic and travel. A regulation forbidding hackmen, peddlers, expressmen and loafers from coming within the passenger depot is reasonable. *Summitt v. State*, 8 Lea (Tenn.), 413, 1881; 9 Amer. & Eng. R. R. Cases, 302.

10. — Inclosed depot grounds are private property, and a city cannot prevent the standing of carriages therein for hire. *Regina v. Johnstone*, 4 Wyatt, Webb & A'Beckett (Australia), 216. 1867.

11. Highway crossing. The railway company is required to make the highway at the crossing "as convenient as may be." The highway is not required to be as easy and safe as the old, but should be as easy and convenient as the ground will permit. *Nashville and Decatur R. R. Co. v. State*, 1 Bax-

ter (Tenn.), 55, 1873; 15 Amer. R'y Rep., 233.

12. Homicide. The general rule is, that every person, placed in a situation in which his acts may affect the safety of others, must take all precautions to guard against the risk to them arising from what he is doing. A failure to do this, resulting in death to another, is culpable homicide. Two railway employes accordingly convicted for neglect resulting in the death of a passenger. *Puton, In re*, 2 Broun's Justiciary (Scotch), 535. 1845.

13. — A telegraph officer of a railway was charged with culpable homicide, or culpable neglect of duty, in so far as he had neglected to turn on a certain signal; and, in consequence of that neglect, a collision took place, by which one person was killed and several others severely injured. A conviction under this charge sustained. *Rowbotham, In re*, 2 Irvine's Justiciary (Scotch), 89. 1855.

14. Indictment; corporation. A corporation aggregate may be guilty of a misdemeanor by non-feasance. And in such a case an indictment is maintainable against it in its corporate name. *Regina v. Birmingham and Gloucester R'y Co.*, 2 Gale & Davison, Queen's Bench, 236. 1812.

15. — The discrepancy between the name "The St. Paul, Minneapolis and Manitoba R. R. Co.," in an indictment, and the name "The St. Paul, Minneapolis and Manitoba R'y Co." in the evidence, held unimportant. *State v. Brin*, 30 Minn., 522. 1838.

16. — Where a corporation cannot appear by attorney, as in the case of an indictment found at the assizes or sessions, the proper mode of proceeding against it to enforce the remedy by indictment is by distress infinite to compel appearance, after removal by *certiorari*. *Regina v. Birmingham and Gloucester R'y Co.*, 3 Eng. R. R. & Canal Cases, 148. 1842.

17. Larceny from railroad car. Where a person is indicted for breaking and entering a car with intent to steal, and for the larceny of goods contained therein, and is acquitted of the breaking and entering, and convicted of the larceny only, the judgment of the court will not be reversed because of the admission of evidence for the sole pur-

Larceny — Obstruction of Railway.

pose of proving the breaking and entering, whether such evidence was properly admitted or not. *Manson v. The State*, 24 Ohio St., 590. 1874.

18. — **jurisdiction; venue.** Where a person enters a moving car in one county with intent to commit a larceny therefrom, and with the same intent continues in the car until it passes into another county, and there commits the intended larceny, there is, in law, a fresh entry in the latter county, and the offense is indictable therein under the statute. *Powell v. The State*, 53 Wis., 217, 1881; 9 Amer. & Eng. R. R. Cases, 156.

19. **Larceny; railway tickets.** Gen. St. 1878, ch. 95, § 26, was framed to meet the case of an appropriation of tickets which had been sold by a railway company to a passenger and *taken up* by a conductor so as again to become the property of the company by which they were issued, but which, instead of being returned to the proper depository, were otherwise disposed of by the conductor or some other person, with a larcenous intent. *State v. Brin*, 30 Minn., 522. 1883.

20. — The fraudulent taking of a railway ticket is larceny, if done to defraud, although the ticket, if used, would be returned to the company. *Regina v. Beecham*, 5 Cox's Criminal Cases, 181. 1851.

21. **Obstruction of railway.** The mischievous placing of an obstruction upon a railway by boys was held sufficient to justify a finding that it was done maliciously. *Regina v. Upton*, 5 Cox's Criminal Cases, 298. 1851.

22. — Defendants, two boys, went upon the premises of a railway company and played with a heavy cart which was near the railway. It ran down an embankment by its own impetus and obstructed the railway. The boys made no attempt to remove it. *Held*, that the first act being a trespass, and therefore unlawful, the boys might properly be convicted of obstructing a railway. *Regina v. Monaghan*, 11 Cox's Criminal Cases, 608. 1870.

23. — Defendant improperly went upon a railway and stood up, signaling the train to stop by holding up his hands. *Held*, to be an obstruction of a railway engine within the meaning of the statute. *Regina v. Hardy*, 11 Cox's Criminal Cases, 656. 1871.

24. — Altering the signals by a drunken man, so that a train was caused to stop, was held to be the obstruction of a railway carriage within the meaning of 24 and 25 Vict., c. 97. *Regina v. Hadfield*, 11 Cox's Criminal Cases, 574, 1870; *Queen v. Hadfield*, Law Reports, 1 Crown Cases Reserved, 253, 1870.

25. — The obstruction of a railway is a crime under 3 and 4 Vict., c. 97, s. 15, although the road has not yet been opened up for traffic. *Regina v. Bradford*, 8 Cox's Criminal Cases, 309. 1860.

26. — The prisoner, who was not a servant of the railway company, stood on a railway between the two lines of rails, at a point between two stations. As a train was approaching he held up his arms in the mode used by inspectors of the line when desirous of stopping a train between two stations. This, as the prisoner intended that it should, caused the driver to shut off steam and diminish the speed, and led to a delay of four minutes. *Held*, that the prisoner had obstructed a train within the meaning of 24 and 25 Vict., c. 97, s. 36. *Queen v. Hardy*, Law Reports, 1 Crown Cases Reserved, 278. 1871.

27. — Upon an information before justices on behalf of a railway company for an offense against its act of incorporation, in placing stones and rubbish on the railway, and thereby obstructing the free passage of the same, the evidence was that the act was done by certain persons employed by the defendant to repair a wall between the railway and his premises adjoining, and that on one occasion the defendant himself, who was standing by, nodded his head and directed the workmen to go on. *Held*, on appeal, under the 20 and 21 Vict., c. 43, s. 2, that there was evidence to warrant the justices in convicting the defendant. *Roberts v. Preston*, 9 Common Bench, N. S., 207; 99 E. C. L., 206. 1860.

28. — If one wilfully places on a railroad track, on which engines and carriages conveying persons are likely to pass, any obstruction likely to produce disaster to such engines or carriages, and to endanger the safety of the persons conveyed thereon, he is guilty of the offense described in § 63, ch. 94, Gen. St. 1878, though no engine or carriage be actually stopped or impeded by such obstruction. *State v. Kilty*, 9

Action — Approach to Depot.

Amer. & Eng. R. R. Cases (Minn.), 153. 1881.

29. — It being found by the jury that the defendant wilfully and maliciously placed obstructions so that life was endangered, *held*, that it was no defense that the respondent in fact intended other mischief and did not intend to endanger life. *State v. Beckman*, 57 N. H., 174. 1876.

30. — An indictment charged the obstruction of a railroad by wilfully and maliciously placing thereon two sleepers and a post. *Held*, that the statutory offense — Gen. Stats., ch. 263, sec. 16 — was well charged. *Ib.*

31. — To warrant a conviction under art. 678, Rev. Penal Code, for obstructing a railway, the evidence must show that the obstruction might have endangered human life. Proof of the condition of the grade at the point in question, and the usual rate of speed at that place, were essential. *Bullion v. State*, 7 Tex. Court of Appeals, 462. 1879.

32. Sabbath breaking. A corporation may be indicted for "Sabbath breaking" under §§ 16 and 17 of ch. 149 of the Code of W. Va. In an indictment against a railroad company for being found laboring at its trade and calling on a certain Sabbath day, it is proper and necessary to allege that such labor was not in household work or other work of necessity or charity; but it is not necessary to allege that the defendant did not conscientiously believe that the seventh day of the week ought to be observed as a Sabbath, or that it did not refrain from all secular labor on that day, or that the labor was not done in the transportation of the mail, or of passengers or their baggage. *State v. Baltimore and Ohio R. R. Co.*, 15 West Va., 362. 1879.

33. Shooting or throwing at car; indictment. An indictment for violating the act of 1877, ch. 4, in shooting or throwing a missile at a railway car or engine, which fails to charge that the same was in actual motion or stopped for a temporary purpose, is defective. *State v. Boyd*, 9 Amer. & Eng. R. R. Cases (N. C.), 155. 1881.

34. Ticket brokers; "scalpers." Section 8 of the act of March 9, 1875, regulating the issuing and taking up of railway tickets, etc. (1 R. S. 1876, p. 259), exempts from the oper-

ation of its provisions all special tickets, whether half-fare or excursion tickets, or special in any other respect. *State v. Fry*, 81 Ind., 7, 1881; 6 Amer. & Eng. R. R. Cases, 340.

35. — A ticket, having stamped upon its face the word "special," is *prima facie* exempt from the provisions of said act of March 9, 1875. *Ib.*

36. — The Indiana statute forbidding sale of tickets by an unauthorized person does not apply to "special tickets." *State v. Fry*, 6 Amer. & Eng. R. R. Cases (Ind.), 340. 1882.

37. Vulgar language on highway; railway not a highway. The track of a railroad company, used to carry on its business as a common carrier, is not a public highway within the meaning of the statute against the use of vulgar and abusive language. To constitute such highway there must be a road dedicated to and kept up by the public, as distinguished from a private way. *Comer v. State*, 62 Ala., 320. 1878.

CROPS.

See INJURIES TO CROPS.

CROSSINGS.

See CONSTRUCTION OF RAILWAYS; EMINENT DOMAIN; HIGHWAY; INFUNCTION; INJURIES TO PERSONS ON THE TRACK; PRIVATE WAYS AND CROSSINGS.

1. Action; *res adjudicata*. Where an action against a railway company for damages in consequence of its failure to provide a crossing had resulted for the defendant, it was held that another action could not be maintained to compel it to provide a crossing. *Bettys v. Chicago, Milwaukee and St. Paul R'y Co.*, 43 Ia., 602, 1876; 14 Amer. R'y Rep., 481.

2. Approach to depot. A switch crossing provided by a railroad company across its own ground for ingress to and egress from its depot is not a "traveled public road" within the meaning of section 38 of the railroad act (Wagn. Stat., §10). Failure of a train approaching such crossing to ring a bell or sound a whistle does not, therefore, constitute a violation of that section; but

Bridge — Private Crossings.

whether it may not constitute negligence on the part of the company depends upon the circumstances of the case, and is a question of fact for the jury. *Hodges v. St. Louis, Kansas City and Northern R'y Co.*, 71 Mo., 50, 1879; *Bauer v. Kansas Pacific R'y Co.*, 69 Mo., 219. 1878.

8. Bridge; decree refusing erection. Where the defendant was required to provide a bridge, in order to render accessible that part of complainant's farm which was cut off by the railroad, *held*, that the decree should require that the defendant should construct and maintain a bridge proper and safe for the purpose intended to be answered. Greater particularity is not required. *Carpenter v. Easton and Amboy R. R. Co.*, 28 N. J. Eq., 390, 1877; 14 Amer. R'y Rep., 195.

4. Contract; breach. Where a person by deed poll granted the right of way to a railroad company over his lands, expressly stipulating that the company "shall erect and maintain such crossings as may be necessary to the accommodation of persons whose lands are divided by said track, and shall erect suitable fences," etc., and the company accept said deed and enter upon the land, the grantee of such grantor may have an action in his own name against the company for a failure to maintain crossings. *Willenborg v. Illinois Central R. R. Co.*, 11 Bradwell (Ill.), 293. 1882.

5. Injunction. An attempt by a corporation to avail itself unlawfully of the general railroad law will, on complaint of the party injured, be enjoined as an abuse of the law. *Central R. R. of New Jersey v. Pennsylvania R. R. Co.*, 31 N. J. Eq., 475. 1879.

6. — An abuse of the general railroad law attempted by the unlawful application of its provisions to a private use may be restrained. *Ib.*

7. — Held, that where a prompt assessment of damages could not, in all probability, be had, and where the right of the complainant to any damage was a matter of dispute, depending for its solution upon doubtful questions of law and fact, that a court of chancery might, instead of stopping the progress of a great work of internal improvement, of general and public as well as of private importance, require a bond to be given and allow the construction to go on.

Northern Pacific R. R. Co. v. St. Paul, Minneapolis and Manitoba R'y Co., 4 Federal Reporter, 688; 1 McCrary (U. S. C. C.), 302; 1880; 2 McCrary (U. S. C. C.), 260, 1880; 1 Amer. & Eng. R. R. Cases, 15.

8. Open crossing. The railway track of the defendant crosses the farm of the plaintiff between his house and the highway. Plaintiff constructed a lane from his house to the highway, being open at the end where it meets the highway, and requested the defendant to make an open crossing at the point where such lane intersects its track, which request was refused. In an action for a writ of *mandamus* to compel the construction of such crossing, it was held that an open crossing is within the contemplation of section 1268 of the code, and may be required under its provisions when, as in this case, it is the only "adequate means" of crossing which can be afforded a land owner. *Boggs v. Chicago, Burlington and Quincy R. R. Co.*, 54 Ia., 435. 1880.

9. — Where a railroad running through premises separates the house of the owner from the highway, a crossing thereto through heavy gates, which are not placed on hinges, but must be slid back and carried around, is not, under the circumstances, an adequate crossing. In such case the proprietor is entitled to an open crossing through which he and his family may reach the highway without opening gates. *Gray v. Burlington and Mo. River R. R. Co.*, 37 Ia., 119. 1873.

10. Private crossings. A railroad company whose line runs through the land of an owner is only required to provide a crossing for such owner when his interest and convenience require it. *Henderson v. Chicago, Rock Island and Pacific R. R. Co.*, 48 Ia., 216. 1878.

11. — The conduct of a land owner, through whose property a railway passes, in forcibly opening the gates at a crossing which has been closed by the company, sufficiently indicates his requirement that the company should keep a crossing, in compliance with the provisions of the Revision, § 1329. *Henderson v. Chicago, Rock Island and Pacific R. R. Co.*, 43 Ia., 620, 1876; 14 Amer. R'y Rep., 484.

12. — A complaint charging a railroad

Compensation — Contract.

company with negligence in failing to keep in repair a private way over its railroad track, constructed for its own use and benefit, and used by other persons by the mere license of the railroad company, does not state facts sufficient to constitute a cause of action. *Ferguson v. Virginia and Truckee R. R. Co.*, 13 Nev., 184. 1878.

13. — A railroad company contracted with the owner of land over which its road run to build a bridge over its track at a specified point on said land, within twelve months after the completion of the road. The road was not completed for several years, and the bridge was never built. *Held*, in a suit on the contract by the owner of the land, he was not entitled to recover any damages on account of the delay in building the road. *St. Louis, Jacksonville and Chicago R. R. Co. v. Lurton*, 72 Ill., 118. 1874.

14. — But one action can be maintained upon the breach of a covenant to erect a private crossing. Successive actions cannot be maintained. *Smith v. Great Western R'y Co.*, 6 Upper Canada, Common Pleas, 151. 1855.

15. — **farm crossing; parol agreement.** Where a parol agreement is made in relation to a crossing, the agreement being a part of the consideration of a deed for right of way, such agreement may be shown and enforced. This is not a varying of the deed by parol, but simply the addition of another consideration. *Cameron v. Great Western R'y Co.*, 27 Grant Ch. (Upper Canada), 95. 1879. This cause reversed on the evidence on appeal. 28 ib., 327. 1881.

16. **Street crossings; signal.** The duty of ringing or whistling at a street crossing ceases as soon as the locomotive has passed the crossing. *R. S.*, § 806; *Zimmerman v. Hannibal and St. Joseph R. R. Co.*, 71 Mo., 476, 1880; 2 Amer. & Eng. R. R. Cases, 191.

CROSSING OF RAILWAYS.

1. **Compensation.** One railway company is entitled to have condemnation, under the statute, for its right of way across the right of way of a previously constructed railroad; but the company whose right of way is condemned is entitled to be fully compensated

for all damages it may sustain in consequence thereof. *St. Louis, Jacksonville and Chicago R. R. Co. v. Springfield and Northwestern R. R. Co.*, 96 Ill., 274, 1830; 2 Amer. & Eng. R. R. Cases, 487.

2. **Contract.** In a proceeding for the condemnation of the right of way for a railway across the line of another railway the petitioning corporation offered in evidence a stipulation regularly signed by the petitioner in which it was provided by the petitioner "that it would and should, at its own expense, put in, and thereafter maintain in suitable and proper repair, the frogs and crossings across two main tracks of the defendant; that this stipulation should be binding on the successors and assigns of said petitioner so long as the grade crossing should be maintained at the crossing, the right of way for which was being condemned therein." *Held*, that this was a valid obligation enforceable against the petitioner and its successors and assigns, and was properly admissible in evidence. *Chicago and Alton R. R. Co. v. Joliet, Lockport and Aurora R'y Co.*, 105 Ill., 388. 1883.

3. — In 1872 two railroad companies, A. and B., by their respective presidents, entered into a contract by which A. granted to B., and its successors, the right to intersect and cross the tracks of A., upon complying with certain conditions, and upon payment of \$800 on account of the expense of keeping a flagman at such crossing, B. agreeing to comply with such contract on its part. Subsequently each company's road was sold under the foreclosure of mortgages prior in date to said agreement; neither company, however, was made a party to the action for the foreclosure of the mortgage on the other company's road. The company organized by the purchasers of company B.'s road subsequently consolidated with the appellant under ch. 917 of 1869. The title to company A.'s road passed to the respondent. The agreement was carried into effect and complied with after the foreclosure of both mortgages by the parties acquiring title to the respective roads. Proceedings were instituted by the appellant, under ch. 140 of 1850, to acquire a right to cross the track of the respondent at the points provided for by the agreement. *Held*, that the agreement made

Damages — Injunction.

by the original companies was valid and enforceable in equity; that it was binding upon the parties to the action as the successors of the said companies, and that the application was, therefore, properly denied. *Rome, Watertown and Ogdensburgh R. R. Co. v. Ontario Southern R. R. Co.*, 16 Hun (N. Y.), 445. 1879.

4. — By an agreement between two railroad companies, one, in consideration of a right to cross its road, gave the other a right to cross in future; *held*, that specific performance of the agreement would not be decreed where the crossing was to be at a place not contemplated by the parties, and where it would do very great damage to the former company — it would cross a freight-yard. *Coe v. New Jersey Midland R'y Co.*, 31 N. J. Eq., 105. 1879.

5. **Damages.** The law requiring trains to stop before crossing another railroad, being a mere police regulation, and subject to repeal at any time, the damages sustained by a railroad company for the delay, inconvenience and trouble in stopping before crossing another road seeking a condemnation for right of way across the track of an existing railroad are too vague, indefinite and contingent to be an element in the assessment of damages in favor of the road to be so crossed. *Peoria and Pekin Union R'y Co. v. Peoria and Farmington R'y Co.*, 105 Ill., 110, 1882; 10 Amer. & Eng. R. R. Cases, 129; *Chicago and Alton R. R. Co. v. Joliet, Lockport and Aurora R'y Co.*, 105 Ill., 338, 1883.

6. — A railway company, across and twenty feet above whose line another railway is laid out, cannot recover damages for the expense of maintaining a flagman at the crossing of a highway, alleged to be necessary to guard against the greater liability to accidents occasioned by the obstruction of the view along its track by means of the abutments of the new railway. *Mass. Central R. R. Co. v. Boston, Clinton and Fitchburg R. R. Co.*, 121 Mass., 124. 1876.

7. — In determining the amount of compensation to be awarded to the company the track of which is crossed, the commissioners should not confine themselves to determining the value of the real estate actually taken and the damages occasioned

by cutting the rails, but should allow all actual and direct damages occasioned to the contestant by the taking of the land for the purposes of and resulting from its being used in the manner mentioned by the petitioner. *Lockport and Buffalo R. R. Co., In re*, 19 Hun (N. Y.), 38. 1879.

8. **Equity.** Where the state legislature has not prescribed in what manner one railroad shall cross another, a court of equity has jurisdiction, in a proper case, to control the matter. In Illinois the policy of state legislation is to allow a new railroad, in most instances, to cross another road at grade; but if a new road can at small expense cross the old one at a different level, a court of equity should require it to do so, especially if a grade crossing is dangerous to life and property. The additional expense may, however, be apportioned between the roads, as in such case the old road has no vested absolute rights to control the new. *Chicago and Northwestern R. R. Co. v. Chicago and Pacific R. R. Co.*, 6 Bissell (U. S. C. C.), 219. 1874.

9. **Evidence.** What evidence is sufficient to demonstrate the reasonable practicability of avoiding a grade crossing. *Baltimore and Cumberland Valley R. R. Extension's Appeal*, 3 Amer. & Eng. R. R. Cases (Pa.), 242. 1881.

10. **Injunction.** In a proceeding in the county court for condemnation for a right of way across the track of another corporation, questions as to the sufficiency of a city ordinance in respect to the right of the company seeking the condemnation, and as to the right of such company, under the constitution and laws, to cross the track, and as to injury to the franchise, and as to the proposed crossing being a continuing nuisance, are all such defenses, if available at all, as may be interposed at law in the condemnation proceeding. *Lake Shore and Michigan Southern R'y Co. v. Chicago and Western Indiana R. R. Co.*, 96 Ill., 125, 1880; 2 Amer. & Eng. R. R. Cases, 437.

11. — Under the act of 1878, ch. 192, entitled an act to enlarge the powers of the Pennsylvania R. R. Co. in Maryland, the appellant had the power, upon complying with the requirements of that act, to construct its road across the Potomac Wharf Branch

Proceedings.

of the Cumberland and Pennsylvania Railroad on the west side of Wills' creek, and then to cross over the creek to its east side. But as the appellant was not justified in making its crossing over the Potomac Wharf Branch forcibly and against the consent of the appellees, without a written agreement between them conferring the easement on the appellant, which agreement was not executed, the appellees were entitled to an injunction restraining the appellant from using said crossing over the Potomac Wharf Branch. *Pa. R. R. Co. v. Consolidation Coal Co.*, 55 Md., 153. 1880.

12. Proceedings. Objections to the proposed points of crossing, on the ground that they interfere with lands of the old company, already appropriated for stations, etc., are not proper to be raised on application for the appointment of commissioners. These are matters to be considered by the commissioners. *Boston, Hoosac Tunnel and Western R'y Co., In re*, 79 N. Y., 64. 1879.

13. — The proceedings will bind only such parties as are brought in. *Ib.*

14. — A probate order confirming the report of commissioners upon the condemnation of land for a crossing of railways is invalid if made out of term without notice to the respondent. *Michigan Central R. R. Co. v. Judge of Tuscola County*, 48 Mich., 688. 1882.

15. — The probate court cannot direct a continuance in such proceedings pending before commissioners appointed by it. *Ib.*

16. — Where a railroad corporation desires to cross or intersect the railroad and grounds of another company, and they cannot agree upon a compensation or mode of crossing, upon a petition showing such facts, which are undenied, the petitioners are entitled to an order for the appointment of commissioners to determine the points and manner of crossing. *Boston, Hoosac Tunnel and Western R. R. Co. v. Troy and Boston R. R. Co.*, 58 Howard's Practice (N. Y.), 167. 1879.

17. — In proceedings under the railroad act (subd. 6, § 28, ch. 140, Laws of 1850) by one company to acquire the right to cross the line of another company, the petition was verified by one styling himself the consulting engineer of the petitioning company. It did not appear that he was an officer of

the company. The other company answered the petition on the merits, and went to a hearing on the petition and answer. It did not appear that any objection was made as to the verification. *Held*, that it was too late to raise the objection on appeal. *Boston, Hoosac Tunnel and Western R'y Co., In re*, 79 N. Y., 64. 1879.

18. — In proceedings under the railroad act (subd. 6, § 28, ch. 140, Laws of 1850) by one railway company to acquire the right "to cross, intersect, join and unite" its railroad with that of another corporation, the petition should state that the petitioner is a corporation; that the route of its road as laid down crosses the track of the other road; that it desires to cross or intersect such road, and that "the two corporations cannot agree upon the amount of compensation to be made therefor or the points and manner of such crossing and intersection." It is not necessary to state the matters required by said act (§ 14) where the proceeding is to acquire title to lands. *Lockport and Buffalo R. R. Co., In re*, 77 N. Y., 557, 1879; *Same Case*, *ib.*, 632, 1879; *Buffalo and Lockport R'y Co., In re*, 15 Hun (N. Y.), 365, 1878.

19. — As to whether, where the proposed route of a railroad company crosses the track of an existing company, the latter can apply for the appointment of commissioners under the general railroad act (§ 22, ch. 140, Laws of 1850, as amended by § 1, ch. 560, Laws of 1871), to change route, *quere*. *Lake Shore and Michigan Southern R. R. Co., In re*, 89 N. Y., 442. 1882.

20. — Where commissioners to change the route are appointed on the application of an existing corporation, they have no power to determine the grade at which the proposed route shall cross the tracks of the petitioner. *Ib.*

21. — The fact that the route as located by the new company runs through ground already appropriated by the petitioner for transfer, storage and depot purposes, does not make it error for the commissioners to refuse to adopt the route proposed by the petitioner. The question, whether the new company had located its line over lands it cannot condemn for railroad purposes, is not one properly to be determined by the commissioners. *Ib.*

Railway Commissioners — Statute.

22. Railway commissioners. A statute authorized the extension of a railway, and provided that it should not cross any existing railroads at grade, and that all necessary structures for crossing under grade should be subject to the approval of the railway commissioners. A plan for the proposed structure by which a railroad was to be crossed was prepared and submitted to the commissioners, and, a hearing being had, was approved by them. After the hearing, and before being notified of the approval, the company whose location was to be crossed extended a siding, so as to make a second track at the point of crossing. The other company tore up this siding and removed the embankment supporting the same. The track as it existed at the time of the hearing was not disturbed, and the extension of the railroad was constructed under the same, in accordance with the plan proposed to and approved of by the commissioners. *Held*, that the company whose location was thus interfered with could not maintain a bill in equity against the other company to restrain it from tearing up the siding and removing the embankment, and to recover damages for such acts. *Fitchburg R. R. Co. v. New Haven and Northampton Co.*, 134 Mass., 547. 1883.

23. Regulation. By a railway grant the legislature does not intend to divest itself of the police power of the state; the right to regulate railroad crossings flows from that power. *Pittsburgh and Connellsville R. R. Co. v. Southwest Pennsylvania R'y Co.*, 77 Pa. St., 173. 1874.

24. Review. The question of the point of crossing may be tried before the commission and is then subject to review. *Lehigh Valley R'y Co., In re*, 93 N. Y., 639. 1883.

25. Right to cross. By the act of 1871, the rights of a crossing railway are secondary to those of that crossed, and the crossing company must show by evidence that no unnecessary injury is inflicted on the other by a grade crossing, and that such crossing cannot be reasonably avoided. *Pittsburgh and Connellsville R. R. Co. v. Southwest Pennsylvania R'y Co.*, 77 Pa. St., 173. 1874.

26. — Merely crossing a railroad or canal with another railway, as it involves no exclusive use of the property occupied in

crossing, is not a taking or impairment of the company's franchise whose property is thus burdened. *State v. Dover and Rockaway R. R. Co.*, 43 N. J. Law, 528. 1881.

27. Statute; Great Britain. By a clause in a railway act, after reciting to the effect that the proposed line skirted the sea and would obstruct the traffic between the sea and the lands on its shore, and so deprive the lands of their natural advantages of position as respected the sea, and that the lands abounded with minerals, which in some cases belonged to persons not owners of the surface, and were well suited for manufactories and other purposes of commerce, and that it was desirable to give facilities of access between the lands and the sea, and from the sea and the lands on the seaward side of the line to parts inland, it was enacted to the effect that the owners or occupiers of any lands, manufactories or mines, lying near or adjoining the railway, and in parts adjacent, might at any time make any railways across the railway (not crossing it on a level) and use them "for the benefit of themselves and of all and every other person and persons to whom they or any of them may from time to time give leave, and in such way and for such purposes as they or any of them may require." A neighboring land owner proposed to construct a railway on his own land and to carry it under the company's railway, and to use it as a public railway for general traffic. *Held*, that he was entitled so to do, and that the clause in the act did not restrict the use of the cross railway to purposes connected with the more convenient enjoyment of the neighboring lands. *Hughes v. Chester and Holyhead R'y Co.*, 3 De Gex, Fisher & Jones, 352; 64 Eng. Ch., 351. 1861.

28. — Indiana. The act of June 18, 1852 (1 R. S. 1876, p. 711), supplemental to the act of May 11, 1852 (1 R. S. 1876, p. 696), providing "for the incorporation of railroad companies," in so far as it forbids railroad companies organized under the latter act from crossing or intersecting railways terminating in cities of the class specified in its first section, at certain points, is special in its character and against public policy, and should be construed so as not to apply to a railway of the latter class, which, under

Statute — Unfinished Railway.

the provisions of the act of February 21, 1863 (1 R. S. 1876, p. 723), authorizing "railroads to make extensions," etc., has since so extended its line as to carry its terminus beyond the corporate limits of the city within which it had theretofore been. *Aurora and Cincinnati R. R. Co. v. City of Lawrenceburg*, 56 Ind., 80, 1877; 18 Amer. R'y Rep., 136.

29. — Where such company has so extended its line, it may not only consent to, but aid in, the construction of a railway by another company, crossing or intersecting the road of the former, at a point prohibited by such supplemental act. *Ib.*

30. — **Massachusetts.** The statutes of 1872, ch. 53, § 12. and ch. 180, § 3, relating to railways thereafter "constructed," to cross at grade, do not apply to a railway company which, prior to the passage of these statutes, has located its line, exercised its right of taking land for its use, incurred liability for land, damages and expense in preparing its road-bed, in rock excavations, in the construction of abutments for a bridge, and in the building a long bridge at grade, in the immediate vicinity of the point where it intended to cross another railway at grade, although the railway and the crossing at grade were not completed. *Attorney-General v. Ware River R. R. Co.*, 115 Mass., 400. 1874.

31. — **New York.** The statutes of New York in relation to crossing of railways construed. *Lockport and Buffalo R. R. Co., In re*, 19 Hun (N. Y.), 38. 1879.

32. — **Ohio.** Under the constitution and laws of Ohio the right of one railroad corporation to cross the track of another in constructing and operating its road is derived by grant of the franchise so to do from the state, and not by purchase or appropriation from the road first located and constructed. The latter has no vested exclusive right to such crossing for its use, against the right of the public. *Lake Shore and Michigan Southern R'y Co. v. Cincinnati, Sandusky and Cleveland R'y Co.*, 30 Ohio St., 604, 1876; 16 Amer. R'y Rep., 291.

33. — In a proceeding under the statute by one such corporation to appropriate a strip of land across the track of another, to

be used in common by each as a railroad crossing, at a common grade, the owner of such track has no right to recover as consequential damages the additional expense rendered necessary in operating its road caused by complying with the provisions of the act of 1860. *Ib.*

34. — In such a proceeding the owner of the track is entitled to compensation for the property or interest therein actually appropriated, and for such consequential damages, not provided for by the act of 1860, as are the direct and proximate consequence of such appropriation. *Ib.*

35. — The act of March 24, 1860 (1 S. & C., 372a), entitled "An act to prevent collisions on railroads within the state of Ohio," is a valid exercise of this power to prevent collisions at railroad crossings. *Ib.*

36. — **Pennsylvania.** The act of 1868 did not give a railway company an arbitrary right to cross another railway, regardless of the rights of the corporation injured and the safety of the public. *Pittsburgh and Connellsville R. R. Co. v. Southwest Pennsylvania R'y Co.*, 77 Pa. St., 173. 1874.

37. — **Texas.** Article 10, § 1, of the constitution of Texas, which provides that "every railway company shall have the right with its road to intersect, connect with, or cross any other railroad," is not self-acting, but requires supplementary legislation, prescribing the regulation of its exercise. *Missouri, Kansas and Texas R'y Co. v. Texas and St. Louis R'y Co.*, 10 Federal Reporter, 497. 1882.

38. — **Wisconsin.** Under § 1808, R. S., a train approaching a railway crossing should come to a stop, not immediately at the four hundred foot post, but somewhere between that post and the crossing. *Lockwood v. Chicago and Northwestern R'y Co.*, 55 Wis., 50, 1882; 6 Amer. & Eng. R. R. Cases, 151.

39. Unfinished railway. The land of a railway company, consisting of a portion of the bed of a disused canal, purchased from the commonwealth, upon which no tracks are actually laid by the owner, although they shortly are to be laid, is liable to be crossed by the tracks of another railway company in such a manner as will not interfere with the use thereof for the construction of a railroad. *Western Pennsyl-*

Miscellaneous.

vania R. R. Co.'s Appeal, 99 Pa. St., 155, 1881; 4 Amer. & Eng. R. R. Cases, 191.

CULVERTS.

See BRIDGES; WATER COURSES.

CUSTOM.

See CARRIAGE OF MERCHANDISE.

1. **Carrier.** If a case has not been tried on any theory that custom varies the common law rules, and no instructions as to custom are asked, the failure to submit the question of custom to the jury is not ground for a reversal of the judgment. *Eaton v. St. Louis, Iron Mountain and Southern R'y Co.*, 12 Mo. App., 386. 1882.

CUSTOM-HOUSE OFFICERS.

1. **Bonded goods; freight charges; delivery.** It is not the duty of a collector of customs to receive freight charges due upon goods in bond. It is his duty to give notice to the carrier before delivering the goods. But if, instead of giving notice to the carrier, he receives the freight charges, he becomes liable to the carrier therefor. *Cleveland, Columbus, etc., R'y Co. v. McClung*, 15 Federal Reporter, 905. 1883.

2. — The deputy collector's receipt of the freight charges would not render the collector liable therefor to the carrier, the deputy not being an official deputy and not being authorized by the collector to receive the freight charges. *Ib.*

3. — But if the carrier knew of the deputy's acts, or by his acts held out that the agent was authorized to receive the money, he would be liable for the acts of the agent. *Ib.*

4. — The plaintiff, not having alleged that the freight is unpaid, but, on the contrary, having alleged payment of the freight for his use and sued for its recovery, the carrier cannot recover damages by reason of the failure of the collector to give notice before delivering the merchandise to the consignees. *Ib.*

DAMAGES.

See BAGGAGE; BOATS; CARRIAGE OF LIVE STOCK; CARRIAGE OF MERCHANDISE; CONTRACTS; EMINENT DOMAIN; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; INJURIES TO PERSONS CROSSING THE TRACK.

[The various cases in which the measure of damages will be found discussed are arranged under other titles through this book. It has been deemed best to subdivide this title as far as convenient, and to arrange the cases under the other titles.]

1. **Attorneys' fees.** Attorneys' fees are not a proper element of damages in an action of tort. *Houston and Texas Central R'y Co. v. Oram*, 49 Tex., 341. 1878.

2. **Contract; affreightment.** Damages held not excessive upon a contract of affreightment. *Evansville and Terre Haute R. R. Co. v. Montgomery*, 85 Ind., 494, 1882; 9 Amer. & Eng. R. R. Cases, 195.

3. **Sale of lumber.** On a breach of contract to pay for certain lumber at a particular place, the measure of damages would be the difference between the contract price and market price at that place. *Stack v. Railroad Co.*, 10 So. Car., 91. 1877.

4. — **contract to fence land and erect depot.** In a suit against a railroad company for a failure to erect a depot building upon the plaintiff's land, and, also, to erect a sufficient fence on each side of a strip of land conveyed by plaintiff, which it had undertaken to do in consideration of such conveyance to it, the value of such strip of land, and the damage occasioned to the balance of the farm by the failure to fence it, would be the natural and proximate damage which the plaintiff would be entitled to recover. *Rockford, Rock Island and St. Louis R. R. Co. v. Beckemeier*, 72 Ill., 267. 1874.

5. **Conversion.** In an action against a common carrier for conversion, plaintiff is entitled to the value of the goods converted, at the point of destination. *Rice v. Indianapolis and St. Louis R. R. Co.*, 3 Mo. App., 27. 1876.

6. — **no market value.** Action brought for the conversion of certain hay. At the time of the conversion the hay was in stack on the line of the Northern Pacific Railroad, about one hundred and forty miles east of the Missouri river. There was no market value for hay at the place, nor at any other

Default — Excessive.

place within a distance reasonable for the purpose of transporting hay. The region where the hay was was unsettled, and owing to the facts that the season for cutting hay was long past, and that the prairies had been burned over, it was impracticable to put up any more hay in that region before the summer of 1872. The plaintiff called a witness who was accustomed to dealing in hay, who had seen the hay in question, who knew what the supply of hay in the region was, who was acquainted with the facts upon which the demand for hay there would depend. *Held*, that under the circumstances of the case, as above detailed, the opinion of the witness as to the value of the hay at the time of the conversion was properly received. *Burger v. Northern Pacific R. R. Co.*, 22 Minn., 343. 1876.

7. — Property may have a value for which the plaintiff may recover, if it be destroyed, although it may have no actual market value. *Atchison, Topeka and Santa Fe R. R. Co. v. Stanford*, 12 Kans., 354, 1874; 8 Amer. R'y Rep., 230.

8. **Default.** A default admits the allegations of the declaration but not the amount of damages. On the question of damages the party in default may introduce testimony and preserve the rulings of the court by bill of exceptions. *Cairo and St. Louis R. R. Co. v. Holbrook*, 72 Ill., 419. 1874.

9. **Delay in construction of railway.** The measure of damages upon the failure of a contractor to finish a railroad within the time fixed by the contract is the value of the use of the road from the time it should have been completed, under the contract, to the time when it is in fact completed. *Snell v. Cottingham*, 72 Ill., 161. 1874.

10. **Discretion of jury.** Upon a mere matter of damages, where different minds might, and probably would, arrive at different results, and nothing inconsistent with an honest exercise of judgment appears, the verdict should be left as the jury found it. *Mississippi Central R. R. Co. v. Caruth*, 51 Miss., 77. 1875.

11. **Excessive; various amounts held excessive.** Where a passenger, seeking to enter a car reserved for ladies, was ejected with violence, whereby he suffered severe bodily injuries, and recovered a judgment

against the railway company for \$12,000, it was held that the amount should be reduced to \$7,000. *McKinley v. Chicago and Northwestern R. R. Co.*, 44 Ia., 314. 1876.

12. — Where a jury allowed \$6,000 damages for an injury to the knee of the plaintiff, the injury not being permanent, the damages were held to be excessive. The plaintiff was a woman, and her business of coloring photographs was not interfered with by the injury. *Langley v. Sixth Avenue R. R. Co.*, 48 N. Y. Superior Ct., 542. 1882.

13. — An employe of a railway company having recovered \$4,000 for a broken leg, to which it appeared from the evidence that no permanent injury had been done, it was held that the amount should be reduced to \$2,500. *Lombard v. Chicago, Rock Island and Pacific R. R. Co.*, 47 Ia., 494. 1877.

14. — In actions for personal injuries the court will not grant a new trial on the ground of excessive damages, unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from passion, prejudice, partiality or corruption. In this cause \$1,400 was allowed for an injury breaking the plaintiff's leg at the hip, causing material shortening. *Gale v. New York Central and Hudson River R. R. Co.*, 53 Howard's Practice (N. Y.), 385, 1877; 13 Hun, 1, 1878; affirmed, 76 N. Y., 594, 1879.

15. — Giving the evidence of the plaintiff all the weight that can legitimately be claimed for it, his injury is not shown to have been of such a character as to justify a recovery of \$10,000. *Chicago West Division R'y Co. v. Haviland*, 12 Bradwell (Ill.), 561. 1888.

16. — In this case the plaintiff recovered \$4,500 for the fracture of his arm by being run over by a street car, the only proof of the lasting character of the injury being that of the plaintiff and a fellow laborer, to show that he could not do the work of an able-bodied man; *held*, that the damages were excessive. *Chicago West Division R'y Co. v. Hughes*, 87 Ill., 94. 1877.

17. — The deceased was a young man, about twenty-one years of age, and earning about \$25 per month. He was unmarried, had no children, and left a father, mother,

Various Amounts held not Excessive.

two brothers and a sister residing in Germany. The jury gave a verdict of \$5,000. *Held*, that it should not be set aside as excessive. *Bierbauer v. New York Central and Hudson River R. R. Co.*, 15 Hun (N. Y.), 559, 1878; affirmed, *Same v. Same*, 77 N. Y., 583, 1879.

18. — Where a young woman, in attempting to go upon a railway car, stepped into an opening in the station platform, whereby she received an injury to her knee and leg, and it appeared that, at the trial, about three years after the accident, she had not fully recovered, but yet walked naturally and gracefully, and it was not probable the injury would be permanent, and she was not, in consequence of the injury, deprived of any business or calling by which to earn money, and it also appearing that her poor health at the time of the injury prevented as quick a recovery as otherwise might have been expected, and it not appearing that she had suffered any extreme pain, or the injury was serious, it was held that \$2,500 damages was excessive. *Chicago, Rock Island and Pacific R. R. Co. v. Payzant*, 87 Ill., 125, 1877; 18 Amer. R'y Rep., 200.

19. — A verdict for \$10,000 for an injury by a railroad car which necessitates the amputation of an arm, where the defendant was guilty of gross negligence, is not a case of excessive damages. *Robinson v. Western Pacific R. R. Co.*, 48 Cal., 409, 1874; 7 Amer. R'y Rep., 244.

20. — carriage of passenger beyond station. In an action by a female passenger against a railroad company for carrying her beyond her station, plaintiff had judgment for \$1,000. There was no circumstance of malice, insult, wantonness, violence, oppression or inhumanity practiced by the company's servants toward plaintiff, but, on the contrary, their conduct was polite and considerate. *Held*, that the judgment was excessive in amount, and must, for that reason, be reversed. *Trigg v. St. Louis, Kansas City and Northern R'y Co.*, 74 Mo., 147, 1881; 6 Amer. & Eng. R. R. Cases, 345.

21. — In an action brought by a brakeman for personal injuries resulting in the loss of the thumb and first finger of the right hand, and where he was laid up a little over a month and could not do anything for three

or four months, a verdict of \$6,500 is so excessive as to show that it was given under the influence of passion or prejudice, and ought to be set aside. *Kansas Pacific R'y Co. v. Peavey*, 29 Kans., 169, 1883; 11 Amer. & Eng. R. R. Cases, 260.

22. Various amounts held not excessive. A verdict of \$8,000 for the death of a passenger held not excessive. *Cook v. Clay Street Hill R. R. Co.*, 60 Cal., 604, 1882; 6 Amer. & Eng. R. R. Cases, 175.

23. — A verdict for \$3,500 for personal injuries held not excessive. *Klutts v. St. Louis, Iron Mountain and Southern R'y Co.*, 75 Mo., 642, 1882; 11 Amer. & Eng. R. R. Cases, 639.

24. — The sum of \$2,500 was held not to be excessive damages for the breaking of the arm of an old lady sixty-two years of age, the injury being permanent. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Sponier*, 85 Ind., 165, 1882; 8 Amer. & Eng. R. R. Cases, 453.

25. — A verdict of \$7,000 for a personal injury to a passenger held not excessive. *Lambkin v. Southeastern R'y Co.*, 33 Eng. (Moak), 727; Law Reports, 5 Appeal Cases, 352. 1880.

26. — Where, without fault, the plaintiff's son, aged sixteen years, is seriously injured by the negligent management of a train, so as to be unconscious for a time and disabled for some weeks, a verdict for \$530 damages will not be held excessive. *Indianapolis and Vincennes R. R. Co. v. McLin*, 82 Ind., 435, 1882; 8 Amer. & Eng. R. R. Cases, 237.

27. — Fourteen hundred dollars damages in an action to recover for gross negligence, causing the death of the plaintiff's intestate, even if the supreme court may review the case as to damages, is not so large as to require a reversal. *Chicago and Alton R. R. Co. v. Bonifield*, 104 Ill., 223, 1882; 8 Amer. & Eng. R. R. Cases, 493.

28. — Facts stated under which a verdict for \$5,000 actual damages for personal injuries, caused by the negligence of the employes of a railway company, was held not to be so excessive as to require a reversal therefor. *Houston and Texas Central R'y Co. v. Boehm*, 57 Tex., 152, 1882; 9 Amer. & Eng. R. R. Cases, 366.

29. — In an action against a railway com-

Various Amounts held not Excessive.

pany by a lady passenger, for a personal injury caused by gross negligence, and where it appeared the injury was severe, her spine being injured permanently, she being a person of education and a teacher by profession, \$8,958 damages, while considered large, was held not so excessive as to warrant a reversal of the judgment. *Illinois Central R. R. Co. v. Parks*, 88 Ill., 878, 1878; 21 Amer. R'y Rep., 818.

30. — Where a young man, thirty years of age, engaged in an employment which has a regular system of promotions, and earning \$540 a year, was permanently disabled, a verdict of \$11,000 in an action for damages therefor was held not to be excessive. *Belair v. Chicago and Northwestern R'y Co.*, 43 Ia., 662, 1876; 14 Amer. R'y Rep., 575.

31. — A verdict for \$1,700 damages in this case not showing that the jury were actuated by passion or prejudice, this court refuses to set it aside as excessive. *Delie v. Chicago and Northwestern R'y Co.*, 51 Wis., 400, 1881; 5 Amer. & Eng. R. R. Cases, 464.

32. — A verdict for \$8,000 for the loss of a hand held not to be excessive. *Chicago and Alton R. R. Co. v. Wilson*, 68 Ill., 167, 1872.

33. — Where the plaintiff, a girl of seven years of age, was run over by a railroad car, and had one leg cut off and her right hand so crushed as to cause the amputation of two fingers, besides being otherwise injured, a verdict for \$8,100 was held to be not unreasonable. *Chicago and Alton R. R. Co. v. Murray*, 71 Ill., 601, 1874.

34. — A judgment in case of an injury to a child for \$2,000, held not so far excessive as to call for a reversal of the judgment. *Chicago and Alton R. R. Co. v. Becker*, 84 Ill., 488, 1877.

35. — In an action for permanent injuries to the person, courts will seldom disturb the award of damages, where the evidence tends to support the verdict. *Duffy v. Chicago and Northwestern R'y Co.*, 84 Wis., 188, 1874; 8 Amer. R'y Rep., 1.

36. — The plaintiff, when injured, was a farmer, sixty-two years of age, and previous to the injury he was an able-bodied, healthy man, possessed of a strong constitution, working regularly on his farm, and able

to do "a good day's work — a man's work;" and there was evidence which would have justified the jury in finding that plaintiff's injury was permanent, and would practically disable him for labor during the remainder of his life. Held, that a verdict for \$1,600 damages should not have been set aside as excessive. *Ib.*

37. — Where plaintiff suffered injuries that disabled him for life, and which were attended with great bodily suffering, a verdict of \$9,000 was held to be not excessive. *Deppe v. Chicago, Rock Island and Pacific R. R. Co.*, 88 Ia., 592, 1874.

38. — Evidence was given tending to show that the plaintiff, a man about forty years old, in the full vigor of health, was injured by a collision which occurred upon the defendant's railroad; that besides many lesser injuries the accident produced a concussion of the spine, the result of which has been chronic inflammation of the membranes which envelop the spinal chord; that the disease was a progressive one; that it had already largely impaired his faculties, both mental and physical, and that it would probably progress until paralysis and premature death ensued. Held, that a verdict in the plaintiff's favor for \$30,000 would not be set aside as excessive. *Harrold v. New York Elevated R. R. Co.*, 24 Hun (N. Y.), 184, 1881.

39. — Just before the injury complained of plaintiff was a laborer, a strong, healthy man, thirty-four years of age, and he has a wife and four children. The injury made it necessary to amputate one leg above the knee; at the time of the trial, nearly a year after the accident, he was unable to do any work, and he testified that if he walked, stood, sat or kept his leg down for any length of time he became dizzy. In view of these facts, and of the physical and mental suffering involved in the injury, this court does not find in a verdict of \$11,000 such evidence of prejudice, passion or improper bias in the jury as justifies it in reversing a judgment for that sum. *Berg v. Chicago, Milwaukee and St. Paul R'y Co.*, 50 Wis., 419, 1880; 2 Am. & Eng. R. R. Cases, 70.

40. — In view of the plaintiff's age and business at the time of the injury, his previous ability to earn money by his labor, the permanent disablement of his right hand by

Excessive Fare Charged Passenger — Exemplary.

the accident, and the pain and suffering endured, this court does not find in a verdict for \$4,500 such evidence of passion or prejudice in the jury as would warrant a reversal for excessive damages. *Schultz v. Chicago, Milwaukee and St. Paul R'y Co.*, 48 Wis., 375. 1879.

41. — The plaintiff was thirty-four years of age, a miner by occupation; by an accident his right shoulder and some of his ribs were broken, one of his legs had to be amputated, he had severe pains through his breast and sides, was confined to his bed five or six weeks, his right shoulder and arm were disabled. He had no means of support except by his personal labor. Held, that a verdict of \$15,000 is not so excessive as to indicate passion or prejudice upon the part of the jury. *Solen v. Virginia and Truckee R. R. Co.*, 13 Nev., 106. 1878.

42. — Where the plaintiff's foot was crushed so that he became a cripple by the loss of two toes and several bones from the instep, the court refused to set aside as excessive a verdict of \$5,500 damages. *Smith v. Memphis and L. R. R. Co.*, 18 Federal Reporter, 304. 1883.

43. — On a former appeal this court held a verdict for \$2,538 to be excessive, and intimated that unless the proof as to the injury suffered by plaintiff should be different on a new trial, it would regard as excessive a verdict for over \$1,200. There being some additional evidence as to plaintiff's injuries, on the second trial, this court now refuses to disturb a verdict for \$1,500. *Patten v. Chicago and Northwestern R'y Co.*, 36 Wis., 413. 1874.

44. — There were three verdicts in this case; the first for \$10,000, the second for \$12,000, and the third for \$10,000; held, that the supreme court could not, with propriety, say that the latter verdict was excessive. *Porter v. Hannibal and St. Joseph R. R. Co.*, 71 Mo., 66, 1879; 2 Amer. & Eng. R. R. Cases, 44.

45. **Excessive fare charged passenger; threat of expulsion.** A mere threat by a conductor to eject a passenger from a train unless the passenger shall pay a small amount in addition to the regular fare, because unprovided with a ticket, even though he had tried to procure a ticket and found

the ticket office closed, does not entitle him to punitive damages. In such a case, where no malice or wantonness appeared on the part of the conductor, the passenger would be entitled to recover the amount paid in excess of the regular fare, with interest. *Paine v. Chicago, Rock Island and Pacific R. R. Co.*, 45 Ia., 569. 1877.

46. **Exemplary.** A railway company is not liable in exemplary or punitive damages except when the acts of its agents, which brought about the injuries, are wanton or malicious. *Doss v. Missouri, Kansas and Texas R. R. Co.*, 59 Mo., 27, 1875; 8 Amer. R'y Rep., 462; *Illinois and St. Louis R. R. and Coal Co. v. Cobb*, 68 Ill., 53, 1878.

47. — Negligence alone is not to be visited with punitive damages. Wilful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences, is necessary to support such damages. *Kansas Pacific R'y Co. v. Lundin*, 3 Colo., 94. 1876.

48. — For the negligence of an employe, however gross or culpable, the master is not liable in punitive damages unless he is also chargeable with gross misconduct. Ordinary negligence is not sufficient to impose such a liability; it must be reckless and of a criminal nature, and must be clearly established. Such misconduct may be established, however, by showing that the act of the employe was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. *Cleghorn v. New York Central and Hudson River R. R. Co.*, 56 N. Y., 44, 1874; 6 Amer. R'y Rep., 179.

49. — In the absence of proof that the company knew of the reckless character of the agent and still retained him in its employment, vindictive damages will not be allowed; in such case the plaintiff is only entitled to compensation, as against the company, for the actual injuries sustained. Against the tortfeasor the rule is otherwise. *Nashville and Chattanooga R. R. Co. v. Starnes*, 9 Heiskell (Tenn.), 52, 1871; 19 Amer. R'y Rep., 280.

50. — If the proof fails to warrant an imputation of wilfulness, recklessness or rudeness to a passenger or property, the

Expulsion of Passenger — Injuries Causing Death.

court should, when so requested, instruct the jury not to inflict punitive damages; otherwise, if there is conflict of evidence as to any fact which, if proved, justifies their imposition. *Chicago, St. Louis and New Orleans R. R. Co. v. Scurr*, 59 Miss., 456, 1882; 6 Amer. & Eng. R. R. Cases, 341. See, also, *Same v. Jarrett*, 59 Miss., 470, 1882.

51. — Exemplary damages are allowed when the wrongful act is done with a bad motive or so recklessly as to imply a disregard of social obligations, or where there is negligence so gross as to amount to positive misconduct. *Louisville, Nashville and Great Southern R. R. Co. v. Guinan*, 11 Lea (Tenn.), 98, 1883.

52. — Punitive damages may be recovered for gross negligence. For a less degree actual damages alone should be assessed. Punitive damages ought to bear proportion to the actual damages sustained. Whenever the assessment is manifestly unjust, whether it is too small or excessive, the court, in the exercise of a wise and just discretion, should award a new trial. *Mobile and Montgomery R. R. Co. v. Ashcroft*, 48 Ala., 15, 1872.

53. — In an action against a railroad company for injuries it is error to instruct the jury that the plaintiff may recover punitive damages, if the acts of the defendant were wanton or wilful, without also including in such instruction the principle of contributory negligence on the part of the plaintiff. *Indianapolis and St. Louis R'y Co. v. Willis*, 8 Bradwell (Ill.), 242, 1881.

54. — A master is not liable, in exemplary damages, for the act of his servant, where the plaintiff would not have been entitled to recover such damages had the suit been against the servant. *Townsend v. New York Central and Hudson River R. R. Co.*, 56 N. Y., 295, 1874; 6 Amer. R'y Rep., 160.

55. **Expulsion of passenger.** The actual damages to the feelings and for personal suffering gives sufficient scope, without the allowance of exemplary damages, except in cases where the corporation itself has been remiss. *Hays v. Houston and G. N. R. R. Co.*, 46 Tex., 272, 1876; 13 Amer. R'y Rep., 281.

56. — The sum of \$400 damages, for wrongful expulsion of a passenger, held not

excessive. *Toledo, Wabash and Western R'y Co. v. McDonough*, 53 Ind., 289, 1876.

57. — A verdict of \$2,500, for the illegal expulsion of a passenger, held not excessive under the facts of a particular case. *Texas and Pacific R. R. Co. v. Casey*, 52 Tex., 112, 1879.

58. — In trespass for ejecting the plaintiff from a passenger coach near a station, where no extreme violence was used, and no malice or wanton recklessness was manifested, and the plaintiff was not seriously and permanently injured, it was held that \$2,500 damages were excessive. *Chicago, Rock Island and Pacific R. R. Co. v. Riley*, 74 Ill., 70, 1874.

59. **Injuries causing death.** In an action under stat. 9 and 10 Vict., c. 93, to recover damages for the death of a relative killed by the wrongful act, neglect or default of another person, the loss of the reasonable probability of pecuniary benefit from the continuance of the life of the deceased is a sufficient damage to maintain the action. The statute gives to the personal representative a cause of action beyond that which the deceased would have if he had survived, and based on a different principle. *Pym v. Great Northern R'y Co.*, 4 Best & Smith, 396; 116 E. C. L., 396, 1863.

60. — In an action under stat. 9 and 10 Vict., c. 93, by the wife, husband, parent or child of a person killed by misfeasance, the jury, in estimating damages, cannot take into consideration mental suffering or loss of society, but must give compensation for pecuniary loss only. *Blake v. Midland R'y Co.*, 18 Adolphus & Ellis, N. S., 93; 83 E. C. L., 98, 1852.

61. — On the trial of an action under the statute to recover damages for the killing of a person through negligence, the court instructed the jury, if they believed, from the evidence, that the plaintiff was entitled to recover, they should render a verdict for no more than \$5,000. Held, that the instruction, in a doubtful case, was calculated to improperly influence the jury to render a verdict for a large amount. *Chicago, Rock Island and Pacific R. R. Co. v. Austin*, 69 Ill., 426, 1873.

62. — Where the party killed was possessed of personality to the amount of about

Loss of Goods — Personal Injury.

\$3,400 $\frac{1}{2}$, and was tenant for life of an estate in land worth nearly 4,000 $\frac{1}{2}$ a year, with remainder to his eldest son in tail, and by settlement a jointure of 1,000 $\frac{1}{2}$ a year was settled on his wife, and 20,000 $\frac{1}{2}$ secured to the younger children on his death, and the deceased died intestate, *held*, that the widow and younger children had a sufficient expectation of pecuniary interest from the continuance of his life to render its loss the ground of an action. In that case, the jury having given 13,000 $\frac{1}{2}$ damages, *i. e.*, 1,000 $\frac{1}{2}$ for the widow, and 1,500 $\frac{1}{2}$ for each of the younger children, *held*, that this was excessive, and that the damages for each of the children ought to be reduced to 1,000 $\frac{1}{2}$. *Pym v. Great Northern Ry Co.*, 2 Best & Smith, 759; 110 E. C. L., 759. 1862.

63. — The anguish of the survivors is not to be considered in estimating the damages. *Kansas Pacific Ry Co. v. Miller*, 2 Colo., 442, 1874; 20 Amer. Ry Rep., 245.

64. **Interest.** In awarding damages for an injury resulting from a tort, compensation in the nature of interest may be included. *Lawrence R. R. Co. v. Cobb*, 35 Ohio St., 94. 1878.

65. — In actions sounding in damages the jury may allow interest or not. *Home Insurance Co. v. Pennsylvania R. R. Co.*, 11 Hun (N. Y.), 182. 1877.

66. — Interest on the value of property lost or destroyed through the negligence of the railway company may be properly included in the damages. *Varco v. Chicago, Milwaukee and St. Paul Ry Co.*, 30 Minn., 18, 1882; 11 Amer. & Eng. R. R. Cases, 419.

67. — A judgment for tort will bear interest. *Fifth Baptist Church v. Baltimore and Potomac R. R. Co.*, 2 Mackey (Dist. Col.), 458. 1883.

68. **Loss of goods.** In case of goods lost in transit the measure of damages is their value at the place of destination. *Union R. R. and Transportation Co. v. Traube*, 59 Mo., 355, 1875; 8 Amer. Ry Rep., 441.

[See CARRIAGE OF MERCHANDISE.]

69. **Malice; pleading.** Where a party intends to prove malice, to effect damages, he must expressly aver the same. *Johnson v. Chicago, Rock Island and Pacific R. R. Co.*, 51 Ia., 25. 1879.

70. **New trial.** The mere fact that damages are excessive is not a ground for new trial. They must appear to have been given under the influence of passion or prejudice. *Missouri, Kansas and Texas R. R. Co. v. Weaver*, 16 Kans., 456, 1876; *Berry v. Central Ry Co. of Iowa*, 40 Ia., 564, 1875; *Pry v. Hannibal and St. Joseph R. R. Co.*, 73 Mo., 123, 1880.

71. — In cases tried under the common law, the refusal of the court to set aside a verdict for excessive damages cannot be alleged for error in the appellate court. The decision of the court below is final. *Pabst v. Baltimore and Ohio R. R. Co.*, 2 MacArthur (Dist. of Columbia), 42. 1875.

72. **Parent and child.** Plaintiff, a man in moderate circumstances, sued for the death of his daughter, an only child, healthy and bright, and six years of age. She left her surviving plaintiff and his wife, deceased's mother, who was severely injured and crippled by the same accident. *Held*, that a verdict of \$5,000, rendered under proper instructions, should not be set aside as excessive. *Hooghkirk v. Delaware and Hudson Canal Co.*, 11 Abbott, New Cases (N. Y.), 72, 1881; 63 Howard's Practice (N. Y.), 328, 1881.

73. **Personal injury; measure of damages.** When an action is brought for an injury to the person, caused by a negligent or wrongful act not continuous in its nature, for which but one action can be maintained, the plaintiff may recover compensation for the disabling effects of the injury, prospective as well as past. In such action, to recover damages for an injury to the person, the jury may, in estimating the damages, consider the expenses of the cure; and the proper cost of future treatment or nursing, when the injury is permanent or irremediable; and the loss of time up to the verdict; and probable future loss, or incapacity to do as profitable labor as before; and suffering, mental and physical, proximately caused by the injury. *South and North Ala. R. R. Co. v. McLendon*, 63 Ala., 266. 1878.

74. — The amount of the award for loss of power to earn money, and for pain and anguish, is in the discretion of the jury. *Morris v. Chicago, Burlington and Quincy R. R. Co.*, 45 Ia., 29. 1876.

Personal Injury.

75. — In an action for personal injury the measure of damages is not such a sum as will at legal interest produce an amount equal to the value of the services lost. Such damages would be excessive. *Houston and Texas Central R. R. Co. v. Burke*, 9 Amer. & Eng. R. R. Cases (Tex.), 369. 1882.

76. — Case stated in which actual damages were claimed for personal injuries inflicted through the negligence of the common carrier, and in which it was held, not only that the plaintiff was entitled to damages for the pain and suffering caused by his injuries; to compensation for the value of time lost while rendered incapable of work, and for diminished capacity to labor up to the time of the trial, but for all future increased disability to acquired gains from labor. It was also held that, as an element of actual damage, might be estimated the fact that the injury had diminished the capacity of the injured party mentally and physically for development, whereby his gains might be increased in future life. *Houston and Texas Central R'y Co. v. Boehm*, 57 Tex., 152, 1882; 9 Amer. & Eng. R. R. Cases, 366.

77. — In assessing damages for loss of limb, the jury should consider the age, situation, bodily suffering and mental anguish of the person injured, and the loss sustained by him in consequence, and the extent he was thereby disabled from self-support. *Whalen v. St. Louis, Kansas City and Northern R'y Co.*, 60 Mo., 823, 1875; 9 Amer. R'y Rep., 224.

78. — evidence; child. In an action on the case for personal injuries, brought in the name of the child injured, the child can, if injured by defendant's fault, properly have satisfaction for the pain, suffering and permanent injury. In such suit there can be no recovery for loss of child's services and necessary expenses of the parent, as this is not the proper action in which to recover such damages; and it is error to permit a parent to testify as to such expenses, etc., in an action brought by the child. *Chicago and Alton R. R. Co. v. Lammert*, 12 Bradwell (Ill.), 408. 1883.

79. — evidence; earnings. It was competent, in an action against a railroad company for damages for personal injuries, to

show the compensation the plaintiff was receiving at the time the injury occurred. *Kline v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 50 Ia., 656. 1879.

80. — evidence; loss of arm. Evidence is unnecessary to show that the loss of an arm reduces the capacity to earn money. *Texas & Pacific R'y Co. v. O'Donnell*, 58 Tex., 27. 1881.

81. — evidence; expense of living. In an action against a railway company for damages for personal injuries, the defendant offered to show what was the average cost of living for a person in plaintiff's condition at the town in which he lived at the time he suffered the injury. *Held*, that the evidence was not admissible. *Simonson v. Chicago, Rock Island and Pacific R. R. Co.*, 49 Ia., 87. 1878.

82. — evidence; unlawful character of business. The plaintiff claimed damages for being disabled from the practice of his profession by an injury caused by the negligence of the defendants. *Held*, that the defendants might show that his practice was an unlawful one. *Jacques v. Bridgeport Horse R. R. Co.*, 41 Conn., 61, 1874; 6 Amer. R'y Rep., 1.

83. — pain and suffering. In a suit to recover damages for personal injuries sustained by the plaintiff through the negligence of the defendant, an instruction asked by the latter, that compensatory damages in favor of the plaintiff include only "the fair and reasonable expenses of his cure and the value of his time lost," is erroneous and should be refused. *Ohio and Mississippi R'y Co. v. Dickerson*, 59 Ind., 317. 1877.

84. — Compensatory damages, in such a case, should include reasonable compensation for the bodily pain and suffering necessarily attending the injury complained of. *Id.*; *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Sponier*, 85 Ind., 165, 1882; 8 Amer. & Eng. R. R. Cases, 453.

85. — In actions brought by the parties injured, mental pain and anguish are proper elements of the damages, although no malice or wantonness be charged. *Porter v. Hannibal and St. Joseph R. R. Co.*, 71 Mo., 66, 1879; 2 Amer. & Eng. R. R. Cases, 44.

86. — The court instructed the jury as follows: "In cases of this character (personal

Remittitur — Trespass.

injury), the law does not prescribe any fixed or definite rule of damages, but leaves their assessment to the good sense and unbiased judgment of the jury." *Held*, not erroneous. *Solen v. Virginia and Truckee R. R. Co.*, 13 Nev., 106. 1878.

87. — In an action to recover damages for a personal injury from being struck by a train of passing cars, on the ground of negligence, the court instructed the jury, in case they found for the plaintiff, in assessing damages they might take into consideration the plaintiff's pain and anguish of mind consequent upon such injury. *Held*, that there was no error. But mental anguish not connected with bodily injury is not proper to be considered in such a case. *Indianapolis and St. Louis R. R. Co. v. Stables*, 62 Ill., 313, 1872.

88. — In estimating the damages for personal injuries caused by negligence, the rule is that it should be such an amount as will compensate for pain and suffering, expense of physician and medicines, loss of wages if a laboring man, loss of business if engaged in business, also injury to him physically and mentally, affecting his capacity to labor or carry on business; and in considering these the jury may include not only past losses but continuing losses, where the evidence satisfies them that the injuries will continue. *Totten v. Pennsylvania R. R. Co.*, 11 Federal Reporter, 564. 1882.

89. — While future physical suffering is a proper element of damages, yet the damages should be limited to such as would result with reasonable certainty from the injury complained of, and should not be left to mere conjecture. *Fry v. Dubuque and Southwestern R'y Co.*, 45 Ia., 416. 1877.

90. — **prospective damages.** In an action on the case for personal injuries, the recovery is not limited to the actual injury, and the suffering sustained and undergone up to the time of trial, but the plaintiff may recover prospective damages for the disabling effect of the injury. *Bay Shore R. R. Co. v. Harris*, 67 Ala., 6. 1880.

91. **Remittitur.** In case of a verdict for excessive damages; where the jury appear not to have been influenced by prejudice, passion or bias, a new trial may be granted, unless plaintiff remit the excess; but the

court should not require plaintiff to remit a portion of the damages, and at the same time deprive defendant of the benefit of the reduction unless he shall submit to onerous terms; as by directing judgment to be entered for plaintiff for the whole amount of the verdict upon his filing a stipulation that if defendant shall, within sixty days, pay him a certain smaller sum, with the costs, he will enter a full satisfaction of the judgment. *Schultz v. Chicago, Milwaukee and St. Paul R'y Co.*, 49 Wis., 375. 1879.

92. — A *remittitur* may be entered in case of excessive damages, and thereupon the judgment will be permitted to stand. *C. & M. R. R. Co. v. Himrod Furnace Co.*, 37 Ohio St., 434, 1882; 3 Amer. & Eng. R. R. Cases, 471.

93. — A verdict of \$10,000 damages in favor of one severely injured by negligence of a railway company, when the plaintiff was only a day laborer, and not wholly disabled, and the negligence was not reckless, was held excessive. But a *remittitur* of \$6,000 having been entered, and judgment entered for \$4,000, *held*, that this was not so excessive as to justify a reversal. *Illinois Central R. R. Co. v. Ebert*, 74 Ill., 399. 1874.

94. — Where the verdict in an action for damages is deemed by the court excessive, it may impose upon the successful party the alternative of accepting a reduced amount, or of submitting to a new trial. *Noel v. Dubuque, etc., R. R. Co.*, 44 Ia., 293. 1876.

95. **Remote damages.** A party suing for an injury received can only recover such damages as flow from and are the immediate result thereof. Damages produced by other agencies than those causing the injury, or even by agencies remotely connected with those causing the injury, cannot be awarded as proximate or proper compensation. *Indianapolis, Bloomington and Western R'y Co. v. Birney*, 71 Ill., 391. 1874.

96. **Trespass; mines.** Where one engaged in mining and removing coal from his own land crosses the line and proceeds to mine and remove coal from the land of another, not by mere mistake, but knowingly and wilfully, in an action of trespass by the owner of the land so intruded upon, the jury will be warranted in giving punitive dam-

 Accord and Satisfaction — Right to Apply Independent Claim in Payment.

ages. *Illinois and St. Louis R. R. Co. v. Ogle*, 92 Ill., 353. 1879.

97. **Verdict.** The amount of damages is peculiarly for the jury; and unless, in view of the evidence, the damages are so excessive and disproportioned to the injury alleged as to indicate that the verdict was the result of passion, prejudice or partiality, the judgment will not, on appeal, be set aside. *International and Great Northern R. R. Co. v. Stewart*, 57 Tex., 166. 1882.

98. — Where the jury, in the absence of proper instructions respecting the measure of damages, returned a verdict for an amount which was justified by the evidence, the defendant cannot be held to have suffered prejudice by the omission. *Cooper v. Central R. R. Co. of Iowa*, 44 Ia., 184. 1876.

99. — In a suit for damages, in which both actual and exemplary damages were claimed, the verdict was for \$150 actual damages, and for \$237.50 "for insult." *Held*, the verdict by its terms excluded the idea that a larger sum than \$150 for actual damages was intended. *Galveston, Harrisburg and San Antonio R'y Co. v. Dunlavy*, 56 Tex., 256, 1882; 11 Amer. & Eng. R. R. Cases, 673.

100. **Warranty; failure of title.** One who contracts in good faith to sell lands and to convey, with covenants of warranty, can only be held liable for nominal damages, aside from the purchase money paid and the expense of examining the title. *Cockcroft v. New York and Harlem R. R. Co.*, 69 N. Y., 201. 1877.

DEAF PERSONS.

See INJURIES TO PERSONS ON THE TRACK.

DEATH

See CONTRACTORS; DAMAGES; FEDERAL COURTS; HUSBAND AND WIFE; INJURIES CAUSING DEATH; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; INJURIES TO PERSONS GENERALLY; INJURIES TO PERSONS ON THE TRACK.

1. **Accord and satisfaction; settlement with injured party before death.** Declaration by the plaintiff, as widow of R., under 9 and 10 Vict., c. 93, and 27 and 28 Vict., c. 95, against a railway company for negligence,

whereby R., a passenger, was injured, of which injuries he died. Plea, that in the life-time of R. the defendant paid him, and he accepted, a sum of money in full satisfaction and discharge of all the claims and causes of action he had against the defendant. Demurrer, on the ground that the accord and satisfaction with R. was no accord and satisfaction of the claim arising from his death. *Held*, that the cause of action was the defendant's negligence, which had been satisfied in his life-time, and that the death of R. did not create a fresh cause of action. *Read v. Great Eastern R'y Co.*, Law Reports, 3 Queen's Bench Cases, 555. 1868.

DECREE.

See MORTGAGE; RECEIVER.

1. **Right to apply independent claim in payment.** Where, by the terms of a decree rendered in its favor against a railway company, the United States was entitled to an execution thereon for a certain sum of money, and B., another company and the successor of A., and representative of its interests and assets, by petition prayed that an alleged indebtedness of the United States to B., contracted since the rendition of the decree, be applied in payment of that sum, *held*, that inasmuch as the claim of B. does not arise out of the decree, and the United States is not liable to suit thereon except in the court of claims, B. is not entitled to the relief prayed for. *Railway Co. v. United States*, 101 U. S., 639. 1879.

DEDICATION.

See DEPOT; HIGHWAYS; STREETS.

DEED OF TRUST.

See MORTGAGE.

DEFALCATION.

See AGENCY.

Miscellaneous.

DEFAULT.

See **APPEAL.**

1. **Jury trial.** Damages in the federal courts, upon default, may be assessed by the court without a jury. *Raymond v. Danbury and Norwalk R. R. Co.*, 43 Conn., 596. 1876.

2. — On default the plaintiff is not entitled to an assessment of his damages by a jury instant. *Memphis and Ohio R. R. Co. v. Dowd*, 9 Heiskell (Tenn.), 179. 1872.

3. **Setting aside.** Default set aside under the peculiar facts of the case — the general attorney of the railway company having been “unexpectedly called away from his office.” *Dupries v. Milwaukee and St. Paul R’y Co.*, 20 Minn., 156. 1873.

DEFECTIVE MACHINERY.

See **INJURY TO EMPLOYEES; INJURIES TO PASSENGERS.**

DELAYS.

See **PASSENGERS; CARRIAGE OF LIVE STOCK; CARRIAGE OF MERCHANDISE; DEMURRAGE; DAMAGES.**

1. **Breach of contract; damages.** Shoes were sold at a high price with contract to be delivered by a fixed time. Notice of this fact was given to the station agent. Delay was incurred in transportation. Held, that the loss of profits could not be considered as an element of damages. The judges were not agreed and a full discussion of the conflicting views is reported. *Horne v. Midland R’y Co.*, Law Reports, 8 Common Pleas Cases, 131, 1873; *Same Case*, 7 ib., 583; 3 Eng. (Moak), 390; 4 ib., 363, 1872.

DEMAND.

See **BONDS OF RAILWAY COMPANIES; DETINUE.**

DEMURRAGE.

1. **Delay.** If a vessel is delayed for several days at the port of destination because other vessels which have arrived there ahead of her are in turn unloading at the one elevator, there is no liability for demurrage for the delay so caused. *Finney v. Grand Trunk R’y Co.*, 11 Bissell (U. S. C. C.), 370; 14 Federal Reporter, 171. 1882.

2. — The master of a vessel received a cargo of coal to be delivered to the defendant at the port of New Haven, the consignees to have, by the bill of lading, a certain time for receiving the cargo, after which they were to pay demurrage. On arriving at the port he gave notice to the defendant, but was not able to bring his vessel to any dock on account of the ice, and was detained several days beyond the stipulated time, waiting for his turn to be towed to a dock through a way kept open in the ice by the defendant by means of a steam tug. Held, that he was not entitled to demurrage. *Holgdon v. New York, New Haven and Hartford R. R. Co.*, 46 Conn., 277. 1878.

3. — Where a cargo of corn was unloaded as soon as practicable, at defendant's elevator, it being the only elevator at the port of arrival, defendant is not liable for demurrage, notwithstanding there was a delay in unloading the cargo, arising from the fact that other vessels had arrived before the libellant's vessel, and preference was given to them in unloading. *Finney v. Grand Trunk R’y Co.*, 14 Federal Reporter, 171. 1882.

4. **Time; day.** Eight hours should be construed as eight twenty-fourths of a day and not eight-tenths. *Wiles v. N. Y. Central and Hudson River R. R. Co.*, 2 Hun (N. Y.), 109. 1874.

5. — A contract for demurrage, at \$10 a day, held to be for each day of twenty-four hours, and not for each working day of ten hours. *Wiles v. N. Y. Central and Hudson River R. R. Co.*, 4 Thompson & Cook (N. Y. Supreme Ct.), 264. 1874.

DEMURRER TO EVIDENCE.

1. **Practice upon demurrer to evidence considered.** *Green v. Pittsburgh, Wheeling and Ky. R. R. Co.*, 11 West Va., 685. 1877.

DEPOT.

See **AGENCY; BAGGAGE; CARRIAGE OF MERCHANDISE; CONTRACT; EMINENT DOMAIN; INJURIES TO PASSENGERS; STATION.**

1. **Approaches.** A railway company is bound to keep all approaches to its depots safe and convenient for use, even though

Contract—Conveyance.

the same may be within the limits of the highway. *Quimby v. Boston and Maine R. Co.*, 69 Me., 340. 1879.

2. Contract. A valid agreement by a railway company to restore an abandoned depot having been violated, the contracting party may recover the damages resulting to him from the breach of the contract. *Rich v. New York Central and Hudson River R. R. Co.*, 87 N. Y., 382, 1882; 11 Amer. & Eng. R. R. Cases, 594.

3. — mandatory injunction. The bill alleges that the defendant established one of its regular depots at Hall's on the completion of its road in July, 1882, and used it as such from July 10 to October 15, 1882. During this period defendant stopped all its trains at Hall's as at any of its other stations, receiving, discharging, transporting and forwarding to and from Hall's passengers and freights over and from its various trains. On October 15, 1882, defendant opened and established another depot about three miles distant, and entirely abandoned Hall's as one of its depots, and has all along refused, and still refuses, to stop any of its trains at Hall's, or to ship over its road, to or from Hall's, freights or passengers, to the threatened great and irreparable damage of complainants and other residents of Hall's. An injunction is asked to prohibit defendant from allowing its trains to pass Hall's without stopping as at other stations or depots on the line, and from refusing to ship and carry all freights and passengers to and from Hall's over all its trains, as it does to and from the other regular depots of the road. *Held*, that the injunction asked is of the mandatory class. Such an injunction will not be granted, under the Tennessee chancery practice, upon a mere interlocutory or preliminary application. *Hall v. Chesapeake, Ohio and Southwestern R. R. Co.*, 12 Amer. & Eng. R. R. Cases (Tenn.), 41. 1888.

4. — specific performance. The following clause, coming after the description and preceding the *habendum*, in a deed to a railway company: "But this conveyance is made upon the express condition that said railroad company shall build, erect and maintain a depot or station-house on the land herein described, suitable for the convenience of the public, and that at least one train each

way shall stop at such depot or station each day when trains run on said road, and that freight and passengers shall be regularly taken at such depot," is held to be an express condition subsequent, and not a covenant, nor specifically enforceable as one against the grantee. *Blanchard v. Detroit, Lansing and Lake Michigan R. R. Co.*, 31 Mich., 43. 1875.

5. — There is still another objection to the specific enforcement of this undertaking, in the want of details in the agreement; waiving other deficiencies, neither the specific location for the building, nor anything certain as to the plan, size, shape, materials or arrangement is given, but all this has been left substantially to the discretion of the grantee, subject only to the limitation that it should be suitable for the convenience of the public; and while this might be sufficiently definite for many purposes, it is not so for a building contract, or an agreement to be executed by the court. *Ib.*

6. Conveyance; condition. A deed to a railway company (reciting a consideration of one dollar) conveyed one tract "*only* for depot and other railroad purposes," and another parcel, adjoining the former, "for a railway," and recited that both parcels were "granted *solely* for said road purposes." These words are in the granting clauses, and the *habendum* clause is "unto the said party of the second part and to its assigns *forever*." In ejectment for said tracts of land, it was shown by oral evidence, against objection, that the only consideration for the conveyance was the condition that the railway depot should be erected on the land, the effect of which the grantor believed would be to enhance the value of her other lands in the vicinity, for building purposes. *Held*, that parol evidence as to the consideration was properly admitted, to aid in the construction of the deed. *Held*, that the grantor was still the owner of the fee. *Horner v. Chicago, Milwaukee and St. Paul R'y Co.*, 38 Wis., 165. 1875.

7. — Where real estate is conveyed to a railway company "for and in consideration of the permanent location and construction of the depot of said railroad" thereon, and such depot is constructed upon the real estate, but is subsequently removed and

Defective Walks — Persons not Passengers.

erected upon other land, the removal constitutes a breach of the implied condition subsequent contained in such deed, and such real estate reverts to the grantor. *Indianapolis, Peru and Chicago R'y Co. v. Hood*, 66 Ind., 580. 1879.

8. Defective walks. In an action for an alleged injury received in passing over a foot-walk leading to defendant's depot, by reason of the defective condition of the walk, the burden is upon the plaintiff to show that the walk where he received his injury was constructed by the defendant, and was in its possession and control as one of the approaches to its station. *Quimby v. Boston and Maine R. R. Co.*, 69 Me., 340. 1879.

9. Hotel runners; right to eject them. A railway company may make reasonable regulations for the conduct of all persons who come upon its premises, and authorize its agents and servants to remove therefrom any person who violates its regulations, using no greater force than is necessary. Where an inn-keeper, or his agent, in violation of a regulation of a railroad company, comes upon its platform for the purpose of soliciting patronage for his hotel, he may be ejected by the servants of the company, who may use such force as is necessary for that purpose. *Landrigan v. The State*, 31 Ark., 50, 1876; 18 Amer. R'y Rep., 14.

10. Location; contract restraining location; illegality. Where a party conveyed real estate to a railroad company upon an agreement or condition that the company would not establish a depot or station within three miles of a particular point, and the company violated the agreement, it was held that the condition or agreement was illegal, and that a reconveyance of the property could not be decreed on account of its violation by the railroad company. *St. Louis, Jacksonville and Chicago R. R. Co. v. Mathers*, 71 Ill., 592. 1874.

[See AGENCY.]

11. — specific performance. Equity will not enforce the specific performance of a contract on the part of a railway company to locate passenger and freight depots at a particular point and at no other point in a town, the enforcement of such contract being regarded as against public policy. *Marsh*

v. Fairbury, Pontiac and Northwestern R'y Co., 64 Ill., 414. 1872.

12. — statute. Notification of a vote, at a legal town meeting, that the town of D. "require" a railroad to "locate a depot in the town of D., on the line of said railroad, west of the Back Meadows," is equivalent to the "request" for the establishment of such depot, prescribed by Gen. Stat., c. 147, s. 14; and such vote is sufficiently definite as to location. *Nashua and Rochester R. R. Co. v. Derry*, 58 N. H., 65. 1877.

13. Persons not passengers; injury. Act of April 4, 1868. Under the sweeping terms of this act any one not a passenger, who enters the depot of a railroad company, takes the risk upon himself. *Gerard v. Pa. R. R. Co.*, 12 Philadelphia, 394. 1878.

14. — A railway company is not liable for an injury to a person resulting from its failure to exercise ordinary skill and care in the erection and maintenance of its station-house where, at the time of receiving the injury, such person was at such station-house by mere permission and sufferance, and not for the purpose of transacting any business with the company or its agents, or on any business connected with the operation of the road. So held where the injury complained of was caused by a portion of the roof blowing off and fatally injuring the plaintiff's intestate. *Pittsburgh, Fort Wayne and Chicago R'y Co. v. Bingham*, 29 Ohio St., 364. 1876.

15. — A railway company is not liable for injuries occasioned by its buildings or structures being blown down by storms where it had used that care and skill in their structure and maintenance which men of ordinary prudence and skill usually employ; and it is error in such cases to charge the jury that the company is "bound to guard against all storms which can reasonably be anticipated." *Pittsburgh, Fort Wayne and Chicago R'y Co. v. Brigham*, 29 Ohio St., 374. 1876.

16. — rights of persons not passengers. The waiting-rooms of a railway station are for the use of incoming and outgoing passengers, and while one not entering there as a passenger or on business with the company is not a trespasser, yet, upon request by an agent of the company to leave, it is his duty to do so, and upon his refusal to go it is the

Authority — Compensation.

right of the agent to eject him, using no more force than is reasonably necessary. *Johnson v. Chicago, Rock Island and Pacific R. R. Co.*, 51 Ia., 25. 1879.

17. Right to exclusive use; constitutional law. The act of February 4, 1872, ch. 32, which prohibits any railway company from constructing or maintaining any track or running any engines or cars on any street or highway so near any depot or any other railway as to endanger the safe and convenient access to such depot, and the use of it for ordinary depot purposes, being only a public regulation for the safety of the public, no constitutional objection exists against its application to a road previously chartered. *Portland, Saco and Portsmouth R. R. Co. v. Boston and Maine R. R. Co.*, 65 Me., 122, 1876; 10 Amer. R'y Rep., 117.

18. Platform; construction; town ordinance. The trustees of the village of New Rochelle were authorized to pass by-laws "to compel all persons or corporations landing passengers within the limits of said village to construct such suitable and safe platforms and accommodations as are necessary for the safety of passengers." *Held*, that the trustees had no authority to pass a by-law directing the defendant to reconstruct a platform and stairway upon land not belonging to it, but which, it was alleged, could be purchased for a reasonable sum. Nor could they enforce the same by *mandamus*. *People v. New York, New Haven and Hartford R. R. Co.*, 11 Hun (N. Y.), 297. 1877.

DEPOT GROUNDS.

See DEPOT; EMINENT DOMAIN; INJURIES TO DOMESTIC ANIMALS.

DIRECTORS.

See ATTORNEYS; INJURY TO EMPLOYEES.

1. Authority. The directors of a corporation are its primary agents, and, in reference to corporate property, act in the relation of trustees. The character of their relation requires of them the highest and most scrupulous good faith in their transactions for

the corporation and the stockholders. The law does not permit them to manage the affairs of the corporation for their personal and private advantage, nor pecuniarily to be interested in contracts which other parties make with the corporation through their influence and direction. *Ryan v. Leavenworth, Atchison and Northwestern R'y Co.*, 21 Kans., 365. 1879.

2. — A contract between two corporations, through their respective boards of directors, is not voidable at the election of one of the parties thereto, from the mere circumstance that a minority of its board of directors are also directors of the other company. *United States Rolling Stock Co. v. Atlantic and Great Western R. R. Co.*, 34 Ohio St., 450, 1878; 21 Amer. R'y Rep., 3.

3. Bills and notes; checks. An order by directors of a railway company to a bank to honor checks drawn in a particular manner imposes no liability personally upon the directors. *Beattie v. Ebury*, Law Reports, 7 English & Irish Appeal Cases, 102. 1874.

4. Collateral security; bonds. Where a director receives the corporate property as collateral security for a debt honestly due him, or a liability justly incurred, the rule forbidding dealings for his own benefit has no application, as the payment of the debt or the discharge of the obligation is an essential prerequisite of an avoidance of the transaction; and this is so whether the pledge be taken for a present or a precedent debt. *Duncomb v. New York, Housatonic and Northern R. R. Co.*, 4 Amer. & Eng. R. R. Cases, 293; 84 N. Y., 190, 1881; reversing *Same v. Same*, 23 Hun (N. Y.), 291, 1880; *Duncomb v. New York, Housatonic and Northern R. R. Co.*, 88 N. Y., 1, 1882.

5. Compensation. To entitle directors, etc., of a railway company to receive compensation for official services, such compensation must be fixed by the by-laws of the organization, or at least by a resolution of the directors spread on the minutes of their proceedings, and this before the services are rendered. *Lafayette, Bloomington and Mississippi R'y Co. v. Cheeney*, 87 Ill., 446, 1877; 19 Amer. R'y Rep., 103.

6. — If a director of such a company, under a proper employment by the company, performs services outside of the line of his

Election — Injunction against, by Stockholders.

duty as an officer, and which are usually performed by other agencies, and which are not required of him by the charter or by-laws of the company, such as procuring right of way and soliciting subscriptions, he will be entitled to compensation for such services. *Same v. Same*, 87 Ill., 446, 1877; 19 Amer. R'y Rep., 103; *Holder v. Lafayette, Bloomington and Mississippi R'y Co.*, 71 Ill., 106, 1873.

7. — But he cannot recover for services performed as a member of the executive committee, nor in making efforts to contract for the construction of the road, including time and travel, as these are a part of his duties as director. *Cheaney v. Lafayette, Bloomington and Mississippi R'y Co.*, 68 Ill., 570, 1873.

8. — Where a director of a railway company is appointed treasurer, and no provision at the time is made for his compensation, he will have no right to claim pay for the same, and the subsequent allowance of a claim in his favor will not entitle him to recover. *Holder v. Lafayette, Bloomington and Mississippi R'y Co.*, 71 Ill., 106, 1873.

9. — Before a director can recover for his services as such, it must appear that a by-law or a resolution had been adopted allowing such compensation. It will not be sufficient to prove that the matter of allowing compensation was talked over by the board when in session, where the records of the company fail to show any allowance. Where a by-law of a railway company provided that, whenever any bill against the company should be certified as correct by a majority of the executive committee, the president or vice-president should draw an order on the treasurer for the amount thereof, and that the secretary should countersign the same, which order should constitute a proper voucher against the company; and a bill for the services of a director was indorsed, "approved by the executive committee," and signed by only two of the committee, which consisted of five members, *held*, that the bill was not properly audited in pursuance of the by-law, and afforded no evidence of an account stated. *Rockford, Rock Island and St. Louis R. R. Co. v. Sage*, 65 Ill., 328, 1872.

10. — *gratuity.* A railway company cannot, at an ordinary general meeting,

make a donation to its directors on account of past services performed by them. *Hutton v. West Cork R'y Co.*, Law Reports, 23 Chancery Division, 654, 1883.

11. *Election.* Under the provision of the Revised Statutes (1 R. S., 603, § 5), authorizing any person who "may be aggrieved by or may complain of any election" of directors of a corporation to make application to the supreme court to compel a new election, only some person whose rights have been infringed and who is justly entitled to complain may institute the proceedings. *Syracuse, Chenango and New York R. R. Co., In re*, 91 N. Y., 1, 1883.

12. *Fraud.* When, for the purpose of settling a contest between the individual directors of a corporation and third persons, the corporation is made to pay the damages occasioned by the fraudulent acts of the directors, the person taking the money, with knowledge thereof, is liable to the corporation for the same. *Erie R'y Co. v. Vanderbilt*, 5 Hun (N. Y.), 123, 1875.

13. — *sales by directors to themselves.* Directors of a railroad company stand in the relation of trustees to the stockholders and creditors of the road, and are not allowed in chancery to deal with it at all for their individual benefit; but their contracts for the sale of any part of its property to one of their number are not void at law; they are only voidable in equity at the instance of any one interested in the property of the road. Such sale cannot be avoided at law by a new company (which, by purchase of its property and reorganization, has succeeded the old) obtaining possession of the property sold, and refusing to deliver it to the purchaser. *Little Rock and Ft. Smith R'y Co. v. Page*, 35 Ark., 304, 1880; 7 Amer. & Eng. R. R. Cases, 36.

14. *Injunction against, by stockholders.* A railway company was promoted and the act obtained, with the view of the line being constructed on the broad gauge, and negotiations for a lease to the G. W. R'y Co. were entered into, with the sanction of the legislature and of the then shareholders. Before, however, these negotiations had been carried into effect, a change took place in the sentiments of the shareholders by means, as it was alleged, of large purchases of shares by

Resignation — Against another Carrier.

the South-Western R'y Co., which thereby acquired the majority of votes, and the control over the new company. The chairman and six out of the ten directors, however, refused to carry out the wishes of the majority, whereupon the three directors filed a bill, praying an injunction against the seven directors. The seven directors then moved to have the bill taken off the file, and subsequently applied to have an injunction, obtained against them *ex parte*, dissolved. *Held*, by the lord chancellor, affirming the judgment of the vice-chancellor of England, that the decision of the court on the motion should stand over until an opportunity had been given to the shareholders to express their opinion as to the objects of the bill. And *held*, by the vice-chancellor, that a motion to dissolve the injunction, obtained *ex parte*, be dissolved, with costs. *Exeter and Crediton R'y Co. v. Buller*, 5 Eng. R. R. & Canal Cases, 211. 1847.

15. Liability as trustee. The director of a railroad company in all matters pertaining to the construction of its road and the acquisition of the road-way, is bound to act as the representative and for the benefit of the company. He cannot acquire for himself property which it is his duty to acquire for the company, and which is necessary for its purposes. In respect to such dealings he stands upon the same footing as an ordinary trustee. *Blake v. Buffalo Creek R. R. Co.*, 58 N. Y., 485, 1874; 6 Amer. R'y Rep., 213.

16. Not a stockholder. A person who is not a stockholder in a railway company, but is duly appointed by a city, under the statute of 1874, ch. 251, § 5, to represent it at the meetings of the stockholders and to vote on the stock which it owns therein, may be elected a director of the company. *Wight v. Springfield and New London R. R. Co.*, 117 Mass., 226. 1875.

17. Order for examination. The directors of a defendant corporation are not parties to the action, and an order requiring them to appear for examination and to produce books and papers is not authorized by § 870 of the Code of Civil Procedure. *Boorman v. Atlantic and Pacific R. R. Co.*, 17 Hun (N. Y.), 555. 1879.

18. — Nor can they be required to produce before trial, for the inspection of the oppo-

site party, the books of the corporation, or to give him sworn copies of entries therein, under the provision (§ 803) authorizing the court to compel such production or copy by "a party to an action." *Ib.*

19. — The provisions of the Code of Civil Procedure (§ 870), authorizing the taking of the deposition "of a party to an action" for trial, at the instance of an adverse party, does not authorize the examination of the directors of a corporation which is a party. *Ib.*

20. Trust relation; bonds of corporation. A director of a corporation occupies a fiduciary position, and so is within the rule forbidding one intrusted with powers to be exercised for the benefit of others, from dealing in his own behalf in respect to matters involving the trust. *Duncomb v. New York, Housatonic and Northern R. R. Co.*, 4 Amer. & Eng. R. R. Cases, 293; 84 N. Y., 190, 1881; reversing *Same v. Same*, 23 Hun, 291, 1880.

21. — The director cannot purchase the bonds of the company below par except on peril of avoidance by the courts upon application of the corporation. *Duncomb v. New York, Housatonic and Northern R. R. Co.*, 84 N. Y., 190. 1881.

22. — But as he may be the lawful holder of such bonds, knowledge upon the part of a purchaser from him for value and in good faith of bonds so bought that he is a director, does not put such purchaser upon inquiry, or charge him with constructive notice of the defect in the title. *Ib.*

DISCHARGE OF EMPLOYEE.

1. Resignation. Where the president of a company notified the general superintendent that he was discharged, but advising him that he might send in his resignation, the sending in of the resignation was held not to bar the right to recover damages for breach of contract by the discharge. *Cumberland and Pa. R. R. Co. v. Slack*, 45 Md., 161. 1876.

DISCRIMINATION.

See CARRIAGE OF MERCHANDISE; CARRIAGE OF PASSENGERS; RATES; REGULATION OF RAILWAYS; TICKETS.

1. Against another carrier. The company published a list of rates for the car-

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riage of merchandise, divided into seven classes, of which the lowest was 16s. and the highest 60s. per ton; and for "boxes, bales, hampers or other packages, when they contained parcels or other packages or things under one hundred and twelve pounds weight each, directed, consigned or intended for different persons, or for more than one person," they imposed a charge of 1d. per pound weight. *Held*, that this last was not a reasonable charge in the case of a package above five hundred pounds weight, made up by a carrier and directed to one person, although containing a number of parcels under one hundred and twelve pounds weight each, consigned or directed to different persons. The company also became a carrier on the London and Birmingham line, and published a list of charges for the carriage of goods from Manchester to London, among which "Manchester packs" were charged 3s. 3d. per hundred weight, or 65s. per ton. At the foot of this list was a notice that "goods were brought to the station at Camden Town without extra charge," and that there was "no charge for booking or delivery in London." The company made an agreement with C. & H. that the latter should carry from the station at Camden Town and deliver in London all such goods carried by the railway, and for so doing should receive 10s. per ton out of the entire charge of 65s. per ton. *Held*, that under these circumstances the charge of 65s. per ton, when made to any other persons who were ready to receive their goods at Camden Town, was both *unreasonable* and *unequal*. *Pickford v. Grand Junction R'y Co.*, 3 Eng. R. R. & Canal Cases, 193; 10 Meeson & Welsby (Exchequer), 399. 1842. See *Baxendale v. Great Western R'y Co.*, 16 Common Bench (N. S.), 137; 111 E. C. L., 135, 1864; *Same v. Same*, 14 Common Bench (N. S.), 1; 108 E. C. L., 1, 1863.

2. — The fourteenth section of the special act of the Great Northern R'y Co., 13 and 14 Vict., c. lxi, empowers the company to charge for the carriage of small parcels any sum which it may think fit. And by s. 90 of the Railways Clauses Consolidation Act, 8 and 9 Vict., c. 20, which is incorporated in the special act, after reciting that it is expedient that the company should be

enabled to vary the tolls upon the railway, so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties, etc., empowers the company to vary the tolls, "provided that all such tolls be at all times charged equally to all persons, and after the same rate in respect of all passengers, and of all goods, etc., conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly, in favor of or against any particular company or person traveling upon or using the railway." *Held*, that the company was bound to charge the public alike; and, therefore, that the fact of a party using its line being a common carrier did not justify the company in charging him more than the rest of the public. *Crouch v. Great Northern R'y Co.*, 9 Welsby, Hurlstone & Gordon (Exchequer), 556. 1854.

3. — One who holds himself as a carrier of goods between two places, one of which is beyond the confines of England, is still subject to the common law liability of a carrier for hire, and is bound to accept all goods which are reasonably tendered to him for conveyance between those limits. A common carrier has no general right to refuse to receive a parcel tendered to him for conveyance, unless informed of the nature of its contents. A railway company acting as a common carrier, and bound by statute to deal equally with all persons, cannot make a regulation for the conveyance of goods which in practice affects one individual only. *Crouch v. London and North Western R'y Co.*, 14 Common Bench, 255; 78 E. C. L., 254, 1854; 25 Eng. Law & Equity, 287. See *Same v. Great Northern R'y Co.*, 34 Eng. Law & Equity, 573. 1856.

4. — In dealing with the 17 and 18 Vict., c. 31, s. 2, — which prohibits railway companies from giving any undue or unreasonable preference or advantage to or in favor of any particular person or any particular description of traffic, or subjecting any particular person or any particular description of traffic to any undue or unreasonable prejudice or

Baggage — Competing Points.

disadvantage,—the fair interests of the company are to be taken into the account. A railway company made an agreement with A. to carry for him a large quantity of coals during three years, from Peterborough to various places on its lines of railway, at certain rates. B., a coal merchant at Ipswich, sent coals (which had been brought to that port by sea) to various places on the same lines of railway, and the company charged him a much larger sum per ton, in proportion to the distance over which his coals were carried, than they charged to A.,—the professed object of the difference being to enable A. (whose coal came to Peterborough by railway) to compete in the coal trade of the district with B., who had the advantage of having his coals brought to Ipswich by sea. *Held*, that this is giving an undue preference. *Ransome v. Eastern Counties Ry Co.*, 1 Common Bench (N. S.), 437; 87 E. C. L., 437, 1857; 38 Eng. Law & Equity, 231; 1 Neville & McNamara, 63.

5. — Injunction will issue against a railway company under the 17 and 18 Vict., c. 31, to restrain it from requiring other carriers to bring their goods to the railway station at an earlier hour than they received their goods delivered at their own receiving offices. *Baxendale v. London and South Western Ry Co.*, 12 Common Bench (N. S.), 758; 104 E. C. L., 757, 1862.

6. — Contracts between carriers to refuse the allowance of business with competing lines, and to divide the business of certain portions of the country between them, are illegal and void. *Denver and New Orleans R. R. Co. v. Atchison, Topeka and Santa Fe R. R. Co.*, 4 McCrary (U. S. C. C.), 325, 1892.

7. — The former decree in the case between these parties does not, either by its terms or by necessary implication, forbid a change in the division of freights and fares between the Atchison, Topeka and Santa Fe R. R. Co. and the Denver and Rio Grande R. R. Co., so as to decrease the share of the latter. *Denver and New Orleans R. R. Co. v. Atchison, Topeka and Santa Fe R. R. Co.*, 12 Amer. & Eng. R. R. Cases (U. S. C. C.), 1, 1893.

8. **Baggage.** The action of the Atchison, Topeka and Santa Fe R. R. Co., in refusing to check baggage beyond its own line, held

to be a violation of the decree entered in 9 Am. & Eng. R. R. Cas., 374, ordering it not to discriminate against the plaintiff. *Ib.*

9. **Carriage by sea in part.** *Held*, that s. 2 of the Railway and Canal Traffic Act, which prohibits undue and unreasonable preferences or advantages being given by railways and canal companies to particular persons, did not apply to the case of arrangements made by a railway company, whose line terminates at the sea, with a steamboat owner for carrying across the sea goods and passengers brought by the railway. *Napier v. Glasgow and South Western Ry Co.*, 1 Neville & McNamara, 293, 1865; 4 Scotch Session Cases (3d series), 87.

10. **Carriage to and from station.** Where the customer does not require a railway company to carry goods to and from the station, the company has no right to charge therefor, and a rule requiring all goods to be delivered to W. at a point distant from the station, and the refusal to permit any one but W. to carry goods to the station, was held an unjust discrimination. *Garton v. Bristol and Exeter Ry Co.*, 6 Common Bench (N. S.), 639; 95 E. C. L., 638, 1859; 1 Neville & McNamara, 218; 28 Law Journal, C. P., 306.

11. **Charter.** A railroad company is chartered solely for the purpose of performing the duties of a common carrier. The grant in its charter is nothing more than that the corporation shall have the same right of establishing tolls that a natural person has when acting as a common carrier,—a right to be exercised within the same limitations that the common law, in behalf of justice and public policy, imposes upon the natural man. *Chicago and Alton R. R. Co. v. The People*, 67 Ill., 11, 1873.

12. — The rule forbidding unreasonable charges and unjust discriminations being a common law rule, railroad companies, by accepting their charters, take them with this implied limitation upon the power granted in general terms to establish their rates of freight. *Ib.*

13. **Competing points.** The establishment permanently of less rates of freight at points of competition with other roads than is fixed at other places for the same distance can-

Connecting Lines — Coal Traffic.

not be justified by showing that the rates charged at such other places are reasonably low, and that the rates charged at competing points are unreasonably low. *Ib.*

14. Connecting lines. The court refused to grant a writ of injunction under the Railway Traffic Act, 17 and 18 Vict., c. 31, on the complaint of a company having a branch on a trunk line, to restrain the parent company from charging higher rates for the conveyance of passengers to the complainants' terminus than it charged for the conveyance of passengers to the terminus of another branch line (in which the plaintiff company was interested) extending over the same number of miles. To constitute an "undue or unreasonable preference" within the act, by reason of an inequality of charge, it must be an inequality in the charge for traveling over the same line or the same portion of the line. *Caterham R'y Co. v. London, Brighton and South Coast R'y Co.*, 1 Common Bench (N. S.), 410; 87 E. C. L., 410. 1857.

15. Constitutional law; rates beyond the state. Unjust discrimination was alleged in freight on a through contract from points in Illinois to points in another state. The court adheres to the conclusion reached in this case in 104 Ill., 476, holding § 87 of the railroad act, to prevent unjust discrimination in the rates charged for carrying passengers or freights, to be free from any constitutional objection, and holding a railway company liable to the penalty imposed by such section for discriminating in the rate of charges as to different contracts for through transportation of freights from points in Illinois to a point in another state for different distances, charging a greater sum for the less distance of the entire carriage than for the greater distances. *Wabash, St. Louis and Pacific R'y Co. v. People*, 12 Amer. & Eng. R. R. Cases (Ill.), 10. 1882.

16. Coal traffic. An injunction was asked against a railway company under the 17 and 18 Vict., c. 31, enjoining it,— "*first*, to carry for the complainant such coal and coke as he might offer; *secondly*, to charge tolls not higher than the tolls charged by it for carrying coal and coke to persons to whom coal and coke were also carried on another railway forming a continuous line

with defendant's, and tolls not higher than those charged by it to persons with whom it had private agreements for such carriage; *thirdly*, to provide for the complainant depots for depositing and receiving his coal and coke, similar to those provided for persons with whom it had private agreements, along its railway, and similar to those provided at such stations for persons who consigned their coal and coke to the company; *fourthly*, to afford to complainant the same facilities as the company afforded to persons who consigned their coal or coke to the company; *fifthly*, to provide for complainant cars for carriage of his coal and coke, and forwarding the same; *sixthly*, to afford to him all reasonable and proper facilities and accommodations for unloading at the various stations, and to afford to him at the said stations the same facilities as the company affords to colliery owners or to any other persons." It was referred to one of the masters to inquire and report upon the following questions: "*First*, whether any, and what, accommodation and facilities were provided or afforded at any, and what, stations on the line of the railway for the unloading of coal and coke, and for what persons and under what circumstances; *secondly*, whether the company carried coals or coke for persons other than the complainant on terms different from those which the company charged the complainant; *thirdly*, whether there was any difference between the circumstances under which the company had so carried coals and coke for such other persons and those under which the company had carried coals and coke for the complainant; *fourthly*, why the company was enabled to carry coals and coke for such other persons at a cost to the company less than the cost to the company of carrying coals and coke for the complainant." Upon the first point, the master reported as to the accommodation afforded by the company for unloading coals and coke at the different stations, that the company ascertained as nearly as possible the consumption in the neighborhood of each station and the sort of coal required, and entered into terms with the collieries having the particular description of coal to supply the required quantity; that a depot

Damages.

agent was appointed to manage the sale of the coals so supplied, through whom the orders were transmitted to the colliery, and who accounted to the colliery owners for the proceeds; that all the depots were allotted to such agent; that all coal dealers were treated alike; and that this course was adopted by the company for the purpose of preventing any obstruction to the general traffic of the railway. *Held*, that this was not giving an undue or unreasonable preference to any particular person or company, or subjecting any particular person to any undue or unreasonable prejudice. *Oxlade v. North Eastern R'y Co.*, 1 Common Bench (N. S.), 454; 87 E. C. L., 453, 1857; 40 Eng. Law & Equity, 234.

17. — A railway company agreed with the lessees of certain collieries to carry their coals at a somewhat lower rate of tonnage than it carried for others, in consideration of the owner of those collieries having laid out a large sum in constructing tram-ways to connect them with the railway; it also made a further reduction, under the influence of a threat, that, unless it acceded to the terms proposed by the lessees, the owner would construct another line of railway direct from the collieries to the place of shipment, for the use of his tenants, and so would divert from the company a very considerable and essential portion of its traffic. *Held*, that neither of these was a justifiable reason for the "undue preference" thus given. *Harris and the Cocker-mouth R'y Co. In re*, 3 Common Bench (N. S.), 692; 91 E. C. L., 692. 1858.

18. — By its scale of tariff, a railway company divided the places through which its lines passed into districts, and charged at a reduced rate per ton for coals carried a given distance from Peterborough or Ipswich respectively, when consigned in full train loads of two hundred tons or thirty-five trucks. The advantage of this reduced rate was given to persons consigning coals from Peterborough to one of these districts in full train loads, though on their arrival at Cambridge, the company, for its own convenience, thought fit to break up the train and carry about one-third of it forward by the ordinary goods trains,—the whole consignment, however, ultimately finding its

way into the district to which it was addressed by the consignor. *Held*, that this was not giving any undue preference to the Peterborough coal dealers, or imposing any undue prejudice on the Ipswich dealers; although the latter were unable to avail themselves of the lower rate of charge for coals consigned by them to the same district, by reason of the insufficiency of the demand for sea-borne coals at the places comprised therein. *Ransome v. Eastern Counties R'y Co.*, 8 Common Bench (N. S.), 709; 98 E. C. L., 708, 1860; 29 Law Journal (Common Pleas), 329; 1 Neville & McNamara, 155.

19. — The desire to introduce northern coke into Staffordshire was held not to be justifiable ground for giving a special rate therefor. *Oxlade v. North Eastern R'y Co.*, 40 Eng. Law & Equity, 234, 1856; 1 Common Bench (N. S.), 454; 26 Law Journal (Common Pleas), 129; 1 Neville & McNamara, 72.

20. — *renting cells.* The N. E. R'y Co. carried coals to certain stations on its line for colliery owners only, and at such stations there were cells for the receipt and sale of the coal let to the colliery owners for their separate use at rents averaging less than 3d. per ton on the coal sold, and also unappropriated cells for the receipt of coal sent by colliery owners not renting cells. The latter were charged a higher rate of carriage than the colliery owners renting cells, and in addition a charge of 3d. per ton in lieu of rent. The rent and charge respectively covered all terminal services, but the services rendered the colliery owners renting cells exceeded those rendered at the unappropriated cells. *Held*, that the extra charge for carriage, and the charge of 3d. per ton in lieu of rent, occasioned an undue prejudice to the colliery owners not renting cells. *Locke v. Eastern R'y Co.*, 3 Neville & McNamara, 44. 1877.

21. *Damages.* Where, at a former term of the court, it was decided that the receiver of a railway company, by the adoption of a contract with a third party and settlements with him thereunder, had discriminated against the plaintiffs in the rates charged them for transportation of wheat and grain over the railway operated by him, contrary to the provisions of the state statute, and that plaintiffs were entitled by law to have

Exclusive Privilege — Injunction.

their grain carried over said line at rates which would put them on an equal footing with said third party for like transportation, and it was referred to a special master to take an account of the amount of such unfavorable discrimination, and to report the result of such examination, *held*, that the amount of the fund which, under the contract, could be used to pay such third party's commissions, and all expenses incident to the business and the receiver's freight, is the difference between the prime cost of the wheat shipped and the net proceeds of sales, deducting freights and charges incurred upon other lines, and after the shipment left the receiver's road; and that the amount of discrimination is the difference between such amount, after deducting therefrom expenses, compensation, rent of warehouses, interest, exchange, insurance, and the outlay at way stations made by the receiver to secure the trade, and the amount of the freight charged to such third party according to tariff rates; and that a decree be entered accordingly. *Griesser v. McIlrath, Receiver, etc.*, 4 McCrary (U. S. C. C.), 412. 1882.

22. Exclusive privilege. A contract of a railway company which gives to certain persons an exclusive advantage or monopoly over all other transporters in the transportation of goods is unjust and cannot be legally enforced. *Messenger v. Pennsylvania R. R. Co.*, 37 N. J. Law, 531, 1874; *Union Locomotive and Express Co. v. Erie R'y Co.*, 37 N. J. Law, 23, 1874.

23. Illegality. An agreement by a railway company to carry goods for certain persons at a cheaper rate than they will carry under the same conditions for others is void as creating an illegal preference. *Messenger v. Pennsylvania R. R. Co.*, 36 N. J. Law, 407, 1873; 12 Amer. R'y Rep., 393.

24. Injunction. The court will not grant an injunction against illegal charges until the illegality is established at law. *Pickford v. Grand Junction R'y Co.*, 3 Eng. R. R. & Canal Cases, 538. 1844.

25. — It is competent to the court, under the Railway Traffic Act, 17 and 18 Vict., c. 31, s. 2, to interfere to prevent a railway company from fixing the rate of tolls to be taken on the railway with a view to the promotion of its own interests, where such act subjects

others to unreasonable disadvantage, or operates to their prejudice by giving undue preference to third parties. *Bawendale and Great Western R'y Co., In re*, 5 Common Bench (N. S.), 336; 94 E. C. L., 336, 1858; 1 Neville & McNamara, 202; 28 Law Journal, C. P., 81; 4 Jurist (N. S.), 1279.

26. — The plaintiff, a "packed parcel" carrier, having been charged by the defendant, and having paid to it under protest, a sum for the carriage of his packed parcels beyond the sum charged by it to certain wholesale houses for the carriage of goods of a similar description, brought an action against it to recover the amount of the overcharge, and obtained a verdict, which was afterwards upheld in the exchequer chamber, upon argument of a bill of exceptions. The defendant continued, however, to make the same charges and to receive the same sums of money from the plaintiff for the carriage of his goods as before, and he therefore issued a fresh writ to recover the money paid by him during another and more recent interval of time. After issuing the writ he applied, under the provisions of the Common Law Procedure Act, 1854 (17 and 18 Vict., c. 125), ss. 79, 82, for an injunction to restrain the defendant from charging him for the carriage of his goods "otherwise than equally with all other persons, and after the same rate, in respect of goods of the like description under the like circumstances." *Held*, that the case was not one in which the court would exercise its statutory power to grant an injunction. *Sutton v. South Eastern R'y Co.*, Law Reports, 1 Exchequer Cases, 32. 1855.

27. — A. collected parcels and forwarded them by railway; the railway company refused to admit A.'s vans into its station after 6:30 P. M., but admitted its own vans and those of B. at a later hour with parcels, which it forwarded the same night. The time (6:30 P. M.) fixed by the company, as that after which it would not receive goods to be forwarded the same night, was reasonable. The company in admitting its own vans later acted *bona fide*, and not with the intention of gaining an undue advantage over other collecting carriers; it admitted B.'s vans in consequence of an injunction obtained by him. In two similar cases, in-

Jurisdiction of Railway Commissioners — Overcharge.

junctions under the Railway and Canal Traffic Act, 1854 (17 and 18 Vict., c. 31), s. 3, had been granted by this court to restrain those companies from admitting their own vans into their station with goods to be dispatched the same night at a later hour than those of other persons. On an application by A. for a similar injunction against the present defendants, *held* (by Erle, C. J., and Montague Smith, J.), that the exercise of this special jurisdiction by the court being subject to no review, and depending in each instance on the special facts of the case, cases previously decided under it are not binding on the court in the same manner that precedents in law are binding; that the injunction prayed would interfere with the transport of traffic, which it was the object of the legislature to facilitate, and that it ought not to be granted. *Palmer and London and Southwestern R'y Co., In re*, Law Reports, 1 Common Pleas Cases, 588. 1866. *Contra, Same Case*, Law Reports, 6 Common Pleas Cases, 194; 1 Neville & McNamara, 271. 1871.

28. Jurisdiction of railway commissioners. The commissioners have jurisdiction to inquire into a complaint of undue preference being shown by railway companies to one town or place over another town or place. *Dover v. South Eastern R'y Co.*, 1 Neville & McNamara, 349. 1873.

29. Lex loci contractus governs. The legality of a contract is determined by the *lex loci contractus*. A railway company incorporated for the conveyance of passengers and goods from London to Folkestone, under acts of parliament which prohibited it from making unequal charges, obtained another act enabling it to establish a communication by steam vessels with Boulogne, which last mentioned act contained no provision as to equality of rates for the carriage of goods. There was nothing in the law of France which disabled the company as a public carrier from making such contracts for that purpose as it might think most for its own interest. The company by its tariff charged certain rates for small parcels, with double charge for "packed parcels." *Held*, that, so far as regarded the contract for the carriage of such parcels from Boulogne to London, there was nothing illegal in this charge.

Branley v. South Eastern R'y Co., 12 Common Bench (N. S.), 63; 104 E. C. L., 63. 1862.

30. Live stock; conditions of shipments. No recovery can be had from a railway company under s. 10, ch. 68, Laws of 1874, for discrimination in charges for cars between different shippers of stock, unless it is shown that the shipments were made upon like conditions. *Paxon v. Illinois Central R. R. Co.*, 56 Ia., 427. 1881.

31. Main and branch lines; rates. The G. R'y Co. leased a branch line, on which F., a coal owner, resided; and made two tables of rates for coals—one applicable to the main line and the other to the branch line, the latter being the higher of the two rates. When F. sent his coals along the branch line, he was charged at the branch rates, but when his coals got to the main line, then at main rates; whereas, when coal owners living on the main line sent their coals from the main line on to the branch line, they were charged for the whole distance (*i. e.*, both on the branch and the main line) at the main line rates only. The special act applicable to the branch line (which also incorporated the Railways Clauses Act) provided that the rates should "be made equally to all persons in respect of goods passing over the same portion of, and over the same distance along, the railway and under the like circumstances, and no reduction or advance shall be made partially, either directly or indirectly, in favor of or against any particular person." *Held* (the two lords differing in opinion), that the rates charged upon F. was no violation of the equal rates clause. *Finnie v. Glasgow and South Western R'y Co.*, 34 Eng. Law & Equity, 11. 1855.

32. Overcharge; connecting lines; recovery back. The Bristol and Exeter R'y and the Great Western R'y are continuous lines, but are worked by independent companies; and by their acts of parliament are bound to charge all persons equally under the same circumstances for the carriage of goods, etc. By the scale bills issued by each of the companies, certain sums were specified as the charges for the carriage of goods where the goods were to be collected and delivered by the companies; and a smaller sum was specified as chargeable where the

Packed Parcels.

goods were to be collected and delivered by the parties themselves. The plaintiff, a carrier, sent certain goods which he had undertaken to collect and deliver on his own account by the Bristol and Exeter R'y Co., to be carried upon both lines of railway, but he objected to the charges as being excessive, and paid the whole amount claimed under protest. *Held*, first, that he was entitled to recover back the amount so paid in excess of what was a fair and reasonable charge, in an action of money had and received, although he had not made any tender of any specific sum as a fair and reasonable charge; and secondly, that the whole sum so paid in excess was recoverable from the Bristol and Exeter R'y Co., although it had received a portion of it as agent only of the Great Western R'y Co. *Parker v. Bristol and Exeter R'y Co.*, 6 Welsby, Hurlstone & Gordon (Exchequer), 702; 7 Eng. Law & Equity, 528; 20 Law Journal Rep., N. S. (Exch.), 442, 1851; *Parker v. Bristol and Exeter R'y Co.*, 6 Eng. R. R. & Canal Cases, 776, 1851.

33. Packed parcels. Where a higher rate was charged to S. for packed parcels contained in large packages than was charged to other persons, *held*, that was an inequality for which S. was entitled to maintain an action. *Sutton v. Great Western R'y Co.*, 3 Hurlstone & Coltman (Exchequer), 800, 1865; *Garton v. Bristol and Exeter R'y Co.*, 4 Hurlstone & Norman (Exchequer), 33, 1859.

34. — A railway company by its act of incorporation was empowered to fix the sum to be charged by it in respect of the carriage of small parcels (not exceeding one hundred pounds each), "as to it should seem proper;" but that provision was not to extend to "articles, matters or things sent in large aggregate quantities, although made up of separate and distinct parcels, such as bags of sugar, coffee, meal, and the like, but only to single parcels unconnected with parcels of a like nature which might be sent upon the railway at the same time." By a subsequent act it was provided "that the charges by that act authorized to be made for the carriage of goods, etc., by the company, should be at all times charged equally to all persons, and after the same rate, in respect of all goods of a like description and con-

veyed on the same portion of the line; and that no reduction or advance should be made either directly or indirectly in favor of or against any particular company or person. *Held*, that the company was restricted to a reasonable charge, and was not justified in making an increased charge in respect of the conveyance of "packed parcels," the jury having negatived that any additional risk or expense was incurred in the carriage thereof. *Piddington v. South Eastern R'y Co.*, 5 Common Bench (N. S.), 111; 94 E. C. L., 109. 1858.

35. — By special acts a railway company was entitled to charge for goods carried on its line at rates not exceeding certain rates per ton. It was permitted to charge a higher rate for small parcels not exceeding five hundred pounds weight, provided that articles sent in large aggregate quantities, although made up of separate parcels, such as bags of sugar, coffee, meal, and the like, shall not be deemed small parcels, but such term shall apply only to single parcels in separate packages. Plaintiff, a carrier, sent to the company at once many packages, all consigned to one consignee, each less than five hundred pounds of articles of similar classes, but not being separate packages of one article. The company charged for them as separate parcels. *Held*, that they were justified in so doing; the proviso applying only to articles that were of such a nature that a large quantity was generally made up in separate packages. *Parker v. Great Western R'y Co.*, 6 Ellis & Blackburn, 77; 88 E. C. L., 76; 34 Eng. Law & Equity, 301. 1856.

36. — By s. 171, 5 and 6 W. 4, c. cvii, the company was empowered to fix the charges on small parcels of not to exceed five hundred pounds weight, as to it might seem proper; provided that the provision should not extend to articles in large aggregate quantities, although made up in separate parcels, but only to "single parcels unconnected with others of a like nature." Under this statute the company issued a "scale bill" on which was an intimation that it would charge for packed parcels fifty per cent. additional upon goods received from other carriers only, and which additional was not charged the general public. *Held*, an inequality under the statute. *Parker v. Great Western R'y Co.*, 11 Common Bench,

Passenger Rates — Quantities.

545; 73 E. C. L., 545. 1851. See *Parker v. Great Western R'y Co.*, 8 Eng. Law & Equity, 426; 21 Law Jour. Rep. (N. S.), C. P., 57. 1851.

37. — The fact that the person wanting the goods carried was also a carrier does not constitute a dissimilarity of circumstances so as to justify the increased charge. *Edwards v. Great Western Railway Co.*, 11 Common Bench, 588; 73 E. C. L., 588, 1851; 8 Eng. Law & Equity, 447; 21 Law Jour. Rep. (N. S.), C. P., 72, 1851.

38. — A railway act provided that the charges of the company should be reasonable and equal to all persons. The company carried goods for other carriers, to whom it made certain allowances as an equivalent for the trouble of collection, etc., of parcels. But in its dealings with A., a particular carrier, it refused to make such allowances. *Held*, that the charges were not equal and reasonable. *Parker v. Great Western R'y Co.*, 7 Manning & Granger, 253; 49 E. C. L., 252, 1844; 3 Eng. R. R. & Canal Cases, 563.

39. — The defendant, a railway company bound by its act of parliament to take the same rates and tolls from all persons alike under the same or similar circumstances, charged a tonnage rate upon goods over one cwt., and a higher rate for articles under that weight. Where several parcels, each under one cwt., were delivered to the defendant by one person in a single assignment at one and the same time and addressed to the same consignee, the defendant charged a tonnage rate upon their aggregate weight. The plaintiffs, common carriers, sent by the defendant's railway large consignments of goods directed to themselves as consignees, each consignment consisting of several packages, many of them having the names and addresses of the persons to whom the plaintiffs intended to deliver them. The defendant charged the plaintiffs for each package contained in each consignment according to the weight of the package. *Held*, an inequality of charge, and that the plaintiffs were entitled to recover back the excess. *Baxendale v. London and South Western R'y Co.*, 4 Hurlstone & Coltman (Exch.), 180. 1866.

40. Passenger rates. The court refused to grant a rule for an injunction against the

Eastern Counties Railway Company, under the Railway and Canal Traffic Act, 1854, to compel it to issue season tickets between Colchester and London on the same terms as it issued them between Harwich and London, upon a mere suggestion that the granting the latter (the distance being considerably greater) at a much lower rate than the former was an undue and unreasonable preference of the inhabitants of Harwich over those of Colchester. *Jones v. Eastern Counties R'y Co.*, 1 Neville & McNamara, 45, 1858; *Jones and Eastern Counties R'y Co., In re*, 3 Common Bench (N. S.), 718; 91 E. C. L., 716, 1858.

41. — A railway company having fixed the rates for passengers traveling between the termini of the line according to a much lower scale than the rates charged for passengers traveling between intermediate stations, *held*, that no one has a title to complain of such proportional rating, unless there be a competition of interest, or unless the complainer set forth personal disadvantage to himself; the mere statement that the complainer has frequent occasion to travel upon the railway not being sufficient. *Hozier v. Caledonian R'y Co.*, 1 Neville & McNamara, 27. 1855.

42. Quantities; rates. The second section of the Railway and Canal Traffic Act, 1854, is not contravened by a railway company carrying at a lower rate, in consideration of a guaranty of large quantities and full train loads at regular periods, provided the real object of the company be to obtain thereby a greater remunerative profit by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guaranty. *Nicholson v. Great Western R'y Co.*, 1 Neville & McNamara, 121, 1858; 5 Common Bench (N. S.), 866; 28 Law Journal, Common Pleas, 89; 4 Jurist (N. S.), 1187.

43. — Discrimination in the rates of freight charged by a railroad company to shippers, based solely on the amount of freight shipped, without reference to any conditions tending to decrease the cost of transportation, are discriminations in favor of capital, and contrary to sound public policy. *Hayes v. Pennsylvania Co.*, 12 Federal Reporter, 809, 1882.

Special Agreements — Undue Preference.

44. — The plaintiffs were engaged in mining coal at Salineville, Ohio, for sale in the Cleveland market. They were wholly dependent on the defendant for transportation. The regular tariff between those points was \$1.60 per ton, with a rebate of from thirty to seventy cents per ton to persons shipping over five thousand tons during a year; the amount of rebate being graduated according to the quantity shipped. Under this schedule plaintiffs were required to pay higher rates on the coal shipped by them than were exacted from other and rival parties, who shipped larger quantities. The defendant claimed that the discriminations were made in good faith, to stimulate production and increase its tonnage, and were within the discretion confided by law to every common carrier. In an action to recover back the excess of tariff paid by plaintiffs, *held*, that such discriminations were illegal, and that plaintiffs were entitled to recover the amount paid by them in excess of the rate accorded to their most favored competitor, with interest thereon. *Ib.*

45. **Special agreements.** Special agreements in regard to carriage of goods, giving special advantages, are not illegal where the carrier is willing to afford the same facilities to others upon the same terms. *Nicholson and Great Western R'y Co., In re*, 5 Common Bench (N. S.), 366; 94 E. C. L., 366, 1858; *Same Case*, 7 Common Bench (N. S.), 755; 97 E. C. L., 754, 1860.

46. — It is not a valid consideration for a reduced rate that the party favored is a customer also of the same railway company in goods of a different kind. *Bellsdyke Coal Co. v. North British R'y Co.*, 2 Neville & McNamara, 105. 1875.

47. **Stock yards.** A railroad company cannot bind itself to deliver to a particular stock yard all live stock coming over its line to a certain point, but it is bound to transport over its road and deliver to all stock yards at such point, reached by its tracks or connections, all live stock consigned, or which the shippers desire to consign, to them, upon the same terms and in the same manner as under like conditions it transports and delivers to their competitors; and the performance of this duty may be compelled by injunction at the suit of the proprietor

of the stock yards discriminated against. *McCoy v. Cincinnati, etc., R. R. Co.*, 13 Federal Reporter, 3. 1882.

48. **Statute; rates.** An absolute power in an act of parliament to fix charges for railway carriage is not rendered conditional by a subsequent clause requiring that all the charges made shall be made equally on like goods carried under like circumstances for all persons. The condition only attaches after the power has been exercised. The words "goods of a like description and quantity" and "conveyed along the railway under the like circumstances," in the 7 and 8 Vict., c. iii, and "goods of the same description" and "under the same circumstances," in the Railways Clauses Act, are used, not with reference to the contents of the parcels, but to the parcels themselves, that is, like or different for the purposes of carriage; and these words are used with reference to the conveyance of goods and not to the persons who send them. *Great Western R'y Co. v. Sutton*, Law Reports, 4 English & Irish Appeal Cases, 226. 1868.

49. **Undue preference.** A railway company permitted a carrier (who also acted as superintendent of its goods traffic) to hold himself out as its agent for the receipt of goods to be carried on its line, and his office as the receiving office of the company; and goods were received by him at that place without requiring the senders to sign conditions which the company required all other carriers who brought goods to its station to sign. *Held*, an undue preference, and the subject of an injunction under the 17 and 18 Vict., c. 21. *Baxendale v. Bristol and Exeter R'y Co.*, 11 Common Bench (N. S.), 787; 103 E. C. L., 787, 1862; 1 Neville & McNamara, 229.

50. — A railway company, with the object of discouraging the construction of a competing line, carried slate for certain quarry owners, who agreed to send all their slate over the railway company's line for a fixed number of years, at a less rate than it charged for the same service to the complainant quarry owners, who were offered, but refused to bind themselves by, such an agreement. *Held*, that this was an undue preference within the meaning of the Railway and Canal Traffic Act, 1854, § 2. *Diph-*

Unequal Rates — Unloading Goods.

wys Casson Slate Co. v. Festiniog R'y Co., 2 Neville & McNamara, 73. 1874.

51. — It is not a legitimate ground for giving a preference to one of the customers of a railway company, that he engages to employ other lines of the company for the carriage of traffic distinct from and unconnected with the goods in question; and it is undue and unreasonable to charge more or less for the same service, according as the customer of the railway thinks proper or not to bind himself to employ the company in other and totally distinct business. *Baxendale and Great Western R'y Co.*, *In re*, 5 Common Bench (N. S.), 309; 94 E. C. L., 308, 1858; 1 Neville & McNamara, 191; 28 Law Journal, Common Pleas, 69; 4 Jurist (N. S.), 1241.

52. — The Great Western R'y Co. had an office at C. for the reception of goods to be carried by it on its railway, and an agent there to whom goods arriving at the station addressed to persons residing in Cirencester were intrusted for delivery on account and for the profit of the company. The complainant, a common carrier at C., complained that the company refused to recognize or act upon general orders signed by the consignees of goods directing the company to hand over to him (the complainant), for delivery, all goods which might arrive at the C. station, addressed to such consignees; but that they required him (the complainant) to produce on each occasion a special order, describing the particular goods which the consignees desired to have delivered to them by him; no such special (or any) orders being required from the company's own agent. *Held*, that this was ground for an injunction under the Railway and Canal Traffic Act, 17 and 18 Vict., c. 31, s. 2, it being an undue and unreasonable prejudice to the complainant in the conduct of his business of a carrier, and an undue preference and advantage to the company itself. *Parkinson v. Great Western R'y Co.*, Law Reports, 6 Common Pleas Cases, 554. 1871.

53. — A railway company, with a view to compete with other carriers in the collection and carriage of goods, established receiving offices in various parts of London, from which goods were brought in vans to the railway station. The gates of the station

were closed against the vans of the complainant and other carriers at 6:30 P. M., . . . but the company's own vans were admitted at a much later hour, and the goods brought by them were forwarded by the same night's trains. *Held*, that this was giving an undue and unreasonable preference to the company's own traffic, to the prejudice of the complainant; and a rule for an injunction under the Railway and Canal Traffic Act (17 and 18 Vict., c. 31), s. 2, was made absolute with costs. *Palmer and London and Brighton R'y Co.*, *In re*, Law Reports, 6 Common Pleas Cases, 194, 1871; 1 Neville & McNamara, 271.

54. — distance of carriage. The company made a scale of charges for the carriage of coals from Peterborough and Ipswich respectively to various places, the effect of which was to diminish the natural advantages which the Ipswich dealers possessed over those of Peterborough, from their greater proximity to those places, by annihilating (in point of expense of carriage) in favor of the latter a certain portion of the distance between Peterborough and those places. *Held*, an undue preference to the Peterborough dealers over those of Ipswich. *Ransome and Eastern Counties R'y Co.*, *In re*, 4 Common Bench (N. S.), 135; 93 E. C. L., 135; 27 Law Jour. (N. S.), Common Pleas, 166; 4 Jurist (N. S.), 282; 1 Neville & McNamara, 109. 1858.

55. Unequal rates. A common carrier is bound to charge only reasonable rates for the carriage of goods. Such requirement does not compel the carrier to charge equal rates to all persons. And a contract to give a certain lumber company a reduced rate in preference to all others is not invalid, where the charges made to other parties are not unreasonable. *Johnson v. Pensacola and Perdido R. R. Co.*, 16 Fla., 623. 1878.

56. Unloading goods. The S. W. R'y Co. had been in the habit of unloading goods coming by its line from the Southampton docks consigned to carriers in London, out of its trucks, and of placing them (by its servants) in or conveniently near to the wagons of the consignees, without any extra charge. This practice it discontinued, refusing to allow its servants to unload the trucks without an extra charge for such

Contract—Costs—Stock and Stockholders.

service, except in the case of Messrs. Pickford, whose goods it continued to unload as before, the smallness of their quantity, and the fact of their being carried intermixed with the company's own traffic, rendering it (as the company alleged) more convenient to itself so to do. C., however, another carrier, was denied the aid of the company's servants in the unloading of his goods of the same description, and coming from the same place, the company alleging that the same reasons did not apply to his goods as to Messrs. Pickford's, inasmuch as the former came in large quantities and in separate trucks. The court refused to make absolute a rule for an injunction under the Railway Traffic Act, 1854 (17 and 18 Vict., c. 31), enjoining the company to unload the trucks containing C.'s goods, and to deliver such goods to C. by placing the same in or adjacent to his wagons,—holding the demand to be too large. But they intimated that, if C.'s complaint had been confined to the company's giving an advantage to Messrs. Pickford in the unloading of their goods, which they withheld from him, C. might have been entitled to relief under the statute. *Cooper v. London and South Western R'y Co.*, 4 Common Bench (N. S.), 738; 93 E. C. L., 738; 1 Neville & McNamara, 185; 27 Law Jour. (N. S.), Common Pleas, 324. 1858.

DISPATCH COMPANIES.

See CARRIAGE OF MERCHANDISE; CONNECTING LINES.

1. Contract. A contract between A., a dispatch company, and B., a railroad company, whose road, in connection with those of other companies, forms a continuous line, stipulated that B. should "receive, load and unload, deliver and way-bill," all freight sent to it by A., at such rates for transportation as may be established by the railroad companies, and should, while assuming all the risks of a common carrier, pay for all damage to or loss of property while on its road or in its possession. A similar contract was entered in by A. with each of the other companies, between which there was an arrangement that the amount charged for the through freight should be divided between them according to the length of their re-

spective roads; that each company should pay for losses occurring on its road; and that on such freight the last carrier should collect the charges from the consignee, deduct its share thereof, account in the same way to the next company, and so on to the first. Settlements were made by the railroad companies, periodically, upon accountings between them, and each settled separately with A. *Held*, 1. That B., by its agreement with A., incurred neither an obligation to carry freight beyond its own road, nor a liability for the negligence of either of the other companies. 2. That the arrangement between the railroad companies did not make them partners *inter sese* or as to third persons. *Insurance Co. v. Railroad Co.*, 104 U. S., 146, 1881; 3 Amer. & Eng. R. R. Cases, 260.

DISSOLUTION.

1. Costs. Where the directors of a railway company, in pursuance of the statute (S. & S., 243), applied to the court for a decree to dissolve the corporation, on the ground that the object of its creation had wholly failed or become impracticable, and it appeared to the court that the corporation had no property liable to execution for payment of the costs of the proceeding, *held*, that it was proper for the court to order that the directors should pay said cost, and that in default of such payment execution should issue against them therefor. *Godley v. Pugh*, 29 Ohio St., 438. 1876.

2. Stock and stockholders. A joint stock company was formed for making a railroad, but some time afterwards the project was abandoned. One of the shareholders then filed a bill, on behalf of himself and all the other shareholders, except the members of the managing committee, who were made defendants, praying for an account of the moneys received, and the expenses properly incurred, by the defendants, on account of the company; that the plaintiff and the other shareholders might be declared liable to contribute to such expenses in proportion to the number of their shares, or in such other proportion as the court should think just; and that such proportion might be deducted out of the deposits on their shares,

Miscellaneous.

and the residue be repaid to them; and that the surplus of the moneys in the hands of the defendants, after discharging the debts and liabilities of the company, might be applied in aid of the objects of the suit, as the court should direct. A demurrer to the bill, for want of equity and want of parties, was overruled. *Cooper v. Webb*, 15 Simons (Eng. Ch.), 454. 1846.

3. Winding up of railway companies. The jurisdiction of the court is not affected by the 9th and 10th Vict., ch. 28, for facilitating the winding up of certain railway companies. *Jones v. Lord Charlemont*, 16 Simons (Eng. Ch.), 271. 1848.

DITCHES.

1. Personal injury. A railway company is entitled to the exclusive use of its grounds, except at lawful crossings of public and private ways. Without a breach of legal duty, it is not guilty of actionable negligence. This rule applied to a personal injury by reason of a traveler falling into a ditch. *Omaha and Republican Valley R. R. Co. v. Martin*, 14 Neb., 295. 1883.

2. Right to dig; grant. A written instrument granting a railroad company the right to dig a channel over the land of the grantor creates an easement, not a revocable license. *Cook v. Chicago, Burlington and Quincy R. R. Co.*, 40 Ia., 451. 1875.

3. — Where the owner of real estate had granted to a railroad company the right to dig a channel through his land, and while the work was in progress had conveyed the land to another, *held*, that the nature of the work was such as to put the grantee upon inquiry respecting the authority under which it was prosecuted. *Id.*

DIVIDENDS.

See STOCK AND STOCKHOLDERS.

DOGS.

See CARRIAGE OF LIVE STOCK.

DOMICILE.

See CHARTER; CONSOLIDATION; REMOVAL OF CAUSES.

DOWER.

1. Purchase of land for railway uses. The purchase, under Gen. Stats., ch. 68, § 10, by a railway company, of land without the limits of its road necessary for depot and station purposes, does not extinguish an existing inchoate right of dower therein. Had the land been taken by proceedings of condemnation, would the dower have been extinguished, *query?* *Nye v. Taunton Branch R. R. Co.*, 113 Mass., 277. 1878.

DRAIN.

1. Costs. Where a railway company is sued for damages for failure to construct a drain, and the damages recovered do not amount to \$50, the plaintiff cannot recover costs. Rev. St., § 397, 1876; *Baltimore, Ohio and Chicago R'y Co. v. Crissman*, 11 Amer. & Eng. R. R. Cases (Ind.), 410. 1883.

DRAINAGE.

1. Implied grant. Implied grants are not to be favored. Thus, a right of drainage through the grantor's adjoining land will not pass by implication (the deed being silent thereon), unless such right is clearly necessary to the beneficial enjoyment of the estate conveyed, though a drain has already been constructed through the adjoining land, and is in use at the time of the conveyance. *Dolliff v. Boston and Maine R. R. Co.*, 68 Me., 173. 1878.

DRAWBACKS.

See CARRIAGE OF MERCHANDISE; DISCRIMINATION; RATES.

DRAW-BRIDGE.

See DAMAGE; EMINENT DOMAIN.

DRUNKENNESS.

See INJURIES TO EMPLOYEES; INJURIES TO PERSONS ON THE TRACK.

Miscellaneous.

EASEMENTS.

1. Right to dig well. The grantee of "the right of way over and through the land for all purposes connected with the construction, use and occupation of its railway," has the legal right to dig a well upon such right of way, and to use the water supplied by percolation for railway purposes, although such use may materially diminish the supply of water in a spring upon the grantor's land. *Hougan v. Milwaukee and St. Paul R'y Co.*, 35 Ia., 558. 1872.

EATING-HOUSES.

1. Contract. A tenant who erects a building upon the land of another, under contract for mutual occupation and use, may sue for breaches of the contract, but cannot seek a rescission of it and a recovery of the cost of the building upon the *quantum meruit*, unless there be a covenant of purchase. A reserved right to purchase does not create an obligation to do so. *Toledo, Wabash and Western R'y Co. v. Jacksonville Depot Building Co.*, 63 Ill., 308. 1872.

2. Obstruction of passage to. Where a railroad company had several tracks between the depot, where the passengers got off its trains, and an eating-house of a party, and trains were made up at that station, so that it was dangerous for persons to cross over to the eating-house, the company will not be liable to the proprietor of the house for leaving freight and other cars on its side track, so as to make it difficult for passengers to pass over to his house. The company, in such a case, is not obliged to keep open an unobstructed way for the passage of persons to and fro across its track for the accommodation of the private business of an individual, and the obstruction was a lawful means to adopt for the safety of passengers, and to protect itself from liability for injury to others in crossing. *Disbrow v. Chicago and Northwestern R'y Co.*, 70 Ill., 246. 1873.

EJECTMENT.

1. Assessment of damages. In an action by the owner to recover lands which have

been appropriated by a railroad company, without the payment of lawful compensation therefor, where the defendant corporation seeks to have the amount of plaintiff's damages assessed on the trial, pursuant to Gen. St. 1878, ch. 34, § 35, such damages are to be assessed as of the time of the trial. *Morin v. St. Paul, Minneapolis and Manitoba R'y Co.*, 30 Minn., 100, 1882; 10 Amer. & Eng. R. R. Cases, 223.

2. Estoppel. Mere silence and inaction, for the time being, on the part of a land owner, when informed that a railroad company is constructing its track over his property, will not be construed into acquiescence so as to estop him from his action of ejectment. *Walker v. Chicago, Rock Island and Pacific R. R. Co.*, 57 Mo., 275. 1874.

3. — The owner of land may, by his own act, estop himself from demanding actual payment of compensation as a condition precedent to the taking for public uses; and if he expressly consents, or, with full knowledge of the taking, makes no objection, but permits a public corporation to enter upon his land and expend money, and carry into operation the purposes for which it is taken, he may not then be permitted to eject the parties from possession for want of payment of the compensation. *Pryzbylowicz v. Missouri River R. R. Co.*, 17 Federal Reporter, 492. 1881.

4. — When the owner has knowledge of the fact that a company is proceeding to locate and construct its road on his land, and allows it to expend large sums of money in improvements for this purpose, without interfering, he is estopped from evicting it by ejectment. *New Orleans and Selma R. R. Co. v. Jones*, 63 Ala., 48, 1880; 2 Amer. & Eng. R. R. Cases, 425.

5. Judgment. A judgment for possession of real estate against a party, not in possession, and who holds only a naked legal title, does not affect the rights of one not a party to the action, who has possession and full equitable title. *Kansas Pacific R. R. Co. v. McBratney*, 12 Kans., 1. 1873.

6. Jurisdiction. Ejectment having been brought in C. county for lands then situate in that county, the subsequent inclusion of the lands within another county by act of the legislature did not divest the jurisdiction

Lease — Trespass.

of the circuit court for C. county, in the absence of any provision in the act upon that subject. *Cornell University v. Wisconsin Central R. R. Co.*, 49 Wis., 158. 1880.

7. Lease; forfeiture. Upon forfeiture of a lease an action of ejectment may be maintained to recover possession. *Horton v. New York Central and Hudson River R. R. Co.*, 12 Abbott's New Cases (N. Y.), 30-1883.

8. Occupancy; notice. Occupancy of land by a railway in course of construction is constructive notice of the company's rights therein. *Detroit and Milwaukee R. R. Co. v. Brown*, 37 Mich., 533. 1877.

9. Pleading. In an action of ejectment for possession of an undivided interest in a tract of land, *held*, that it was not necessary to allege in the complaint that the defendant had not, since its entry upon the premises, acquired the right to the possession by condemnation for the purposes of its road. This would be a matter of defense. Neither was it necessary to allege that the defendant was not the owner of the other undivided interest, or in possession under such owner. This would also be a matter of defense. *Hennessy v. St. Paul, Minneapolis and Manitoba R'y Co.*, 30 Minn., 55, 1882; 10 Amer. & Eng. R. R. Cases, 112.

10. — In ejectment for land occupied by defendant's railroad and depot, the defendant, in effect, pleaded that it had entered by permission of the plaintiffs, and had paid plaintiffs for the right of way over the land, and for the privilege of maintaining a depot; and that thereupon the plaintiffs had granted to the defendant said right and privilege. The court did not find on this issue, but in effect found that the plaintiffs had consented to the erection of the depots, and had recognized the land as the property of the defendant, and had waived error in the location of the premises. *Held*, that the finding was beyond the issue, and that the findings were defective in not finding upon the issue presented. *Robinson v. Pittsburg R. R. Co.*, 57 Cal., 417, 1881; 2 Amer. & Eng. R. R. Cases, 429.

11. — misjoinder. An action for consequential damages to adjoining land cannot be joined with an action for possession of land unlawfully taken by a railway com-

pany. *Welsh v. Chicago and Northwestern R'y Co.*, 34 Wis., 494. 1874.

12. — description of boundaries. A complaint in ejectment for land described by reference to monuments need not aver positively the existence of such monuments. Thus, when the land is described as all that part of a designated lot lying within one hundred feet on either side of a certain railroad track, it is no objection to the complaint that it does not positively aver that there is a track on the land. *May v. St. Paul and Pacific R. R. Co.*, 26 Minn., 74. 1879.

13. — possession. In ejectment, where the defendant claimed title to the whole premises, disclaiming as to no part thereof, *held* immaterial that the defendant was in actual possession of only a part. *Colorado Central R. R. Co. v. Smith*, 5 Colo., 160. 1879.

14. — variance. Pleading held sufficient, under the evidence, as to the description of the premises in dispute. *Chicago and Alton R. R. Co. v. Morgan*, 69 Ill., 492. 1873.

15. Practice. Practice under the Michigan statutes considered. *Michigan Central R. R. Co. v. McNaughton*, 45 Mich., 87. 1881.

16. Right of possession. In an action by the owner of the fee to recover land used by a railway company for its road-bed, where defendant claimed only a right of possession, the presiding judge charged the jury that the plaintiff had the title and they must find for him the land in dispute and damages. *Held*, erroneous, as the right of title does not necessarily carry with it the right of possession; and for such error a new trial was granted. *Tutt v. Port Royal and Augusta R. R. Co.*, 16 So. Car., 365. 1881.

17. — In an action brought by the trustees for the recovery of a strip of land used by a railroad company under a license, *held*, that no interference with the terms of the deed being alleged or proven, the plaintiff could not recover possession or damages for its detention. *Ib.*

18. Title. A will construed and question of title determined. *Buffington v. Summit Branch R. R. Co.*, 74 Pa. St., 162. 1873.

19. Trespass. A railway company, having entered on lands without the consent of the owner, without condemnation by statutory proceedings, and without payment of

Corporate Elections — Cases Collated.

compensation, was a trespasser, and the owner might have maintained trespass or ejectment against it, or enjoined by bill in equity the construction of its road until compensation to him was ascertained and paid. *Jones v. New Orleans and Selma R. R. Co.*, 70 Ala., 227, 1881; *Lyon v. Green Bay and Minnesota R'y Co.*, 42 Wis., 538, 1877; 15 Amer. R'y Rep., 91; *Cox v. Louisville, New Albany and Chicago R. R. Co.*, 48 Ind., 178, 1874; 8 Amer. R'y Rep., 296.

20. — damages. Where a railway company takes possession of land without the consent of the owner, and without having ascertained and paid compensation under the statute, it is liable to an action of ejectment, or to an action of trespass, in which the owner may recover the damages accruing before suit brought, but not permanent damages as for the taking of the land. *Sherman v. Milwaukee, Lake Shore and Western R. R. Co.*, 40 Wis., 645, 1876; 13 Amer. R'y Rep., 459.

21. When land owner not entitled. A railway company constructed its road-bed over lands acquired by the United States under the provisions of the direct tax act of 1863 (12 U. S. Stat., 422), without objection by the government, or claim to a right of notice or demand for the appointment of commissioners to assess compensation; after five years' use by the railway company the United States sold this land by metes and bounds, without reservation of the road-bed, to V., who had knowledge of its possession and use by the company. V. afterwards brought action for the recovery of the strip of this land used by the railway company, and for damages, and proved his title-deed from the United States. *Held*, that V. was properly non-suited; but without prejudice to his right as to compensation. *Verdier v. Port Royal R. R. Co.*, 15 So. Car., 476, 1881; 10 Amer. & Eng. R. R. Cases, 677; *Sams v. Port Royal R. R. Co.*, 15 So. Car., 484, 1881.

ELECTIONS.

See ELECTIONS OF CORPORATE OFFICERS; SUBSCRIPTIONS BY COUNTIES; SUBSCRIPTIONS BY CITIES AND TOWNS.

1. Corporate elections; ballots. Two tickets were voted upon, one containing the

name of thirteen directors, and the other the names of seven directors. Upon a petition presented under § 5, of title 4, of ch. 18, of part 1 of the Revised Statutes, by persons who had voted the ticket containing the names of seven directors, to have the persons therein named declared entitled to that office, *held*, that the ticket was not void because it did not contain thirteen names. That no stockholder was bound to vote for any larger number of persons than he chose, and that any number of persons who might receive a majority of the lawful votes were elected, although there was a failure to elect the full number required by law. *Vandenburgh v. Broadway R'y Co.*, 29 Hun (N. Y.), 348. 1883.

2. — bondholders. The right of bondholders to vote at corporate elections determined under a particular statute. *Hendrie v. Grand Trunk R'y Co.*, 2 Ontario Rep., 441. 1883.

3. — right of stockholders to hold election. Directors of a corporation who are in office cannot dispute the right of a stockholder to have a new election of directors held in accordance with the by-laws, on the ground that the stockholder bought his stock with the money of rival companies, and intends to use his legal rights as the holder of a majority of the capital stock for purposes detrimental to the interests of the corporation, and that the proposed election of directors is a step towards the illegal control of the property and the business of the corporation. *Camden and Atlantic R. R. Co. v. Elkins*, 37 N. J. Eq., 273. 1883.

4. — time. In the absence of any by-law fixing a date within the year, the election should be held upon the recurrence in the following year of the day on which the first election was held, if that were a legal day. *Vandenburgh v. Broadway R'y Co.*, 29 Hun (N. Y.), 348. 1883.

ELECTIONS OF CORPORATE OFFICERS.

See ELECTIONS.

ELEVATED RAILWAY.

See INJUNCTION; PATENTS.

1. Cases collated. The various litigation in reference to the construction of the ele-

Compensation.

vated railways in New York city will be found as follows: *Story v. N. Y. Elevated R. R. Co.*, 11 Abbott, New Cases (N. Y.), 236, 1882; *Same v. Same*, 3 ib., 478, 1877; *Sixth Avenue R'y Co. v. Gilbert Elevated R. R. Co.*, 43 N. Y. Superior Ct., 292, 1878; *Gilbert's Elevated R'y Co. v. Anderson*, 3 Abbott, New Cases (N. Y.), 434, 1877; *Spader v. N. Y. Elevated R. R. Co.*, 3 Abbott, New Cases (N. Y.), 467, 1877; *N. Y. Elevated R. R. Co., In re*, 3 ib., 401, 1877; *Sixth Avenue R. R. Co. v. Gilbert's Elevated R'y Co.*, 3 ib., 372, 1878; *Ninth Avenue R. R. Co. v. N. Y. Elevated R. R. Co.*, 3 ib., 347, 1877; *Patten v. N. Y. Elevated R. R. Co.*, 3 ib., 306, 1878; *Sixth Avenue R. R. Co. v. Gilbert's Elevated R'y Co.*, 3 ib., 53, 1877; *Ninth Avenue R. R. Co. v. N. Y. Elevated R. R. Co.*, 3 ib., 22, 1877; *Caro v. Metropolitan R. R. Co.*, 46 N. Y. Superior Ct., 188, 1880; *N. Y. Elevated R. R. Co., In re*, 7 Hun (N. Y.), 239, 1877; *Same Case*, 70 N. Y., 327, 1877; *Gilbert Elevated R. R. Co., In re*, 9 Hun (N. Y.), 303, 1876; *Caro v. Metropolitan Elevated R. R. Co.*, 64 Howard's Practice, 224, 1882; *Haight v. New York Elevated R'y Co.*, 49 Howard's Practice (N. Y.), 20, 1875.

2. Compensation. The rule, that where an individual conveys village or city lots, designated upon a map as abutting upon a public street, the map being referred to in the deed, the grantee acquires, as against the grantor, a right of way over the strip of land referred to as a street, although the same may not, in fact, be a public street, not having been accepted by the public as such; yet, as between the parties to the grant, the land is deemed to have been dedicated to the public by the grantor, and he cannot thereafter appropriate said lands to any use inconsistent with their use as a public street, applied. *Story v. N. Y. Elevated R. R. Co.*, 11 Abbott's New Cases (N. Y.), 236, 1882; reversing *Same v. Same*, 3 ib., 478, 1877; *Peyser v. New York Elevated R. R. Co.*, 12 Abbott's New Cases (N. Y.), 276. 1883.

3. — The city of New York having power to lay out and open streets and to acquire land for such purposes, had power to dedicate its own land to such uses, and to bind itself by a covenant with its grantees of abutting lands that a particular street should forever be kept as a public street. *Id.*

4. — Although the construction of a surface railroad without a change of grade is a legitimate exercise of the power regulating the use of public streets for public purposes, it seems that the taking of permanent and exclusive possession for sidings and the permanent occupation with rows of standing cars, or the erection of permanent depot buildings, would not be within the power. *Id.*

5. — The erection of an elevated railroad, — such as that described in the evidence in this case, — is inconsistent with the use of a street as a public street, and is a taking and appropriation of the property of abutting owners for public use. *Id.*

6. — The erection of an elevated railroad which, as a fact, will to some extent obscure the light of the abutting premises and impair their general usefulness and depreciate their value, is a taking of the property of the owner of the premises, and such easement requires compensation. *Id.*

7. — The right to construct elevated railroads in streets should be made to depend upon their providing a suitable and sufficient indemnity to abutting owners against any damages which they may sustain thereby; or, if they may justly be deemed too onerous, then provision should be made by law for such indemnity in some other mode. Until such indemnity, in a suitable form, shall have been provided, the right to construct should be denied. *Brooklyn Rapid Transit Co., In re*, 62 Howard's Practice (N. Y.), 404. 1882.

8. — The supreme court has the power, and it is their duty, to review the report of commissioners appointed by the general term, pursuant to the provisions of the Rapid Transit Act of 1875, upon the facts, and, after a consideration of all the circumstances, to determine the question whether private rights and interests should be yielded for the sake of the public good. *Id.*

9. — The erection of an elevated railway in a street is an appropriation of the property of adjoining property owners, for which they are entitled to compensation. A full discussion of the law in relation to building of elevated railways is had in this case. *Story v. New York Elevated R. R. Co.*, 90 N. Y., 122, 1882; 7 Amer. & Eng. R. R. Cases, 596.

Constitutional Law — Statute.

10. — The franchise to use a highway for a particular purpose authorizes the appropriation of so much only as is requisite to carry into effect the design for which the power of appropriation was given, and this privilege is exhausted by the appropriation in fact of so much of the roadway as the exigencies of such design actually require. *Sixth Avenue R'y Co. v. Gilbert Elevated R. R. Co.*, 43 N. Y. Superior Ct., 292. 1878.

11. — The franchise authorizing a corporation to use for the purpose of a railroad streets opened in the city of New York, under the act of 1813, or parts thereof, does not take away any property or right of property of the abutting owners in the streets. *Ib.*

12. — The construction of an elevated railway over the street is not an injury for which a street railway company is entitled to compensation, neither as an injury to its railway franchise nor to its real property abutting the street. *Ib.* But see *Story v. N. Y. Elevated R. R. Co.*, 11 Abbott, New Cases (N. Y.), 236. 1882.

13. **Constitutional law.** Section 36 of the Rapid Transit Act (ch. 606, Laws of 1875), authorizing certain existing corporations, whose routes coincide with those determined upon by the commissioners appointed under said act, to construct and operate railways thereon upon fulfilment of the requirements of the act, is not in violation of the constitutional provisions (art. 3, § 18) prohibiting the passage of a private or local bill granting to any corporation the right to lay down railroad tracks, or granting to it any exclusive privilege, immunity or franchise. *Gilbert Elevated R'y Co., In re*, 70 N. Y., 361, 1877; 19 Amer. R'y Rep., 186.

14. **Contract.** Contract between two elevated railway companies considered, and held, that an injunction could not be sustained to restrain suits of dissatisfied stockholders. *Manhattan R'y Co. v. New York Elevated R'y Co.*, 29 Hun (N. Y.), 809. 1883.

15. — A contract for the erection of an elevated railway construed. *New England Iron Co. v. Gilbert Elevated R. R. Co.*, 91 N. Y., 153. 1883.

16. **Injunction.** The operation of the defendant's elevated railway may be enjoined as a nuisance where its operation is of such

character as to pollute the air of abutting dwelling houses. *Caro v. Metropolitan R. R. Co.*, 46 N. Y. Superior Ct., 138. 1880.

17. — An injunction asked by a street railway company against an elevated railway denied. *Ninth Avenue R. R. Co. v. N. Y. Elevated R. R. Co.*, 7 Daly (N. Y.), 174. 1877.

18. **Lease.** The leases of the elevated railways to the Manhattan R'y Co. examined. *N. Y. Elevated R. R. Co. v. Manhattan R'y Co.*, 63 Howard's Practice (N. Y.), 14. 1881.

19. — The appointment of a receiver did not terminate the lease. *Ib.*

20. **Parks and highways.** The fee of the parkway leading to, and the road adjoining, the concourse constructed by the park commissioners of Brooklyn, under ch. 583 of 1874, as amended by ch. 489 of 1875, was not vested in the county of Kings, but remained in the former owners. The county of Kings cannot maintain an action to restrain the construction of an elevated railroad across it, on the ground of its ownership of the fee therein, or on the ground that the railroad will frighten teams and diminish the value of the adjoining lots, which are to be assessed to reimburse the county for the money borrowed by it by the issue of bonds, for the purpose of paying the cost of the improvements made under the said acts. *Supervisors of Kings County v. Sea View R'y Co.*, 23 Hun, 180. 1880.

21. **Statute.** The Rapid Transit Act is not subject to the objection that it delegates legislative powers to the commissioners. The manner of exercising a franchise by a street railroad company is not an essential element of the franchise, and the legislature may authorize it to be controlled by the people or officers of a locality whose interests are especially affected by its exercise. *Gilbert Elevated R'y Co., In re*, 70 N. Y., 361, 1877; 19 Amer. R'y Rep., 186.

22. — The New York Rapid Transit Acts construed. *Kings County Elevated R'y Co., In re*, 20 Hun (N. Y.), 217. 1880.

23. — **proceedings.** Proceedings under the statute in relation to elevated railways examined. *Kings County Elevated R'y Co., In re*, 73 N. Y., 333. 1879.

24. — The duty of the general term, upon an application to confirm the report of the

Contract.

commissioners, in relation to an elevated railway, determined. *Kings County Elevated R'y Co., In re*, 78 N. Y., 383, 1879; reversing *Same Case*, 18 Hun (N. Y.), 378, 1879.

25. — commissioners. Under the provisions of the state constitution (art. 3, § 18), prohibiting the construction of a street railroad without the consent of a specified portion of adjacent property owners, or in lieu thereof a determination of commissioners appointed by the general term of the supreme court, that such railroad ought to be constructed, and a confirmation thereof by the court, the determination of the commissioners is inoperative until so confirmed. The general term has original jurisdiction so far that it has the power, and it is its duty to review the whole case and to pass upon the sufficiency of the facts to warrant the determination, and it is within the discretion of said court whether or not to confirm the commissioners' report. *Kings County Elevated R'y Co., In re*, 2 Amer. & Eng. R. R. Cases, 431; 82 N. Y., 95. 1880. See, also, *Same Case*, 20 Hun (N. Y.), 217. 1880.

26. The Battery. The declaration of the legislature that The Battery in New York city shall not be appropriated for private uses is not a contract under which any right or easement passed to an adjoining owner. The use of an elevated railway is a public use, and the application of an injunction to restrain the construction of such a railway across The Battery was refused. *Spader v. N. Y. Elevated R. R. Co.*, 3 Abbott, New Cases (N. Y.), 467. 1877. .

ELEVATORS.

1. Contract; breach; several actions. A contract between the D. and S. C. R. R. Co. and the Dubuque Elevator Co. contained the following stipulation: That the elevator company "should erect a building suitable for receiving, storing, delivering and handling all grains that should be received by the cars of said railroad company not otherwise consigned." A supplemental contract, subsequently entered into by the same parties, provided that the elevator company should receive and discharge for the said railroad com-

pany "all through grain at one cent a bushel." The contract provided for its continuance for a term of fifteen years. In an action against the railroad company for its refusal to comply with the terms of the contract, it was held that a recovery in a former action would constitute no bar to an action for subsequent breaches of the same contract. *Richmond v. Dubuque and Sioux City R. R. Co.*, 40 Ia., 264. 1875.

2. — with elevator company; for handling grain at Mississippi river. The act of congress of June 15, 1866, authorizing every railroad company in the United States whose road was operated by steam, and its successors and assigns, to carry upon and over its road, boats, bridges and ferries all passengers, troops, government supplies, mails, freight and property, on their way from one state to another state, and to receive compensation therefor, and to connect with roads of other states, so far as to form continuous lines for the transportation of the same to their place of destination; and the act of July 25, 1866, authorizing the construction of certain bridges over the Mississippi river, and among others a bridge connecting Dubuque with Dunleith, in the state of Illinois, and providing that the bridges, when constructed, should be free for the crossing of all trains of railroads terminating on either side of the river, for reasonable compensation, were designed to remove trammels upon transportation between different states, interposed by state enactments or by existing laws of congress, and were not intended to interfere with private contracts and annul such as had been made on the basis of existing legislation and existing means of interstate communication. *Railroad Co. v. Richmond*, 19 Wallace, 584, 1873; 7 Amer. R'y Rep., 235.

3. — A contract between a railroad company and an elevator company, that the latter company, in consideration of erecting and using for that purpose an elevator, should have for a prescribed term the handling, at a stipulated price, of all grain brought by the railroad company in its cars to the city of Dubuque, on the Mississippi river, to be transmitted to a place above, did not cease to be valid and binding upon the parties because afterwards, by the construc-

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tion of a railroad bridge across the Mississippi at Dubuque, it became unnecessary for the railroad company or its lessee, and a useless expense to it, to have the grain brought by it to Dubuque handled at that place. The enforcement of the contract after the construction of the bridge was not an interference with the power of congress to regulate commerce between the states. *Ib.*

4. Delivery of grain; duty of railway company; Illinois constitution. A railroad corporation will only be compelled to deliver grain in the particular warehouse or elevator to which it is consigned, when such warehouse or elevator is upon the line of its road. But the line of the road is not necessarily confined to tracks, side tracks or switches by it owned or leased. *Hoyt v. Chicago, Burlington and Quincy R. R. Co.*, 93 Ill., 601. 1879.

5. — If such corporation has already purchased or secured the legal right to use the track of another road necessary to reach a particular warehouse or elevator, then such warehouse or elevator may be considered so upon its line. But when it has to run over the track of another company, for the use of which it has no license or contract, to reach such warehouse or elevator, it cannot be compelled to run over such track in order to deliver grain. *Ib.*

6. — Where a railway company built a side track from its road connecting with the side track of another company leading to a public warehouse, whereby it could reach such warehouse over a part of the track of such other company, and the circuit court enjoined it from removing the connecting track, it was held that, in view of the statutory provisions that every railroad corporation shall permit connections to be made, there was no error in enjoining the removal of the track at the suit of the owners of the warehouse. *Ib.*

7. Receipts; conversion of wheat. Consideration of the facts appearing in this case with reference to their tendency to show a conversion of certain wheat claimed by plaintiffs. New trial refused where it is evident that it will not change the result of a former trial. *Lewis v. St. Paul and Sioux City R. R. Co.*, 20 Minn., 260. 1873.

8. Unreasonable regulations. Defendant, according to its usual course of business at its elevators, weighs the quantity of wheat belonging to a consignee into what is called a delivery bin, from which it can be spouted into consignee's wagon or sacks at consignee's pleasure. By a regulation adopted by defendant a consignee is required to receipt for wheat which has been thus weighed into a delivery bin for him before taking the same from such bin, and before he can ascertain, except from defendant's statements, whether the quantity of wheat receipted for is in the bin or not. *Held*, as a conclusion of law, that the regulation is unreasonable and void. *Christian v. St. Paul and Pacific R. R. Co.*, 20 Minn., 21. 1873.

EMBANKMENTS.

See CONSTRUCTION OF RAILWAYS; NUISANCE; WATERCOURSES.

EMBEZZLEMENT.

See AGENCY.

1. Settlement by note. A judgment note was given for money fraudulently abstracted from the treasury of the West Philadelphia R. R. Co. On application to open the judgment and allow defendant a credit thereon, evidence of payment to officers of the company, who were confederates of the defendant who stole the money, is not proof of payment to the company, and no credit can be claimed for such payments. *West Philadelphia R. R. Co. v. Nagle*, 12 Philadelphia, 228. 1877.

EMINENT DOMAIN.

See APPEAL; BRIDGES; CANALS; CERTIORARI; CHARTER; CONSTRUCTION OF RAILWAYS; CONVEYANCE; EJECTMENT; ELEVATED RAILWAYS; ESTOPPEL; EVIDENCE; FEDERAL COURTS; HIGHWAY; INJUNCTIONS; LIMITATIONS, STATUTE OF; PLEADINGS; RIGHT OF WAY; TRESPASS; WATERCOURSES.

I. GENERAL PRINCIPLES.

II. PROCEEDINGS GENERALLY.

1. *Proceedings under charter.*
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- II. PROCEEDINGS GENERALLY — con.
 - 4. *Pleadings, practice and general requirements.*
 - 5. *Report, judgment and subsequent proceedings.*
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- III. JURY, VIEWERS AND COMMISSIONERS.
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- V. PARTICULAR KINDS OF PROPERTY TAKEN OR DAMAGED.
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 - 1. *Streets.*
 - 2. *Highways.*
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- VIII. TAKING LANDS FOR DEPOTS AND OTHER BUILDINGS.
- IX. CONDEMNATION OF CORPORATE PROPERTY.
- X. PUBLIC LANDS.
- XI. EVIDENCE.
- XII. STATUTORY REMEDY EXCLUSIVE.
- XIII. TITLE OF LAND OWNER.
- XIV. TITLE ACQUIRED BY THE COMPANY.
- XV. NEGLIGENCE AND UNLAWFUL ACTS.
- XVI. CONSTITUTIONAL LAW.
- XVII. LICENSE.
- XVIII. CONTRACT.
- XIX. SURVEYS AND LOCATION.
- XX. INJUNCTIONS.
- XXI. TRESPASS.

I. GENERAL PRINCIPLES.

1. **Abandonment of proceedings.** A notice by the defendant railway company, to treat for a part of the plaintiffs' manufactory, was met by a counter-notice by the plaintiffs, requiring it to take the whole. The defendant then gave the plaintiffs notice of its intention to apply to the board of trade for the appointment of a surveyor to determine the value of the premises comprised in the notice to treat, and of the further lands and hereditaments which the plaintiffs could lawfully require and had required the defendant to purchase and take. The plaintiffs then filed their bill, praying for a declaration that the defendant could not take a part of the manufactory without taking the whole,

whereupon the defendant gave notice of its intention to withdraw from its notice to treat, offering to pay the plaintiffs' costs of suit up to that date; but the plaintiffs declined the offer, and insisted on an answer, which was filed. The bill was then amended, and, as amended, prayed for a declaration that the defendant was bound to take the whole manufactory. *Held*, that the defendant's notice of its intention to apply for the appointment of a surveyor did not amount to a binding contract by it to take the property; hence that it was at liberty to withdraw its notice to treat; and specific performance as prayed by the amended bill refused. *Grierson v. Cheshire Lines Committee*, Law Reports, 19 Equity Cases, 83, 1874.

2. — A railway company presented its petition to the supreme court to acquire title to certain lands. The owners opposed the application, but the court appointed the commissioners, who made their report to the court, and on motion of the company an order was made confirming it, and directing the amount of the award to be paid. The company refused or neglected to file the papers or pay the award. An order was therefore obtained by the owners for the company to show cause why the petition, order, etc., should not be filed, and on the return day an order was made directing the filing of the same, the payment of the award in ten days, or that a precept issue to collect the award; from which order the company appealed. *Held*, that the recording of the order of confirmation and payment of the sum awarded would vest the title to the land in the company. That the recording of the order was the duty of the clerk, and the payment of the award the duty of the company. That the right of the owner to have both performed had been adjudged by the court, and the rights and obligations of both parties had thereby become fixed, subject only to the right of appeal given by the statute, and neither party could recede or abandon the proceeding without the consent of the other. *Rhinebeck and Connecticut R. R. Co., In re*, 8 Hun (N. Y.), 34, 1876; 16 Amer. R'y Rep., 74; affirmed, 67 N. Y., 242, 1876.

3. — If proceedings are instituted to con-

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demn for public use the property of an individual, and, after the value of the property is ascertained by inquest, the proceedings are abandoned because the price assessed is unsatisfactory, the corporation instituting such proceedings will be answerable to the owner for all damages occasioned by them. *Leisse v. St. Louis and Iron Mountain R. R. Co.*, 72 Mo., 561. 1880.

4. — right to afterwards renew the same proceedings. A railway company, in 1856, took possession of a meadow, a large part of which belonged to one owner and a small part to another who did not know the exact extent of his land. The company, in 1859, took a conveyance of the large part, on which conveyance the extent of the small part was stated. The company did not pay for the small part, and the owner, in 1868, brought an action of ejectment against the company, obtaining judgment, and was put into possession. His possession was disturbed by the company, and he filed his bill to restrain it. The company offered to pay the value of the land as in 1856, and interest thereon, which the land owner refused. The company then produced a notice to treat, given in 1856, and gave notice of its intention to proceed under that notice. The land owner filed a second bill to restrain it. *Held* that, under the circumstances, the company was not entitled to proceed under the notice to treat. *Held* that, under the circumstances, there had been no mistake or inadvertence so as to bring the case under sec. 124 of the Lands Clauses Consolidation Act. *Held*, that the plaintiff was entitled to a decree in both suits; and the plaintiff submitting to have the land valued, and the defendant preferring such a decree to an injunction, decree made for an inquiry as to the present value of the land and the mesne profits for six years, and for payment by the company accordingly. *Stretton v. Great Western and Brentford R'y Co.*, Law Reports, 5 Chancery Appeal Cases, 751. 1870.

5. Abandonment of right of way; constitutional law. The provisions of § 1260, Code, as amended by act of 1874, in relation to the abandonment of a railroad line, clearly contemplated there may be an abandonment of a part of a constructed railway. Whether an abandonment exists depends

upon the circumstances of each case. *Central Iowa R'y Co. v. M. and A. R. R. Co.*, 57 Ia., 249, 1881; 10 Amer. & Eng. R. R. Cases, 138.

6. — Section 1260, as amended by act of 1874, is constitutional. The constitutionality of so much of the statute as provides for "assessing the damages" will not be inquired into in equity, there being a complete remedy at law. *Ib.*

7. Access to siding. Where a railway company was bound by its act to make a good and sufficient siding on a specified field of an owner who had opposed the bill, *held*, that the obligation was not broken, though the company took for other purposes so much of the specified field as not to leave any to furnish access from the siding to an adjoining road without passing over the land taken, or out of the specified field. *Dowling v. Pontypool, Caerleon and Newport R'y Co.*, Law Reports, 18 Equity Cases, 714. 1874.

8. Additional lands. The law does not require a railway company to acquire by condemnation all the lands necessary for the construction and operation of its road at the same time. It may increase its facilities as the business of the country may require. *Fisher v. Chicago and Springfield R. R. Co.*, 104 Ill., 323, 1882; 10 Amer. & Eng. R. R. Cases, 14; *Central Branch Union Pacific R. R. Co. v. Atchison, Topeka and Santa Fe R. R. Co.*, 26 Kans., 669, 1881; 5 Amer. & Eng. R. R. Cases, 389; *Dietrichs v. Lincoln and Northwestern R. R. Co.*, 13 Neb., 361, 1882.

9. — Under the Lands Clauses Consolidation Act, where the first lands taken prove insufficient from unforeseen circumstances, a second notice may be given to the same land owner. *Stamps v. Birmingham and Stour Valley R. R. Co.*, 2 Phillips (Eng. Ch.), 673, 1848; *Stamps v. Birmingham, Wolverhampton and Stour Valley R. R. Co.*, 7 Hare (Eng. Ch.), 251, 1848.

10. — A railway company being empowered by its act to take, amongst other lands, a close belonging to the plaintiff, gave him notice of its intention to take a certain part of it; and, more than a year afterwards, it gave him notice of its intention to take the remainder. The part first taken was intended for making the railway, and the re-

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mainder for making a station, both of which its act empowered it to make. *Held*, that the power of the company, with respect to the plaintiff's close, was not exhausted by its first notice. *Simpson v. Lancashire and Carlisle R. R. Co.*, 15 Simons (Eng. Ch.), 580. 1847.

11. — The act concerning railway companies, approved March 6, 1877 (Pamph. L., p. 48), which authorizes such corporations to condemn lands "adjoining their roads as constructed on their right of way as located," does not apply to lands which merely adjoin a side track leading from the railway route to a freight-house. *State v. United New Jersey R. R. and Canal Co.*, 43 N. J. Law, 110, 1881; 10 Amer. & Eng. R. R. Cases, 103.

12. — The proceedings in acquiring additional land by a railway company considered. *N. Y. Central and Hudson River R. R. Co., In re*, 6 Thompson & Cook (N. Y. Supreme Ct.), 669; 5 Hun (N. Y.), 86, 1875; 66 N. Y., 407, 1876; *N. Y. Central and Hudson River R. R. Co., In re*, 4 Hun (N. Y.), 381, 1875.

13. — Where it satisfactorily appears, upon an application by a railroad company for leave to acquire additional lands, that the parties have not been able to agree upon the price of the land sought, and that the lands are required by the company for the purpose of its incorporation, and to enable it to suitably build embankments, and provide suitable drainage, and to keep its road in proper condition to accomplish the purpose of its incorporation, effect should be given to the general railroad act of 1850, and the amendment of 1869, relative to the acquisition of additional lands by railroad companies, when necessary; and the petitioner be allowed to take an order appointing commissioners of appraisal. *N. Y. Central R. R. Co., In re*, 67 Barbour (N. Y.), 426. 1873.

14. — It cannot be said that the "purposes of its incorporation" are accomplished when a road is constructed, and in operation, with two tracks. The company is bound, by express enactment, to furnish to passengers and freighters the means of transferring passengers and freight in accordance with the statutory requirement. *Ib.*

15. — **widening of railway.** The act of 1864, p. 293, gives the defendant power to condemn lands for the purpose of widening

its road. The limitation upon such power is the reasonable necessity of the road, the proviso as to the width in the second section not applying to the act of widening. *Beck v. United New Jersey R. R. and Canal Cos.*, 39 N. J. Law, 45. 1876.

16. **Bridge over railway.** Where an act of parliament authorized the J. R'y Co. to cross the C. R'y, and the J. R'y Co. purchased the adjoining land so as to build a bridge over the track, the support not resting upon the land of the C. Co., *held*, that temporary scaffolding might be erected on the land of the C. Co. for the construction of the bridge. *Clarence R'y Co. v. Great North of England R'y Co.*, 13 Meeson & Welsby (Exchequer), 706. 1845.

17. **Condemnation for material.** Where lands lying outside of the railway are sought to be appropriated for the purpose of obtaining therefrom materials for the construction of a railway, the petition should disclose the use for which such lands are sought to be appropriated. *Valley R'y Co. v. Bohm*, 34 Ohio St., 114, 1877; 21 Amer. R'y Rep., 30.

18. — The method of procedure for ascertaining damages done the owner by taking material from his land for the construction of a railroad is a summary one, and must be strictly pursued, and every essential prerequisite, called for by the statute, must affirmatively appear on the face of the proceedings in order to give them validity. Thus, the failure of the parties to agree as to the value of the material taken is a jurisdictional fact, necessary to empower the justice to appoint householders to ascertain the damages as in the statute provided; and in a suit upon the award, made by the appraisers, the failure of the record of the justice to recite such non-agreement is an omission fatal to recovery; and it is an omission, also, which parol evidence cannot supply. *Cunningham v. Pacific R. R. Co.*, 61 Mo., 93. 1875.

19. — A railway act empowered the company to make and maintain the works mentioned in it, and to enter upon, take and use such of the lands specified in the plans as should be necessary for such purposes. *Held*, that this provision did not authorize the company to take compulsorily and perma-

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nently land required only for the purpose of excavating materials therefrom, although within the limits of deviation, and it was restrained from taking steps to have the value of such land assessed. *Eversfield v. Mid Sussex Ry Co.*, 3 De Gex & Jones, 286; 60 Eng. Ch., 285. 1858.

20. — gravel pits. The acquisition of land by a railroad company, outside of its way, for the purpose of enabling it to obtain gravel therefrom for the construction of the road, held not allowable under the statutes relating to eminent domain. *New York and Canada R. R. Co. v. Gunnison*, 3 Thompson & Cook (N. Y. Supreme Ct.), 632; 1 Hun (N. Y.), 496. 1874.

21. Consolidation of railways. The power of a railway company to begin proceedings for the condemnation of lands within the state is not lost by its consolidation with another company into a new organization so as to constitute a corporation subject to the laws of the same state as the original company. *Toledo, Ann Arbor and Grand Trunk Ry Co. v. Dunlap*, 47 Mich., 456, 1882; 5 Amer. & Eng. R. R. Cases, 378.

22. Construction of powers. The statutes authorizing the appropriation of private property for public uses must be strictly construed. *Oregonian Ry Co. v. Hill*, 9 Oreg., 377, 1881; *Mississippi River Bridge Co. v. Ring*, 58 Mo., 491, 1874; *Webb v. Manchester and Leeds Ry Co.*, 1 Eng. R. R. & Canal Cases, 576, 1839; *Southern Pacific R. Co. v. Wilson*, 49 Cal., 396, 1874; 8 Amer. Ry Rep., 37.

23. De facto corporation. A *de facto* railway corporation may exercise the right of eminent domain; and, as a rule, the legal existence of a *de facto* corporation can be questioned only by the state, in a direct proceeding instituted for that purpose. *Reisner v. Strong*, 24 Kans., 410, 1880; 10 Amer. & Eng. R. R. Cases, 335; *McAuley v. Columbus, Chicago and Indiana Central Ry Co.*, 83 Ill., 348, 1876.

24. Foreign corporation. A foreign corporation has no power to acquire or possess land for right of way in Iowa, and cannot, therefore, be made a party to a proceeding for the assessment of damages for the land appropriated for that purpose. *Holbert v. St.*

Louis, Kansas City and Northern Ry Co., 45 Ia., 23. 1876.

25. — Where a foreign corporation is using by sufferance the line of a domestic corporation, a land owner is entitled to an injunction, restraining it from the use of that portion of the line running through his land until he shall have been compensated for the appropriation of the same for right of way. *Id.*

26. Franchise. Although a franchise may be taken by a corporation having the right of eminent domain, yet in favor of such right there is no implication unless it arises from a necessity so absolute that without it the grant itself will be defeated. It must also be a necessity that arises from the very nature of things, over which the corporation has no control, and not a necessity created by the corporation itself for its own convenience or for the sake of economy. *Pennsylvania R. R. Co.'s Appeal*, 93 Pa. St., 150, 1880; 3 Amer. & Eng. R. R. Cases, 507.

27. "Lands taken;" statute. The words "lands which shall have been taken for or injuriously affected by the execution of the works," in s. 68 of the Lands Clauses Consolidation Act (8 Vict. c. 18), includes such lands only as are *actually* taken or *actually* affected by the works. *Burkinshaw v. Birmingham and Oxford Junction Ry Co.*, 5 Welsby, Hurlstone & Gordon (Exchequer), 475. 1850.

28. Lateral railways. Where a corporation has the power to build an additional lateral line, that is, a lateral road whose construction and maintenance are possible only upon an independent right of way, the right of way statute does not prevent the condemnation of land for such additional road. *Louer v. Chicago, Burlington and Quincy R. Co.*, 59 Ia., 563, 1882; 10 Amer. & Eng. R. R. Cases, 17.

29. — Under the act of April 13, 1846, s. 17 (P. L., 312), and the act of April 12, 1864 (P. L., 396), extending the provisions of s. 17 of the act of 1846 to the defendant, the Philadelphia and Reading R. R. Co. has the power to make lateral or branch roads leading from the main line to points in either of the counties into or through which said main line may pass, and to appropriate so much of the land to be crossed by such branch as

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may be necessary. If, in the exercise of this grant, it causes damage to the owners of the land, the law provides them with a remedy for the recovery of that damage. *French v. Philadelphia and Reading R. R. Co.*, 13 Philadelphia, 187. 1879.

30. Leased lines. Where one of the grounds upon which it was sought to enjoin condemnation proceedings was that the company in whose name the proceedings were conducted had leased its line for a term of years not yet expired, *held*, that the proceedings were properly taken in the name of such company. *Dietrichs v. Lincoln and Northwestern R. R. Co.*, 13 Neb., 361. 1882.

31. — Where, after the commencement of proceedings by a railroad company to acquire title to lands, it leases its road to another company for a long term of years, the lease does not, *per se*, operate to abrogate the proceedings; the land sought to be condemned may be as necessary, for the corporation instituting the proceedings, after as before the lease; but if the necessity is only in favor of the lessee, it is competent for it to continue the proceedings in the name of the lessor. *Kip v. New York and Harlem R. R. Co.*, 67 N. Y., 227, 1876; 15 Amer. R'y Rep., 98; affirming *Same v. Same*, 6 Hun (N. Y.), 24, 1875.

32. — The time allowed to a railroad company for the exercise of its power to take lands was three years from the passing of its act. During that time it gave the plaintiff notice of its intention to take his lands, and summoned a jury to assess the value of them; but the three years expired before the jury gave their verdict; and on that account the vice-chancellor held that the company was not entitled to take steps for obtaining possession of plaintiff's lands. *Brocklebank v. Whitehaven Junction R. R. Co.*, 15 Simons (Eng. Ch.), 632. 1847.

33. Mandamus. A *mandamus* to a railway company to summon a compensation jury was obtained on affidavits showing that the applicant had a claim for the value of land in his occupation, taken by the company, and likewise for damages done to his remaining land by severing it, and had asserted both claims to the company. By mistake, the rule was drawn up for a *mandamus* to summon a jury who should assess

the value of the land, and omitted to mention damages for severance. The *mandamus* was drawn including both, and was quashed on motion, as varying from the rule. The court refused, on motion, to amend the rule so as to make it agree with the writ, but they afterwards, on the original affidavits, and on counsel's statement of the mistake, granted a *mandamus* including both objects. Lord Denman, C. J., *dubitante*. *Queen v. East Lancashire R'y Co.*, 9 Adolphus & Ellis (N. S.), 980; 58 E. C. L., 978. 1847.

34. — A company having obtained an act of parliament for making a railway, on representation that it will be for the public benefit, with compulsory powers for taking land along the proposed line, is bound, from the time such act receives the royal assent, to execute the work. The royal assent makes the act binding as a contract by the company with the public and with the land owners, whether the clauses under which the railway is to be made be in form imperative or permissive. This duty may be enforced by *mandamus*. *Queen v. Lancashire and Yorkshire R'y Co.*, 1 Ellis & Blackburn, 228; 72 E. C. L., 227. 1852.

35. — *Mandamus* may issue to compel a railway company to proceed with an assessment of damages. *Birmingham and Oxford Junction Railway Co. v. Regina*, 4 Eng. Law & Equity, 276; 20 Law Jour. Rep., N. S. (Q. B.), 304, 1851; *Fotherby v. Metropolitan R'y Co.*, Law Reports, 2 Common Pleas Cases, 188, 1866.

36. Municipal corporations. All the lands of a municipal corporation are held "upon the same or the like uses, trusts or purposes," within § 69 of the Lands Clauses Consolidation Act (8 and 9 Vict., c. 18), so that money paid for the compulsory purchase of one part of the lands of a municipal corporation may be applied in the redemption of an incumbrance upon another part of the lands of the same corporation. *In re Eastern Counties R. R. Co.*, 6 Hare (Eng. Ch.), 30. 1848.

37. — A city has power to control the location of a new line of railway within its limits. *Hickey v. Chicago and Western Ind. R. R. Co.*, 6 Bradwell (Ill.), 172. 1880.

38. Necessity of taking. Necessity and a public use must in all cases exist as a condi-

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tion precedent to the legal right of a railway company to enforce the remedy given by a charter to condemn property. *Tracy v. Elizabethtown, etc., R. R. Co.*, 80 Ky., 259. 1882.

39. — The word "necessary" in § 68 of the Railways Clauses Consolidation Act, 1845, refers to the obligations to make good the interruption, and does not confine the company to any particular mode of doing the works. Where there are several modes of doing the works, the company, acting under the advice of their engineer, are the sole judges which mode should be adopted; but if they do not act *bona fide* the court will interfere. *Wilkinson v. Hull, etc., R'y and Dock Co.*, 6 Amer. & Eng. R. R. Cases (Eng. Ch.), 504. 1882.

40. — The legislature is the proper judge of the necessity of taking property for private use. *United States v. Oregon R'y and Navigat'n Co.*, 16 Federal Reporter, 524. 1883.

41. — Under the statutes of Illinois the amount of land which a railroad company is allowed to take for right of way is measured by the necessities of the case only, and is not limited to a strip of one hundred feet wide. Where the petition states the amount of land necessary for the road, and such allegation is not controverted, no question can arise as to whether more land is sought to be taken than is necessary. *Bowman v. Venice and Carondelet R'y Co.*, 102 Ill., 459. 1882.

42. — The law authorizing the condemnation of private property for railroad purposes is limited to such property as is necessary for such purpose, and no such proceedings can lawfully be had of property not necessary for the construction or use of the road. But this necessity need not be made certain before it is lawful to proceed with the condemnation. *Chicago and Western Indiana R. R. Co. v. Dunbar*, 100 Ill., 110, 1881; 5 Amer. & Eng. R. R. Cases, 253.

43. — convenience. Property convenient for the company may be taken as well as property necessary for its use. (8 and 9 Vict., c. 20.) *Sadd v. Maldon, Witham and Braintree R'y Co.*, 6 Welsby, Hurlstone & Gordon (Exchequer), 143; 6 Eng. R. R. & Canal Cases, 779. 1851.

44. — future needs. In taking possession of land under the act of March 17, 1869, a

railroad company is not confined to the present needs of its business, but may properly provide for the future requirements of a more extended traffic. *Lodge v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 8 Philadelphia, 345. 1871.

45. — to be determined by the corporation. When the legislature authorizes railway directors to take, for the purposes of their undertaking, any lands specially described in their acts, it constitutes them the judges whether they will or will not take these lands, provided that they act with the *bona fide* object of using the lands for the purposes authorized by the act and not for any collateral purpose. Having provided for affording compensation to the owners of the lands, the legislature leaves it to the company to determine what lands are necessary to be taken. *Stockton and Darlington R'y Co. v. Brown*, 9 House of Lords Cases, 246. 1860.

46. — The decision of the general manager of a railway company is *prima facie*, and in the absence of all evidence to the contrary, a just measure of what is essential to the convenient and proper conduct of its business, and sufficient to warrant the exercise of the power of eminent domain in its behalf. *Dietrichs v. Lincoln and Northwestern R. R. Co.*, 13 Neb., 361. 1882.

47. — question for jury. Where a railway company, being authorized by its special act to take such lands as are delineated on its plans, etc., and necessary for the purpose of making the railway, has taken a parcel of land so delineated, and the land owner afterwards disputes the right to it by an action, contending that such land was not necessary for the purpose, etc., the necessity is a question for the jury; and they are warranted in finding such necessity, if it appear that the company proposed to take part of a close, necessary for the purpose, etc., of which close the parcel in question was the residue, and the land owner insisted on the whole being taken. *Doe v. North Staffordshire R'y Co.*, 16 Adolphus & Ellis (N. S.), 526; 71 E. C. L., 525. 1851.

48. — The petition of a railway company which sets forth that, having failed to agree with the owner of land as to its value, which it had taken for the necessary purpose of

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putting down additional tracks, and otherwise using it in the maintenance of its road, is fatally defective, and the proceeding will be set aside. Viewers appointed to assess the value of land taken by a railroad company must find in their report whether such appropriation was necessary; if they do not find it necessary, the land cannot be taken. *Shick v. Pa. R. R. Co.*, 1 Pearson (Pa.), 259. 1866.

49. Power to take property. It is essential to the exercise of the right of eminent domain for the corporation to prove that it has fully organized, by the election of directors, and that it is unable to agree with the owner of the property upon the compensation to be paid therefor. *Powers v. Hazelton and Letonia R'y Co.*, 83 Ohio St., 429. 1878.

50. — Courts have the right to determine whether the use of private property proposed to be taken and appropriated is public in its nature or not; but when the use is public, the judiciary cannot inquire into the necessity or propriety of exercising the right of eminent domain; that right is political in its nature, and to determine when it shall be exercised belongs exclusively to the legislative branch of the government. *Chicago, Rock Island and Pacific R. R. Co. v. Town of Lake*, 71 Ill., 333. 1874.

51. — On an application for the appointment of commissioners to estimate the damages on a condemnation of land for railway uses, the only inquiry that, as a general rule, will be made is, whether the applicant has a *prima facie* right. In this summary proceeding contestable questions will not be decided. *State v. Hudson Tunnel R. R. Co.*, 38 N. J. Law, 17. 1875.

52. — In a proceeding by a railway company before a probate judge, under the act of April 30, 1852, it was incompetent for the land owner to prove, for the purpose of defeating the proceeding, that the incorporators procured the incorporation of the company, not for a public use, but for their private purpose merely, and was exercising the corporate privileges in abuse of the law; nor was it competent to prove for that purpose that there was no necessity for the road. These questions were not committed by the law to the determination of the probate judge, nor to the jury; but pertained to

other proceedings. *Powers v. Hazelton and Letonia R'y Co.*, 83 Ohio St., 429. 1878.

53. — When the use for which private property is taken is public, and the legislature has acted upon the question, the expediency or necessity of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. *Baltimore and Ohio R. R. Co. v. Pittsburg, Wheeling and Ky. R. R. Co.*, 17 West Va., 812, 1881; 10 Amer. & Eng. R. R. Cases, 444.

54. — The right of eminent domain lies dormant in the state until legislative action points out the occasions, the modes, the conditions and the agencies for its appropriation; and a legislative act being the customary mode of determining that fact, must be held for this purpose the law of the land; and no further finding or adjudication is essential unless it be required expressly by the constitution of the state. *Alexandria and Fredericksburg R'y Co. v. Alexandria and Washington R. R. Co.*, 75 Va., 780, 1881; 10 Amer. & Eng. R. R. Cases, 23.

55. — Under R. S., ch. 51, §§ 2 and 3, the purposes for which a railway company has the power to take lands as for public uses, for the location, construction and convenient use of its railway, are for necessary tracks, side tracks, depots, wood sheds, repair shops and car, engine and freight houses. *Spofford v. Bucksport and Bangor R. R. Co.*, 66 Me., 26, 1876; 20 Amer. R'y Rep. 20.

56. — land taken under franchise of another corporation. A railway company permitted its charter to be used for purposes of condemnation of lands for another company's road, and on the location of the latter, which paid and took title in its own name for the land and built the road. Held, that the road was the property of the latter company. If, in such case, any of the land condemned was paid for by the former company with its own funds, which have not been repaid to it, the latter company is bound to refund the amount. *Coe v. New Jersey Midland R'y Co.*, 31 N. J. Eq., 105. 1879.

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57. — One railway company cannot, by agreement, condemn property for its own use and the use of other companies. Each company must proceed for itself. *Swinney v. Fort Wayne, Muncie and Cincinnati R. R. Co.*, 59 Ind., 205. 1877.

58. — Though a railway company may not for some reason have the legal authority to condemn right of way for a lateral line, it may cause another company of its own stockholders to be organized so as to have that power, and when such subsidiary company has condemned the right of way, it may lease its line to the former company, and in this there will be no fraud upon those whose lands have been condemned. *Lower v. Chicago, Burlington & Quincy R. R. Co.*, 59 Ia., 563, 1882; 10 Amer. & Eng. R. R. Cases, 17.

59. — To the petition of a railway company to take lands, the owner answered asking an injunction upon the alleged grounds that the plaintiff had no valid organization, did not intend to build the proposed line, and had organized simply in the interest of another company, which grounds were being tested in a *quo warranto* proceeding then pending against such company. *Held*, that the answer is insufficient. *Aurora and Cincinnati R. R. Co. v. Miller*, 56 Ind., 88, 1877; 18 Amer. R'y Rep., 144.

60. **Private crossing.** By s. 183 of the Grand Junction Railway Act (3 Will. 4, c. xxxiv), it is enacted that the owners and occupiers of lands through which the railway should be made ("except in cases in which the company should, at its own expense, have made communications from the land on the one side of the railway to the land on the other side thereof, according to any agreement with any owner or occupier thereof, or according to the provisions of the act"), at all times for the purpose of occupying the said land, without payment of toll, might pass and repass directly over and across such parts of the railway as should be made in or upon their respective lands. The one hundred and eighty-sixth section prohibited all persons, except the company and its servants, from crossing the railway, "except only directly crossing the same at places to be appointed for that purpose, for the necessary occupation of the respective

lands through which the said railway should pass." And by s. 180, in case of dispute, the company is to make such communication as two or more justices of the peace shall, upon the application of any owners, etc., judge necessary and appoint. *Held*, that until the company had made a communication, the owners of severed lands had a right to cross the railway at any part within their respective lands. *Grand Junction R'y Co. v. White*, 8 Meeson & Welsby (Exchequer), 214. 1841.

61. — By an inclosure award a road was set out as a carriage road and drift-way from a highway to certain of the inclosed lands. The defendant, a railway company, acquired some of the lands and built a cattle pen thereon adjoining its railway, and used the road for the passage to and from the highway of cattle that were to be, or had been, conveyed on its railway, such user being much greater than the user at the time of the grant, which was exclusively for agricultural purposes. *Held*, that this was a lawful user on its part, and that it was not restricted to the user which existed at the time of the grant. *Finch v. Great Western R'y Co.*, Law Reports, 5 Exchequer Division, 254, 1879; 31 Eng. (Moak), 665.

62. **Private use.** The power of eminent domain is conferred for a public use only, or for some present public advantage to be gained, but not with a view to contingent results dependent upon the success of a projected speculation. The railway in this case was not for public use within the meaning of the statutes. *Edgewood R. R. Co.'s Appeal*, 79 Pa. St., 257. 1875.

63. — **diversion of property to private uses.** Where a building erected on land expropriated for the purpose of a railroad station is used as such, but a private business is carried on in certain rooms by one who is the agent of the railroad and receives his compensation in being allowed the use of these rooms, in which railroad freight is, however, stored when necessary, it is not such a diversion by the railway from the use for which the land was expropriated as to authorize an action for damages. *Hoggatt v. Vicksburg, Shreveport and Pacific R. R. Co.*, 34 La. An., 624. 1882.

64. **Proceedings.** Proceedings to condemn lands are special proceedings by a

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temporary tribunal selected for the occasion. *Toledo, Ann Arbor and Grand Trunk R'y Co. v. Dunlap*, 47 Mich., 456, 1882; 5 Amer. & Eng. R. R. Cases, 378.

65. — action of directors. The complaint alleges, in substance, that defendant entered upon and appropriated a strip of plaintiff's land, three hundred feet wide, and claims to have caused an appraisalment of the same to be made, and that this was done under a resolution of its board of directors; but that such resolution was passed at a meeting at which there were present only a certain specified number of directors, less than a quorum. An answer which merely sets forth the resolution, without averring that it was adopted when a quorum of the directors were present, held bad, on demurrer. *Stringham v. Oshkosh and Mississippi R. R. Co.*, 33 Wis., 471. 1873.

66. — condemnation after road is built. Where a condemnation of land and the assessment of damages were set aside, by consent, for the purpose of making a new one of the land actually taken, and the land owner allowed to retain the compensation paid on the original assessment to be applied on the second, and the court instructed the jury that the land owner was entitled to the value of the land sought to be condemned, with the improvements put thereon, and it did not appear but the jury followed the instructions in the assessment, this court, without deciding whether the law was stated correctly, refused to disturb the assessment, on appeal by the land owner. *Mitchell v. Illinois and St. Louis R. R. and Coal Co.*, 85 Ill., 566. 1877.

67. — taking part of a tract. Under the Lands Clauses Consolidation Act, 8 and 9 Vict., c. 18, if the promoters of an undertaking demand a compulsory sale of premises by authority of the statute, the owner, by § 92, may refuse to sell less than the whole; but if they have given notice of requiring a part, the owner cannot, by reason of such notice, require that the whole be taken, and the promoters, on his refusal to sell part, may abandon the purchase. *Queen v. London and South Western R'y Co.*, 12 Adolphus & Ellis (N. S.), 775; 64 E. C. L., 774. 1848.

68. — A lessee held under the same lease two pieces of ground, one on the southern, the other, a corresponding piece of equal width, on the northern side of a road, which at the date of the lease was a private road, but was afterwards dedicated to the public. On the southern piece of ground the lessee's house and garden were situate; on the northern piece he was prohibited from building, and it had been thrown together with corresponding pieces of ground east and west of it, which had been granted to other lessees under the same lessor, into one piece of ground, which was used for the purpose of recreation and pleasure, and had been also let out to a butcher as grazing ground for sheep and cattle. A railway company desiring to take the northern piece of ground for the purposes of its undertaking, held, by the Lord Justice Turner, affirming the decision of the master of the rolls, but *dis-sentiente* the Lord Justice Knight Bruce, that it was not compellable under s. 92 of the Lands Clauses Consolidation Act, 1845, to take the property on the south side of the road also. *Fergusson v. London, Brighton and South Coast R'y Co.*, 3 De Gex, Jones & Smith, 653; 68 Eng. Ch., 652. 1863.

69. Public use. The taking of private property in order that a railway may be made belongs to the class of things which in proper cases are to be regarded as public necessities. *Seacombe v. R. R. Co.*, 23 Wallace, 108, 1874; 11 Amer. R'y Rep., 355.

70. Purposes for which the land may be used. The court gave the following instruction: "That the railroad company, under its articles of incorporation, can only take property for the purpose of a railroad and telegraph line, and having once condemned property, it can use it for any purpose connected with its enterprise. It can use the property condemned of appellant for its main or side track. It can build a depot, freight house, engine house or warehouse upon it at any time it chooses, or appropriate it for any railroad purpose it chooses." *Held* proper, for aught that appeared in the record, as this land in question may have been taken expressly for the purposes mentioned in the instruction of the court; if the appellant relied upon any error in that regard, he should have brought the record

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here in order to raise the point. *Curtis v. St. Paul, Stillwater and Taylor's Falls R. R. Co.*, 20 Minn., 28. 1873.

71. Quantity of land to be taken. A railway company will be restrained from taking more land than is necessary for the purpose for which the taking is authorized. *Webb v. Manchester and Leeds R. R. Co.*, 4 Mylne & Craig (Eng. Ch.), 116. 1839.

72. — by whom determined. Every corporation seeking to condemn land for a public improvement must, in a modified degree, be permitted to judge for itself as to the amount that is necessary for such purpose. This right is subject to all constitutional and statutory restrictions, and to the further limitation that the courts are clothed with ample power to prevent any abuse of the same. *Smith v. Chicago and Western Indiana R. R. Co.*, 105 Ill., 511. 1893.

73. — Defendant's charter authorizes it to take any land along and including the line of its road, not exceeding two hundred feet in width, and any land beyond those limits "which the directors shall, by resolution adopted by them, declare to be necessary for the use of said company," etc. Held, that this provision of the charter must be strictly complied with, before the company can condemn land outside the limit of two hundred feet in width; that the resolution provided for is a corporate act, and must be adopted at a meeting of the directors at which there is present a quorum competent to do business. *Stringham v. Oshkosh and Mississippi R. R. Co.*, 33 Wis., 471. 1873.

74. — Under the act incorporating the Carolina Central R'y Co., and providing for the condemnation of land for the construction and operation of the road (Laws 1872-3, ch. 75, §§ 9, 10), it is the duty of the commissioners appointed by the court not only to ascertain the value, but also the quantity, of the land which it is necessary to appropriate; and the land owner does not waive his right to insist on the performance of this duty by failing to answer the allegations of the petitioner as to the quantity necessary. *Carolina Central R'y Co. v. Love*, 81 N. C., 434. 1879.

75. — certificate of engineer. The court will accept as conclusive the evidence of the engineer in the service of the company as

to the quantity of land required for the purposes of the railway, if the statement has a reasonable appearance of accuracy. *Kemp v. South Eastern R'y Co.*, Law Reports, 7 Chancery Appeal Cases, 364. 1872.

76. — location of track. While a railway company cannot condemn more than one hundred feet in width for right of way, it is not necessary that it should locate its track in the middle of the land condemned. The fact that it owns land adjacent to that which it seeks to condemn will not restrict its right of condemnation. *Stark v. Sioux City and Pacific R'y Co.*, 43 Iowa, 501, 1876; 14 Amer. R'y Rep., 468.

77. — width of right of way. The right of way is not limited to any given width. It may vary in different localities; but obviously, a railway company may appropriate and use for its right of way such width of ground as may be reasonably necessary for the economical and convenient transaction of its business. *Chicago, Rock Island and Pacific R. R. Co. v. The People*, 4 Bradwell (Ill.), 468. 1879.

78. — The statute limits the amount of land, which may be taken by a railway company under condemnation proceedings, to one hundred feet in width, except, first, on account of wood and water stations; second, where a greater width is necessary for excavation, embankment or depositing waste earth. *Johnston v. Chicago, Milwaukee and St. Paul R'y Co.*, 58 Ia., 537. 1882.

79. — Under the Revised Statutes, where a railway company, under statutory proceedings to obtain a right of way, seeks to condemn a strip of land exceeding one hundred feet in width, and the necessity for a greater width is controverted by the land owners, the burden of proof is upon the company. *Wisconsin Central R. R. Co. v. Cornell University*, 52 Wis., 537, 1881; 10 Amer. & Eng. R. R. Cases, 108.

80. — The circuit court for the proper county having found that condemnation of a strip of two hundred (instead of one hundred) feet in width in such county is rendered necessary by the character of the land and timber, the supreme court will not reverse the order, in the absence of a clear preponderance of evidence against such finding.

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Wisconsin Central R. R. Co. v. Cornell University, 49 Wis., 162. 1880.

81. Right to use steam power. The right to use steam upon a railway is the subject of legislative control. The rights of the Long Island R. R. Co. to use steam power determined. *People v. Long Island R. R. Co.*, 60 Howard's Practice (N. Y.), 395. 1890.

82. Side tracks. The right of running sidings to private establishments, and of taking the necessary land for the purpose, is clearly within the constitutional power of the legislature to confer, because the public interest is thereby subserved by reason of the increased facilities afforded for developing the resources of the state, and promoting the general wealth and prosperity of the community. *Getz's Appeal*, 3 Amer. & Eng. R. R. Cases (Pa.), 186. 1881.

83. — Where a railway company had a side track for many years before, connecting its main track with a public warehouse and elevator, in a town, over the land of another, but without having the right of way therefor except by the mere consent or license of the owner, it was held that the company had the right to institute proceedings to condemn the land over which such branch run, for right of way. *Fisher v. Chicago and Springfield R. R. Co.*, 104 Ill., 323, 1882; 10 Amer. & Eng. R. R. Cases, 14.

84. Superfluous land. The mere fact that land of a railway company is required for the purposes of its undertaking, and is not superfluous land, does not prevent an occupier who has exclusive adverse possession for twelve years becoming thereby entitled to the land under the statutes of limitations. *Bobbett v. South Eastern R'y Co.*, Law Reports, 9 Queen's Bench Division, 425. 1892.

85. Telegraph lines. Neither the acts of congress declaring railroads to be post routes, nor the act of July 24, 1866, providing that telegraph companies may construct their lines over post roads, authorize a telegraph company to establish its lines over the right of way of a railway company without making compensation therefor according to law. *Atlantic and Pacific Telegraph Co. v. Chicago, Rock Island and Pacific R. R. Co.*, 6 Bissell (U. S. C. C.), 158. 1874.

86. — It is beyond the power of congress to

authorize a telegraph company to construct its line over private property without compensation. *Id.*

87. — Under the act of March 19, 1875, to "facilitate the construction of telegraph lines," taken in connection with the act of February 8, 1872, for the same purpose, no appeal is allowable from an interlocutory ruling in the course of proceedings to establish such lines, but only from the final judgment therein. *American Union Telegraph Co. v. Wilmington, Columbia and Augusta R. R. Co.*, 83 N. C., 420. 1880.

88. Time of taking; proceedings. Where the special act fixed the time for taking land and completion of the railway, and a notice was served upon a land owner within the time fixed by the act, but nothing further was done till after the time had expired, it was held that the company could not further proceed under the notice. *Richmond v. North London R'y Co.*, Law Reports, 5 Equity Cases, 352. 1868.

89. Title; land dedicated to public use. To effect a statutory dedication of lands to public use, the requirements of the statute authorizing it must be substantially complied with. *Downer v. St. Paul and Chicago R'y Co.*, 22 Minn., 251. 1875.

90. Transfer of railway. The Minneapolis and Northwestern R'y Co., a corporation authorized to construct a railroad between two points, condemned land of plaintiff, and, without constructing the railroad, transferred the right of way to the Minneapolis and St. Louis R'y Co., a corporation authorized to construct a railroad between the same two points. The latter company constructed, and has maintained, its railroad over the right of way so transferred to it. Held, that plaintiff, whose interests are not affected by the transfer, cannot call in question the capacity of the former company to make, nor of the latter company to receive, the transfer, compensation having been made by the former company. *Crolley v. Minneapolis and St. Louis R'y Co.*, 30 Minn., 541. 1883.

91. Tunnel. Damages having been assessed for the construction of a tunnel, all future damages resulting from vibration in its use and natural subsidence of the tunnel are embraced in the assessment. *Croft v.*

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London and Northwestern R'y Co., 3 Best & Smith, 436; 113 E. C. L., 435. 1863.

92. — Under the Lands Clauses Consolidation Act, 8 and 9 Vict., c. 18, compensation must be made before entering upon lands. Therefore, before tunneling under such land compensation must be made in like manner. *Ramsden v. Manchester R'y Co.*, 1 Welsby, Hurlstone & Gordon (Exchequer), 723. 1848.

93. **Watercourses; diversion.** A railway company is not authorized by sec. 16 of the Railways Clauses Act, 1845, permanently to divert the course of a private river, unless the diversion is necessary for the construction of the railway. The diversion cannot be made merely because it will diminish the expense of the construction of the railroad. *Pugh v. Golden Valley R'y Co.*, Law Reports, 12 Chancery Division, 274. 1879.

94. **Wharves.** The only limit to the power of railroad corporations to take lands for railroad purposes is reasonable necessity of the corporation in the discharge of its duty to the public. This includes the acquisition of lands for depots and buildings convenient and proper for the storage and keeping of cars and locomotives when not in use, and for the receipt, storage, safe keeping and delivery of freight and property, as well as such facilities as are usually required in operating its road and the successful prosecution of its business. *New York Central and Hudson River R. R. Co., In re*, 77 N. Y., 248. 1879.

95. — Land under water in the Hudson river, with or without a water front, required by a railway company for piers and wharves to facilitate the transportation of freight, may be condemned by such proceedings. *Ib.*

II. PROCEEDINGS GENERALLY.

1. *Proceedings under charter.*

96. **Charter.** A railway company, after the compulsory powers of its original act had expired and the railway was opened for traffic, obtained another act enabling it to widen its line and enlarge its stations, and to take additional pieces of land; *held*, that, under the circumstances, the company could not proceed to take a piece of land subject

to the compulsory powers of both acts under a notice to treat given under their original act. *Richmond v. North London R'y Co.*, Law Reports, 3 Chancery Appeal Cases, 679. 1868.

97. **Collateral attack.** The validity of the charter issued to a railway company, and the fact that it is lawfully organized, with power to procure condemnation of land, cannot be questioned on an appeal from an award of damages; but such question must be raised when application is made for the appointment of commissioners before the court or judge to whom such application is made, or in the supervisory court to which the proceedings may be removed on *certiorari*, or in some other proceeding authorized by law for that purpose. *Miller v. Prairie du Chien and McGregor R'y Co.*, 34 Wis., 533. 1874.

98. — **forfeiture.** Forfeiture of a charter cannot be raised collaterally. It must be presented by a direct proceeding by the government. So held even against property owners who resist the taking of a highway for a railway track. *N. Y. Elevated R. R. Co., In re*, 3 Abbott, New Cases (N. Y.), 401. 1877.

99. **Powers.** The Carolina Central R. R. Co., under its charter (and being the successor of the rights and powers of the Wilmington, Charlotte and Rutherford R. R. Co. under its charter), and under the general railroad law (Acts 1871-2, ch. 138), has the power to institute proceedings for the condemnation of land necessary for the uses of the company. *North Carolina R. R. Co. v. Carolina Central R'y Co.*, 83 N. C., 489. 1880.

100. **Proceedings; either land owner or company may apply for assessment.** Under the provisions of the act of January 22, 1855 (ch. 140, Gantt's Dig.), either the land owner or the corporation could apply for an assessment of damages for right of way; written notice, as prescribed by the statute, should be given before the appointment of commissioners to assess the damages. *Cairo and Fulton R. R. Co. v. Trout*, 32 Ark., 17. 1877.

101. **Proceedings; notice.** Where the charter required notice, by publication, to the owner or occupier, or unknown owners of land sought to be condemned, of the ap-

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plication to appoint commissioners, and the company publishes such notice as to one who had held a life estate only, but who was dead, not naming the remainder man, it was held that the subsequent proceedings condemning the land for right of way were not binding upon the remainder man, and that he might recover the land appropriated by ejectment. *Chicago and Alton R. R. Co. v. Smith*, 78 Ill., 96. 1875.

102. — Notice to owners is not expressly required by the charter of defendant to be given in any stage of the proceeding, but, by necessary implication, it is indispensable. *Tracy v. Elizabethtown, etc., R. R. Co.*, 80 Ky., 259. 1882.

103. *Security before entry.* The charter of a railway company required the corporation, when requested by the owner of land condemned for its use, and before entering on such land, to give security for the payment of such damages as might be finally awarded. *Held*, that this provision neither barred nor suspended the statutory remedy for enforcing the award. *Fisher v. Warwick R. R. Co.*, 12 R. I., 287. 1879.

104. *Special charter.* Notwithstanding the fact that the Atchison, Topeka and Santa Fe R. R. Co. was organized under a special charter of the territorial legislature, it has a right to proceed for the condemnation of lands in accordance with the provisions of the general statutes in respect thereto. *Central Branch Union Pacific R. R. Co. v. Atchison, Topeka and Santa Fe R. R. Co.*, 26 Kans., 669, 1881; 5 Amer. & Eng. R. R. Cases, 389.

2. Commencement of proceedings.

105. *Form of warrant.* A warrant issued to a sheriff, commanding him to summon a jury to assess the compensation due, "if any," to C. *Held*, that the insertion of these words "if any" did not affect the validity of the warrant, or vary the duties of the jury. *Regina v. Lancaster and Preston R'y Co.*, 6 Adolphus & Ellis (N. S.), 759; 51 E. C. L., 757. 1845.

106. *Notice.* Upon an application to confirm the report of commissioners, appointed to appraise the damages caused by the taking of land for railway purposes, the court

at special term has power to refuse to confirm the report and direct a rehearing, upon the application of a land owner who shows that he has not received proper and adequate notice of the meetings of the commissioners, and that by reason thereof he has been absent therefrom. *New York, Lackawanna and Western R'y Co., In re*, 29 Hun (N. Y.), 602. 1883.

107. — Under a provision in a railway charter requiring notice in condemnation proceedings to be given to "the persons interested," a mortgagee of the lands condemned, if not notified, is not bound by the proceedings in condemnation. *Platt v. Bright*, 29 N. J. Eq., 128, 1878; 19 Amer. R'y Rep., 95.

108. — Before the court can enter judgment upon an application made to appropriate land to public use, the owner of the land must have notice of such application; but at whatever stage of the proceedings the owner is notified to appear, after such notice he has the right to contest the appropriation of his land to the petitioner's use. *Baltimore and Ohio R. R. Co. v. Pittsburgh, Wheeling and Ky. R. R. Co.*, 17 West Va., 812, 1881; 10 Amer. & Eng. R. R. Cases, 444.

109. *Who may commence.* Under the general railway act, the initiative in the exercise of the right of eminent domain belongs exclusively to the corporation. *Sherman v. Milwaukee, Lake Shore and Western R. R. Co.*, 40 Wis., 645, 1876; 13 Amer. R'y Rep., 459. [See par. 100, *ante*.]

3. Jurisdiction.

110. *Collateral attack.* Where commissioners have been duly appointed according to law to condemn land for right of way and assess damages, and have jurisdiction of the matters acted on by them, their action will be conclusive in all collateral proceedings. *Townsend v. Chicago and Alton R. R. Co.*, 91 Ill., 545. 1879.

111. — The service of the notice of a motion for confirmation is only a step in the proceedings, and a matter of practice. The failure to give it will not deprive the court of the jurisdiction already acquired, or render the order liable to be attacked collaterally.

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ally. *Allen v. Utica, Ithaca and Elmira R. R. Co.*, 15 Hun (N. Y.), 80. 1878.

112. Collusive service of process. Jurisdiction to appoint commissioners of appraisal cannot be conferred by notice served only on a person who is in no way connected with the land owner, and has only gone on the land to receive service by collusion with those interested in the condemnation. *Dunlap v. Toledo, Ann Arbor and Grand Trunk R'y Co.*, 46 Mich., 190. 1881.

113. County court. The general statute relating to corporations (Code 1873, ch. 56) confers no jurisdiction on a county court to take or appropriate land or other property of individuals or corporations for a railway company. Its only jurisdiction in such a case is to appoint commissioners to ascertain and report what compensation and damages the owner of the property is entitled to receive where he and the company cannot agree upon the question, and to determine what shall be a just compensation, upon the payment of which the statute vests the fee simple title of the property in the company. *Alexandria and Fredericksburg R'y Co. v. Alexandria and Washington R. R. Co.*, 75 Va., 780, 1881; 10 Amer. & Eng. R. R. Cases, 23.

114. — The provisions in ch. 88 of the acts of 1872-3, in reference to the manner in which lands shall be condemned by railway companies, are not repealed nor abrogated by ch. 114 of the acts of 1875, and the amendatory act of 1879, ch. 8, and therefore the circuit court has no jurisdiction in a case where a railway company seeks to condemn lands, the jurisdiction in such cases being confined to the county court. *Chesapeake and Ohio R. R. Co. v. Hoard*, 16 West Va., 270, 1880; *Same v. Patton*, 9 ib., 648, 1876.

115. Description. An accurate description of the land is essential to the validity of the proceedings. *New York Central and Hudson River R. R. Co.*, *In re*, 10 Amer. & Eng. R. R. Cases, 542; 90 N. Y., 342, 1882.

116. Notice. All interested parties must be notified or the proceedings will be invalid. *Morgan's La. and Tex. R. R. Co. v. Bourdier*, 1 McGloin (La.), 232; *Peoria and Rock Island R'y Co. v. Warner*, 61 Ill., 52, 1871; 12 Amer. R'y Rep., 444.

117. — Where a judgment, purporting to

be a judgment for the condemnation of the right of way for a railway company, is rendered against the company, and it does not appear that the condemnation proceedings were instituted by it, or that the company was a party to them, or even that it had any notice of them, and no summons has been served upon the railway company, *held*, that such judgment is void. *Jurction City and Fort Kearney R'y Co. v. Silver*, 27 Kans., 741. 1882.

118. — Under the statute the circuit and county courts are always open for proceedings to condemn land for right of way, and when the summons is quashed, the court may order an *alias* summons returnable in vacation, and when so issued and served ten days before the return day, the court will acquire jurisdiction to assess the compensation to be paid for the right of way. *Leibengut v. Louisville, New Albany and St. Louis R'y Co.*, 103 Ill., 431. 1882.

119. — Where service is had upon the land owner, but not ten days before the day set by the judge for the hearing of a petition presented in vacation, the service, though not in time for the purposes of a trial, will give the court jurisdiction of the person of the defendant, and the petition gives jurisdiction of the subject matter and of the person of the petitioner, and the court will have the power to continue the cause, and such a continuance will not abate the proceeding. *Bouman v. Venice and Carondelet R'y Co.*, 102 Ill., 472. 1882.

120. — Notice sent by mail to an improper address confers no jurisdiction. *Morgan v. Chicago and Northeastern R. R. Co.*, 36 Mich., 428. 1877.

121. — The plaintiff's messengers being injuriously affected by the works of "The Blackburn Railway Company," he served the secretary, at its office, with a notice containing the particulars required by § 68 of the 8 and 9 Vict., c. 18, but addressed to "The Blackburn and Clitheroe Railway Company;" *held*, that the notice was sufficient. *Eastham v. Blackburn R'y Co.*, 9 Welsby, Hurlstone & Gordon (Exchequer), 758. 1854.

122. Proceedings; petition. The jurisdiction of the railway commissioners being given by statute, and the petition presented

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to them being the foundation of their action, they obtain jurisdiction only when the petition presents a case within the provisions of the statute. *Spofford v. Bucksport and Bangor R. R. Co.*, 66 Me., 26, 1876; 20 Amer. R'y Rep., 20.

123. — The statute having determined specifically what facts must appear on the face of the petition, the court or judge cannot take any action until a petition is filed containing the statutory requirements, for it is by the petition jurisdiction is obtained of the subject matter. *Smith v. Chicago and Western Indiana R. R. Co.*, 105 Ill., 511. 1883.

124. — In proceedings under the statute the allegations set out in the petition for appointment of commissioners that the owner has refused to relinquish the land or to make a voluntary conveyance of it, and that he received five days' notice previous to the presentation, state facts sufficient to give the court jurisdiction of the person of the owner and of the subject matter of the proceeding. *Quayle v. Missouri, Kansas and Texas R'y Co.*, 63 Mo., 465, 1876; 21 Amer. R'y Rep., 220.

125. — On an application for the appointment of commissioners to condemn lands, when a petition duly verified is presented to the judge, making a *prima facie* case, with due proof of notice, the appointment should be made as a matter of course. All uncertain and debatable questions should be certified to the supreme court. *State v. Hudson Tunnel R. R. Co.*, 38 N. J. Law, 548, 1876; 18 Amer. R'y Rep., 82.

4. Pleadings, practice and general requirements.

126. Amendment. In proceeding by a railway company to acquire title to lands under the water of the Hudson river which had been granted by the state to the owners of the uplands, the petition contained an offer on the part of the company to construct a draw-bridge to give access from the river to the docks of the land owners. After an order had been made and appealed from appointing commissioners on application of the company, an order was granted, giving it

leave to withdraw the offer, and to amend the petition accordingly. *Held*, that the court had no power to so amend the petition; that no such power was given by the provision of the general railroad act (§ 20, ch. 140, Laws of 1850), which authorizes the correction of "any defect or informality." *New York and West Shore R. R. Co., In re*, 89 N. Y., 453, 1882; reversing *Same Case*, 27 Hun (N. Y.), 57.

127. Application of land owner for damages. In a proceeding by the land owner for the assessment of damages against a railway company which had constructed its line across his farm, the application particularly described the whole tract of land, but that part of it occupied by the defendant's railway was described as "extending diagonally through said tract of land from a point near the northeast corner to a point near the southwest corner." *Held*, that such description is fatally defective on demurrer. *Indianapolis and Vincennes R. R. Co. v. Newsom*, 54 Ind., 121. 1876.

128. Bond. A railway company gave a bond to plaintiff to secure the payment of damages which plaintiff might sustain by reason of the location of the railway through his farm. On the back of the bond was a stipulation that if, from any cause, the quantity of land and fencing through the property required by the location of the road, as at present located, should be changed or lessened, that a stated deduction should be made from the face of the bond. In debt upon the bond, the company offered to prove that the land actually taken for its line was materially lessened from the quantity named in a draft annexed to the bond. This evidence was rejected by the court below. *Held*, that it should have been admitted. *Wilmington and Reading R. R. Co. v. High*, 89 Pa. St., 282. 1879.

129. Change of route. The Pennsylvania R. R. Co. filed a petition in the common pleas, setting forth that under the provisions of its charter it had surveyed and located the route for a new line, and reciting that it was unable to agree with the owners of property as to the damages to be awarded them, and prayed for the appointment of viewers to assess the same. Viewers were appointed, and filed their report. One of the company's

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exceptions thereto was on the ground that, "since the report of the viewers," it had altered the route of its road through the land of some of the property holders, and the court set aside so much of the report as assessed the damages to them, and then confirmed the rest of the report. *Held*, that this action of the court was final, and the subject of appeal. *Held*, further, that the location of the line by the company was an appropriation of the land, and after the assessment of the damages, the right thereto was vested in the owners, and could not be divested by a subsequent change of route. *Beale v. Pennsylvania R. R. Co.*, 86 Pa. St., 509. 1878.

130. — The notice required by the statute (§ 23 of ch. 140 of 1850, as amended by ch. 560 of 1871) to be given on an application for a change of the proposed route of a railway company must be personally served. *People ex rel. v. Lockport and Buffalo R. R. Co.*, 13 Hun (N. Y.), 211. 1878.

131. Change of venue. The power of changing the venue is not inherent in the county courts, as it is in those of a larger jurisdiction, but was conferred upon them by statute. *Watson v. Chester and Delaware River R. R. Co.*, 83 Pa. St., 254. 1877.

132. Conditions precedent. In proceedings of this character all precedent conditions must be fully complied with. *Kansas City, St. Joseph and Council Bluffs R. R. Co. v. Campbell*, 62 Mo., 585. 1876.

133. — *effort to agree.* Evidence of an effort having been made before the commencement of an action, to agree as to the compensation for a right of way, is a prerequisite to establish a cause of suit. *Oregon R'y and Navigation Co. v. Oregon Real Estate Co.*, 10 Oreg., 444. 1881.

134. Death of party. Where the defendant dies during the pendency of the proceeding, or during the pendency of a petition in error to reverse the same, the revivor of the proceeding must be had in the name of the heirs or devisees, and not of the administrator of the deceased. *Valley R'y Co. v. Bohm*, 29 Ohio St., 633. 1876.

135. Default. Where, upon a hearing before commissioners, the owner makes default, the supreme court, on motion to confirm the report of the commissioners, has

power, the default being excused, to open it, to set aside the report and order a new hearing. *New York, Lackawanna and Western R'y Co., In re*, 93 N. Y., 385. 1883.

136. Deposit of award; conditions. A deposit of the amount of an award of damages for land taken under the law of eminent domain, where a deposit is authorized to be made for the use of the land owner, is unavailing if a condition is imposed respecting the payment of the money deposited to the owner. It is immaterial whether or not the agent making the deposit was authorized to impose the condition. *Kanne v. Minneapolis and St. Louis R'y Co.*, 30 Minn., 423. 1883.

137. — *interpleader.* The defendant railway company had commenced the construction of its road over the lands of the defendant B., and had deposited the amount of the land damages awarded B. by the commissioners, in the plaintiff's bank, as provided by statute, for which the bank had issued a certificate of deposit to B. While said work was in progress, and before much of B.'s land had been taken, said company was enjoined, at the instance of other parties, from the further prosecution of work upon its road, whereupon it forbade the orator to pay B. the sum so deposited, because it had taken but a small portion of the lands of B. for which said damages were awarded, and had damaged said lands to a much less extent than the amount of the damages awarded. B. claimed such deposit, and demanded the same of the orator, and upon its refusal to pay the same to him, brought suit at law therefor. The orator claimed no interest in said fund other than as stakeholder. *Held*, that the orator could sustain a bill of interpleader against the defendants in respect to said fund. *First National Bank of Brattleboro v. West River R. R. Co.*, 46 Vt., 633. 1874. See, also, *Same v. Same*, 49 ib., 167. 1876.

138. Description. The land which a railway company claimed to take for a gravel pit was described in its petition to the railway commissioners as comprised within a space of fifteen rods square; the land condemned by the commissioners for that purpose was not comprised within that limit. *Held*, that they had no power to condemn

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land not described in the petition; and in so doing they exceeded their jurisdiction. *Spofford v. Bucksport and Bangor R. R. Co.*, 86 Me., 26, 1876; 20 Amer. R'y Rep., 20.

139. — In an inquisition of damages the schedule mentioned a dwelling. *Held*, that this description included the yard and garden. *Taylor v. Clemson*, 2 Adolphus & Ellis (N. S.), 978; 42 E. C. L., 1005. 1842.

140. — Where condemnation notices described the land as a certain number of feet on each side of the center line of the railroad, "as the same is located, staked and marked," *held*, that this description was sufficient, and if any other parts of the description differed therefrom they must yield to the visible designation. *Lower v. Chicago, Burlington and Quincy R. R. Co.*, 59 Ia., 568, 1882; 10 Amer. & Eng. R. R. Cases, 17.

141. — The petition, under the statute, must contain such a description of the land sought to be condemned as will show its location and the boundaries thereof. A defective description cannot be remedied by a reference in the petition to a deed. *New York Central and Hudson River R. R. Co., In re*, 70 N. Y., 191, 1877; 18 Amer. R'y Rep., 395.

142. Dismissal of proceedings. On appeal, a railway company may, by a disclaimer, dismiss proceedings instituted by it for condemnation of lands. In such a case the costs must be taxed to the company. *St. Louis, Ft. Scott and Wichita R. R. Co. v. Martin*, 29 Kans., 750, 1883; 10 Amer. & Eng. R. R. Cases, 514.

143. Evidence before commissioners. The commissioners should hear all legal and relevant testimony offered by either party, bearing upon the question of compensation. *Washington, Cincinnati and St. Louis R. R. Co. v. Switzer*, 26 Grattan (Va.), 661. 1875.

144. — Where a petition is filed to condemn land for the right of way, and there is no cross-petition to include other land with it, it is improper to permit evidence to be introduced in regard to land adjoining that described in the petition and belonging to the same owner. *Peoria, Atlanta and Decatur R. R. Co. v. Sawyer*, 71 Ill., 361. 1874.

145. Irregularity; waiver. If a proceeding may be dismissed, on the motion of the land owner, because the instrument of appropriation deposited with the clerk, as provided in § 15, 1 G. & H., 500, is not signed by any person in behalf of the railway company, such objection will be waived if not made until a late stage of the proceeding. *Logansport, etc., R'y Co. v. Buchanan*, 52 Ind., 163. 1875.

146. Manner of proceeding by commissioners. There is no error in the exclusion of testimony for the purpose of sustaining the commissioners' report, to the effect that they were instructed in their duties by the adverse attorneys. The matters of inquiry for the court are: What did the commissioners do in fact, and upon what principles did they arrive at the conclusions reported? Nothing appearing in the record to show how this inquiry was conducted, the action of the court below, in setting aside the report, will be presumed correct. *Quincy, Missouri and Pacific R. R. Co. v. Ridge*, 57 Mo., 599. 1874.

147. Parties. In a proceeding to condemn land under a special statute which passed the fee in the land taken upon payment of the damages assessed, and which required the court to render judgment upon the report of the commissioners in case no appeal was taken from their assessment, both parties appealed, and a trial was had, and the company procured a reversal for error. The land owner having died, the cause was re-docketed in the name of his administrator, the company's appeal dismissed for want of prosecution, and thereupon the administrator dismissed the appeal of his intestate, electing to take the damages as found by the commissioners, which had been deposited. *Held*, that, as the fee in the land descended to the intestate's heirs at law, they should have been made parties, so as to conclude them by the judgment; and for the error in not making them parties the judgment of the court was reversed. *Peoria and Rock Island R'y Co. v. Rice*, 75 Ill., 329. 1874.

148. — Damages resulting to the remainder of the tract not taken, on account of the shape in which it will be left, or of the effect of an embankment built along the track, or

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from cutting off the front from a county road, so as to injure the sale for building sites, are not special damages, and may be proved without being set up in the answer. *North Pacific R. R. Co. v. Reynolds*, 50 Cal., 90, 1875.

149. — There is no rule of law or practice authorizing the filing of an answer of any kind to a petition for the condemnation of land under the Eminent Domain Act. If one is filed, the court may properly have the same stricken from the files. *Smith v. Chicago and Western Indiana R. R. Co.*, 105 Ill., 511, 1883.

150. — An application under § 710 of the practice act, 2 R. S., 1876, p. 289, for a writ to assess damages, must be in writing; and such application constitutes a complaint to which objection may be made as in ordinary proceedings. *Church v. Grand Rapids and Indiana R. R. Co.*, 70 Ind., 161, 1880; 3 Amer. & Eng. R. R. Cases, 198.

151. Practice. Proceedings to condemn land for railway uses are special, and unlike ordinary trials at law; the inquest may be conducted by commissioners or a jury without the aid of counsel, so that the practice must be simple and a large discretion allowed in admitting or rejecting testimony. *Port Huron and Southwestern R'y Co. v. Voorheis*, 50 Mich., 503, 1883.

152. — Practice in proceedings for condemnation of lands considered. *East Tennessee, etc., R. R. Co. v. Burnett*, 11 Lea (Tenn.), 525, 1883; *Camp v. Coal Creek, etc., R. R. Co.*, ib., 705, 1883.

153. — right to open and close. The railway company has the right to open and close. *McReynolds v. Baltimore and Ohio R'y Co.*, 106 Ill., 152, 1883.

154. Proceedings; review. Upon exceptions filed to the report of commissioners, the court should review by evidence the action of the commissioners, and supervise their finding so as to do substantial justice. The court may approve or reject their report, but cannot alter it. *Mississippi River Bridge Co. v. Ring*, 58 Mo., 491, 1874.

155. Second assessment. Where a petition to condemn land for a right of way describes only one tract of land of the defendant's farm, which is cut off from the rest of the farm, and damages are assessed

only in respect to that tract, the owner may afterwards cause the damages to be assessed as to the balance of the land. *Galena and Southern Wisconsin R. R. Co. v. Birkbeck*, 70 Ill., 208, 1873.

156. Statute. A railway company, having commenced proceedings for condemnation of right of way under the statute of 1852, must adhere to it throughout, and cannot resort to other statutes. The rights of parties must be controlled by the act under which proceedings are begun. *Peoria, Pekin and Jacksonville R. R. Co. v. Laurie*, 63 Ill., 264, 1872; 7 Amer. R'y Rep., 214.

157. — Wisconsin statute. The general railway law of 1872 furnishes the rules and methods for the acquisition, thereafter, of private property by railway companies, repealing all prior provisions on the subject in their charters. *Bohlman v. Green Bay and Minnesota R'y Co.*, 40 Wis., 157, 1876; 13 Amer. R'y Rep., 421; *Sherman v. Milwaukee, Lake Shore and Western R. R. Co.*, 40 Wis., 645, 1876; 13 Amer. R'y Rep., 459.

158. Tender. The Michigan statute for condemning lands for railway uses is fatally defective in not providing a means or tribunal for determining the question of tender, which cannot be done by the judge or jury. *Toledo, Ann Arbor and Grand Trunk R'y Co. v. Dunlap*, 47 Mich., 456, 1882; 5 Amer. & Eng. R. R. Cases, 378.

159. Time. A statute authorized a railway company to take a parcel of land after thirty days' notice, and provided that all general statutes relating to the location of railways should govern the taking. *Held*, that the location over the land might be filed before the expiration of the thirty days. *Eastern R. R. Co. v. Boston and Maine R. R. Co.*, 111 Mass., 125, 1872.

160. Void proceedings. An assessment of damages in proceedings to condemn lands is void if the land is not lawfully condemned. *Detroit, Monroe and Toledo R. R. Co. v. Detroit*, 49 Mich., 47, 1882.

5. Report, judgment and subsequent proceedings.

161. Arbitrators; award. The award of arbitrators or an umpire upon a claim for compensation for lands injuriously affected

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by the works of a company, under the Lands Clauses Consolidation Act, 1845 (8 and 9 Vict., c. 18), like the assessment of a compensation jury, merely ascertains the amount, not the claimant's right to compensation. Such an award, therefore, cannot be enforced by motion, like an ordinary award. *Newbold and Metropolitan R'y Co., In re*, 14 Common Bench (N. S.), 405; 108 E. C. L., 401. 1833.

162. — Where there is an award of arbitrators under a verbal agreement to submit matters in dispute, judgment cannot be taken on this award for want of a sufficient affidavit of defense. *Fox v. Philadelphia and Reading R. R. Co.*, 1 Pearson (Pa.), 156. 1859.

163. **Award; description.** A description in an award allowed a strip thirty feet wide on each side of a given line across the entire premises, except that, in crossing a specified tract, a strip only twenty-five feet wide was allowed south of the line. It also described another parcel by making the boundary begin and end at the east end of the northerly outside line of the former and by giving the courses and distances. *Held*, sufficient. *Michigan Air Line R'y Co. v. Barnes*, 44 Mich., 222. 1880.

164. — **easement of land owner.** A report of commissioners, made under s. 14 of ch. 42 of the Code, providing that the party defendant shall have the liberty of constructing certain easements over the land taken by the company, is erroneous upon its face, although otherwise in conformity to the statute, and may be set aside on motion of the defendant. *Railroad Co. v. Halstead*, 7 West Va., 301. 1874.

165. — **entry by corporation without occupying the land.** Where a railway company duly condemned a right of way, which included the plaintiff's lot, and without paying the award entered thereon, but did not actually occupy any portion of plaintiff's property or disturb the fence around it, it was held that the company had not made such an appropriation of the property as to have been guilty of a tort, and that it was not liable to pay the award. *Dimmick v. Council Bluffs and St. Louis R'y Co.*, 58 Ia., 637, 1882; 10 Amer. & Eng. R. R. Cases, 105.

166. — **error in award; lump sum to several lot owners.** Proceedings were had to condemn land, which were regular except that the commissioners awarded a gross sum as compensation to all of six lot owners, who held in severalty, without specifying the sum to which each was entitled. The company paid the money into court, and nothing further was done in the proceeding. *Held*, that the condemnation proceeding being ended, and not pending so as to permit the award to be corrected at the instance of either party, they were without any effect upon the rights of the parties. Such proceedings were void. *Rusch v. Milwaukee, Lake Shore and Western R'y Co.*, 54 Wis., 136, 1882; 6 Amer. & Eng. R. R. Cases, 609.

167. — Where commissioners assessed the damages in view of the tract taken altogether, but understated the quantity of the land by a fraction of an acre, it was held that it did not invalidate their action. *Morgan v. Chicago and Northeastern R. R. Co.*, 39 Mich., 675. 1878.

168. — **how returned.** Under the statute of 1873, ch. 360, authorizing the Eastern R. R. Co. to take land for a freight station, and providing that the general statute shall govern the proceedings, except that, instead of the county commissioners, three commissioners shall be appointed by the court to adjudicate the damages, from whose decision "an appeal to a jury shall lie" in behalf of any owner of land taken, "as is provided in case of lands taken for railroad purposes," the award of commissioners so appointed is to be returned to the court; and the application for a jury, by way of appeal from their decision, is to be made, and the trial by jury had, at the bar of this court. *Wyman v. Eastern R. R. Co.*, 128 Mass., 346, 1880; 1 Amer. & Eng. R. R. Cases, 22.

169. — **must be in money.** It is error to confirm a report of commissioners made under the provisions of ch. 42 of the Code, in which the "just compensation" to which the party is entitled is not exclusively given to him in money, the party himself appearing to resist the report on that ground. *Chesapeake and Ohio R. R. Co. v. Patton*, 6 W. Va., 147. 1873.

170. — **uncertainty.** An award which requires a railroad company to pay \$400 for

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right of way, and to build fences, the money to be paid at any time fixed upon by the company, by giving the land owner three days' notice of the time and place of payment, and requires the land owner at the same time to deliver to the company a deed for the right of way, is void for uncertainty as to the time for the payment of the money and the delivery of the deed. *Alfred v. Kanakake and Southwestern R. R. Co.*, 92 Ill., 609. 1879.

171. Damages; nominal. Where the report of commissioners has been set aside by the general term, on the ground that they erred in only awarding nominal damages to the owners, and a new set of commissioners has been appointed who have made their report, by which nominal damages only are awarded to the owners, the court will not, in the absence of fraud, corruption, misconduct or misapprehension, set aside the last report and appoint a new set of commissioners. *Prospect Park and Coney Island R. R. Co., In re*, 24 Hun (N. Y.), 199. 1881. See, also, *Same Case*, 85 N. Y., 439. 1881.

172. Exceptions. Exceptions held insufficient under the statute. Gen. St., ch. 63. *Tucker v. Massachusetts Central R. R. Co.*, 116 Mass., 124. 1874.

173. Excessive damages. Where the damages are grossly excessive the court below may set aside the report of the viewers. *Philadelphia and Erie R. R. Co. v. Cake*, 95 Pa. St., 139. 1880.

174. Injunction. Where a corporation illegally entered upon land and constructed works thereon without previous expropriation, the owner, on the perpetuation of an injunction prohibiting the entry before expropriation, is entitled to a money judgment for the value of the property illegally taken. *Gay v. New Orleans Pacific Ry Co.*, 32 La. An., 277. 1880.

175. Interest. A defense based on matters of fact as to liability to pay interest on an award on proceedings to condemn land, available on a trial by jury, but as to which no evidence was offered, nor any request made to the judge to admit any evidence respecting it—though he directed the jury to find against the defendant as to the interest, which direction was considered and sustained, and the liability specially found

against the defendant on review by a court of law of competent jurisdiction, cannot be made the ground of relief in a court of equity. *Mettler v. Easton and Amboy R. R. Co.*, 26 N. J. Eq., 65. 1875.

176. Judgment. The judgment does not fix the rights of the company absolutely to the land. It is the tender of payment and the yielding of possession which fixes the rights of the parties. *Williams v. New Orleans, Mobile and Texas R. R. Co.*, 60 Miss., 689. 1882.

177. — A railway company seeking the condemnation of a part of a lot for the purposes of the road has no cause to complain of an order of court fixing the compensation to be paid, and directing the money to be paid to the treasurer of the county for the benefit of the owners of the property affected, or those interested in it. Such an order does not determine who is entitled to the compensation awarded. *Chicago and Western Indiana R. R. Co. v. Prussing*, 96 Ill., 203, 1880; 5 Amer. & Eng. R. R. Cases, 289.

178. — In all cases of condemnation to public use, under title 1, c. 34, Gen. St., the owner of lands is entitled to a personal judgment against the company or party instituting the proceedings for the damages awarded. *Robbins v. St. Paul, Stillwater and Taylor's Falls R. R. Co.*, 24 Minn., 191. 1877.

179. — In a proceeding by a railway company to take lands for the use of its road, against the owner of the land, it is error for the court, on confirming the report of the commissioners and ordering the same to be recorded, to render judgment against the applicant for the amount of damages ascertained by the report. *Chesapeake and Ohio R. R. Co. v. Bradford*, 6 W. Va., 220. 1873. See, also, *Same v. Peck*, ib., 397. 1873.

180. — In proceedings for condemning land to public use, under title 1, ch. 34, Gen. Stat., a bond having been given on appeal taken, pursuant to § 23 of said title, the judgment authorized to be entered on a verdict found therein is one not only settling and declaring the right of the company seeking to appropriate the property to the use thereof, upon payment made, but also in favor of the land owner for the amount of compensation as

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found by such verdict, and adjudging and declaring his absolute right thereto. *Curtis v. St. Paul, Stillwater and Taylor's Falls R. R. Co.*, 21 Minn., 497. 1875.

181. — Where the court has entered judgment upon the award, this judgment is a final adjudication of the controversy until set aside by the court or reversed by writ of error. *Pennsylvania R. R. Co. v. Gorsuch*, 84 Pa. St., 411. 1877.

182. — It is not necessary, in rendering judgment in favor of a land owner for the damages assessed, to provide that a deed shall be executed to the railway company for the land condemned. The title which the company gets is acquired under the statute. *Indianapolis and St. Louis R. R. Co. v. Smythe*, 45 Ind., 322. 1873.

183. — appeal. A judgment on an appeal from an assessment of damages, which refers to the verdict wherein the land taken is properly described, is sufficiently definite and certain as to the land for the taking of which the judgment is rendered. *Peoria and Rock Island R'y Co. v. Mitchell*, 74 Ill., 394. 1874.

184. — by agreement; evidence. W. received \$70 from a railway company under a written contract that it should be applied on any judgment for damages he might recover in an action then pending for the condemnation of a portion of his land for the use of the company as a track for its railway. Judgment was afterwards entered by consent for \$150 damages, and \$50 costs, in favor of W., which was paid and the land condemned to the company's use. Held, that W. might defend, in an action afterwards brought against him by the company to recover said sum of \$70, as overpaid by mistake, by alleging and proving that said judgment was entered in pursuance of a subsequent verbal contract by which he was to receive the amount of such judgment in addition to said sum of \$70 previously received by him under the written contract, and that such defense does not violate the principle which forbids the admission of parol evidence to vary or alter the meaning of written instruments. *Oregonian R'y Co. v. Wright*, 10 Oreg., 162. 1882.

185. — conclusiveness. A judgment of condemnation, rendered by a competent

court charged with a special statutory jurisdiction, and when all the facts necessary to the exercise of the jurisdiction are shown to exist, is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction. *Secombe v. Railroad Co.*, 23 Wallace, 108, 1874; 11 Amer. R'y Rep., 855.

186. — conditions. Where the sum of \$600 was awarded as damages, and the inquisition required the railway company to build a certain trestle for the claimant, and also to haul coal over a switch for him at a certain price, and the money was paid and the terms assented to, and the inquisition further provided that in case of failure to comply with these conditions the sum of \$1,500 should be awarded for the breach, it was held that the sum of \$1,500 was liquidated damages, and might be recovered upon a breach of the conditions. *Pa. R. R. Co. v. Reichert*, 58 Md., 261, 1882; 10 Amer. & Eng. R. R. Cases, 429.

187. — execution. It is error for the circuit court, on the trial of an appeal, to award execution on the judgment for the amount of damages assessed. *Springfield and Illinois Southeastern R'y Co. v. Turner*, 68 Ill., 187. 1873.

188. — On an appeal in the district court, in condemnation proceedings, it is error for the court to render an ordinary personal judgment against the railroad company for the damages assessed to be collected by execution. The judgment for damages in such a case should be in the nature of an award of damages, such as is made by the condemnation commissioners. *St. Louis, Lawrence and Denver R. R. Co. v. Wilder*, 17 Kans., 239. 1876.

189. — execution; stay of. Damages for the taking of property by a railway company arise by an act of appropriation under the state power of eminent domain, and do not rest in contract, express or implied, and the railway company is not entitled, therefore, to a stay of execution under the provisions of the act of 16th of June, 1836. *Harrisburg and Potomac R. R. Co. v. Peffer*, 84 Pa. St., 295, 1877; 18 Amer. R'y Rep., 393.

190. — A corporation cannot take a stay of execution. The thirty days within which damages assessed by viewers against railroad

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companies must be paid under § 11 of the act of February 19, 1849, is not such a stay of execution as is contemplated by § 6 of the act of October 18, 1857. Where a certain number of days are given by law within which to do an act, one of them is included and the other excluded. *Boyer v. Northern Central R'y Co.*, 1 Pearson (Pa.), 113. 1837.

191. — execution; Chicago and Southwestern Railroad. Section 31, page 327, Wagn. Stat., requiring motion and notice before an execution can be issued against a railroad company to compel payment of damages assessed for the taking of land for right of way, does not apply to the Chicago and Southwestern R. R. Co. Under the charter of that company a general judgment may be rendered against the company, for the enforcement of which execution may issue, of course, as in other cases. *Provolt v. Chicago, Rock Island and Pacific R. R. Co.*, 69 Mo., 633. 1879.

192. — mortgage; lapse of time. While a judgment against a railway company for the taking of land on which its road was built remained unpaid, a mortgage of the road with all the property and franchises of the company was foreclosed, and the purchasers organized under the statute a new company, which, with knowledge of the facts, continued to operate its road over said land. *Held*, that equity will restrain the company from further maintaining and operating the road over said land, except upon payment of the judgment against the old company. *Gilman v. Sheboygan and Fond du Lac R. R. Co.*, 40 Wis., 653, 1876; 13 Amer. R'y Rep., 468.

193. — The facts that the judgment against the old company was obtained two years before the foreclosure sale, and that the road had been operated over the land during that time, and that no further steps were taken by suit to enforce payment of the damages until the new company had been occupying the land for thirteen years, do not constitute a waiver of the owner's right to compensation. *Ib.*

194. — Complaint, in substance, that plaintiff, in 1859, obtained judgment against the S. and M. R'y Co., for damages for land taken by it for its road; that in 1861 the property and franchises of that company

were sold under a mortgage; that the purchasers took with notice of the existence and non-payment of said judgment; that they subsequently organized into a new company, which is operating the road built by said S. and M. Co., claiming to own the same and its appurtenances; that, in continuation of the appropriation of plaintiff's said land made by the last named company, defendant, the new company, entered upon the same, and now holds, and ever since 1861 has held, it to its own exclusive use and benefit, without plaintiff's consent; that plaintiff's said judgment is a valid subsisting one, wholly unpaid; and that the S. and M. Co., ever since the mortgage sale, has been insolvent, and has no existence in fact, but has been merged in the defendant. *Held*, that plaintiff has probably a remedy in equity to compel the defendant to make compensation for the land, or stop running cars over it; but defendant is not liable in this action, at law, for a debt upon the judgment. *Gilman v. Sheboygan and Fond du Lac R. R. Co.*, 37 Wis., 317. 1875.

195. — nunc pro tunc entry. In proceedings to set aside the report of commissioners condemning lands for railroad purposes, the entry upon the judge's docket was, "Objections overruled and judgment for defendant." The law required the judgment for defendant entered in such case to be one vesting the title in the company, but the clerk, in writing up the order, by mistake, made it to read, "that plaintiff take nothing by his action, and that defendant recover his costs." *Held*, that the entry might be corrected *nunc pro tunc* at a subsequent term. *Lexington and St. Louis R. R. Co. v. Mockbee*, 63 Mo., 348. 1876.

196. Necessity of the taking. A finding by the jury that they "did ascertain and determine that it was necessary for said company to take said real estate for public use, to wit, for the purpose of said company's incorporation as and for right of way," is a sufficient finding that the land was necessary and requisite for the public use. *East Saginaw and St. Clair R. R. Co. v. Benham*, 28 Mich., 459; 12 Amer. R'y Rep., 356. 1874.

197. Notice to treat; specific performance. After a railway company has given

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notice to treat and the price of the land has been fixed by arbitrators, the company, like an ordinary person, can be compelled to complete the purchase. *Harding v. Metropolitan R'y Co.*, Law Reports, 7 Chancery Appeal Cases, 154. 1872.

198. Partial appropriation. For a complete appropriation of real property compensation should be given in a single proceeding. But for a temporary taking successive actions for damages may be maintained. *Lehigh Valley R. R. Co. v. McFarlan*, 43 N. J. Law, 605, 1881; 11 Amer. & Eng. R. R. Cases, 509.

199. Possession. In proceedings to appropriate private property, there must be a judgment confirming the verdict of the jury before the corporation is entitled by a deposit of the amount of such verdict to possession of the property appropriated. *Wagner v. Railway Co.*, 38 Ohio St., 32, 1882; 10 Amer. & Eng. R. R. Cases, 380.

200. Record; amendment. County commissioners have no right to amend their record on a petition for land damages by inserting, as parties, names not embraced in the petition. *Littlefield v. Boston and Maine R. R. Co.*, 65 Me., 248, 1875; 10 Amer. R'y Rep., 104.

201. Report. The report of the commissioners as to the amount of damages is *prima facie* correct. *Crawford v. Valley R. R. Co.*, 25 Grattan (Va.), 467. 1874.

202. — It is not necessary that the adjudication of county commissioners upon the subject matter of a petition presented by a person whose land has been taken for a railway location should be annexed to or made a part of the warrant for a jury subsequently issued by the commissioners, if a copy of the original petition is incorporated with the warrant. *Childs v. New Haven and Northampton Co.*, 133 Mass., 253. 1882.

203. — Assessors, appointed under the act of February 19, 1849, to assess damages to property caused by the building of a railway, must find the value of the land taken. A report containing a lumping charge of all the injury done will be set aside. The court will not refer a report back to viewers for correction when their previous one seems partial. *Poffenberger v. Susquehanna R. R. Co.*, 1 Pearson (Pa.), 45. 1854.

204. — Under a proper construction of the statute directing the appointment of three commissioners of appraisal, the report of the commissioners is not rendered nugatory by the fact that only two of them acted and signed the report. Such a report is sufficient to authorize the court to render a judgment upon it vesting the title to the land in the company. *Quayle v. Missouri and Texas R'y Co.*, 63 Mo., 465, 1876; 21 Amer. R'y Rep., 220.

205. Second award. The second award of the commissioners is conclusive upon the question of the amount of damages. *Prospect Park and Coney Island R. R. Co., In re*, 27 Hun (N. Y.), 184. 1880.

206. — Where a second assessment of damages is made in a proceeding to condemn land for railway purposes, the court must render judgment for the full amount found by the commissioners. If money has been paid into court upon a former assessment, which has since been set aside at the instance of the land owner, it cannot be treated as a payment or allowed as a credit on the judgment. *Provolt v. Chicago, Rock Island and Pacific R. R. Co.*, 69 Mo., 633. 1879.

207. Setting aside report. Where there is a failure to comply by the commissioners with the requirements of the act to provide for the exercise of the right of eminent domain, the court or judge may set aside the report, or re-submit and direct a further finding. *Pueblo and Arkansas Valley R. R. Co. v. Rudd*, 5 Colo., 270, 1880; 10 Amer. & Eng. R. R. Cases, 404.

208. Town lots. The provision of defendant's charter in regard to proceedings for condemnation, in accordance with which the commissioners are to make an appraisalment and award "in each case separately," does not require them (or the court or jury in case of an appeal) to make a separate appraisalment and award as to each of several town lots appropriated, when such lots together form a compact body of land, and are used and occupied as an entirety. *Sherwood v. St. Paul and Chicago R'y Co.*, 21 Minn., 122, 1874; 11 Amer. R'y Rep., 364; *Same v. Same*, 21 Minn., 127.

209. Undivided interest. In an application by a railway company to condemn land, if damages are assessed for an undivided in-

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terest in a tract of land, the company cannot move to set aside the report of the commissioners as to such undivided interest, but the motion, if made, must be to set aside the report as to the whole tract in which the party owns an undivided interest. *Southern Pacific R. R. Co. v. Wilson*, 49 Cal., 396, 1874; 8 Amer. R'y Rep., 37.

210. Watercourses; future damages, payable monthly, held invalid. An award made under "The Railway Act, 1868," awarding to the respondent railway company as damages for appropriated land "the sum of \$35,013, plus \$100 per month from this date, payable on the first of each month, until the said company shall have set free the watercourse serving to drain the quarries adjacent to the expropriated land, and constructed a culvert to protect the said watercourse," is invalid upon the face of it, in respect of the monthly payments directed, which is not rent, but in the nature of an assessment of damages payable in *futuro*, contingent on a future event, and therefore uncertain; and also in respect of the direction to construct a culvert, which was not within the functions of the arbitrators. *Bourgoin v. La Compagnie du Chemin de Fer de Montreal*, Law Reports, 5 Appeal Cases, 381. 1880.

211. When company is required to take land. Under the provisions of the general railway act (ch. 140 of 1850, and ch. 237 of 1869), relative to the taking of land for the railway company, there is no obligation imposed on the company to take land until the confirmation of the report of the commissioners appointed to assess the damages. *Syracuse, Binghamton and New York R. R. Co., In re*, 4 Hun (N. Y.), 311. 1875.

212. Verdict. A verdict which finds that the land owner "is entitled as compensation the sum of \$420, and as damages the sum of \$411.25, a total sum of \$831.25," is sufficiently certain. *Illinois Western Extension R. R. Co. v. Mayrand*, 93 Ill., 591. 1879.

213. — In a proceeding of expropriation for the construction of a railway, the jury of freeholders cannot, by their verdict, instead of assessing the money value of the property and damages, require the railroad company to do certain work for the benefit of the party whose land is to be expropriated. *New*

Orleans Pacific R'y Co. v. Murrell, 34 La. An., 536. 1882.

214. — If the judgment entered on the verdict of a jury be defective in matters of form, the proper course is not to apply to this court for a writ of *certiorari*, but to the court in which it is entitled, for the correction of the record or vacation of the erroneous judgment. *St. Paul and Sioux City R. R. Co. v. Murphy*, 19 Minn., 500. 1873.

215. — Where an act required the assessment to state the value of the land taken and the other damages separately, but neither the company nor the land owner required the verdict to be thus separately returned, and the jury returned a general verdict only, the court refused to summon a jury for a new assessment, the demand for a new assessment being made by the company. *In re London and Greenwich R'y Co.*, 2 Adolphus & Ellis, 678; 29 E. C. L., 314. 1835.

6. Appeals and writs of error.

216. Amount. The consolidation of two distinct suits between the same parties, in each of which the matter in dispute is less than \$1,000, does not vest this court with jurisdiction. *La. Western R. R. Co. v. Hopkins*, 33 La. An., 806. 1881.

217. — Act No. 21 of the legislature of 1878, chartering the Louisiana Western R. R. Co. and giving it (§ 6) the right to embrace several land holders as defendants in one expropriation suit, does not make the judgment in the premises appealable, on the score that the aggregate amount allowed to all such defendants exceeds \$1,000, though the amount allowed to each respectively is less than that sum. *Ib.*

218. Appearance. Where the land owner takes an appeal from the award of the commissioners, such appeal is an entry of appearance by the land owner, and he waives all questions as to the sufficiency of notice of jurisdiction of the person. *Atchison, Topeka and Santa Fe R. R. Co. v. Patch*, 28 Kans., 470. 1882.

219. — The mere filing of precipes for subpoenas is not a voluntary appearance in the court to the merits, and the filing or

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giving of an appeal bond is not thereby waived. *Beckwith v. Kansas City and Olathe R. R. Co.*, 28 Kans., 484, 1882; 10 Amer. & Eng. R. R. Cases, 442.

220. Bond. In proceedings by the appellant to acquire title to lands for the purposes of its railroad under Gen. Stat., ch. 84, the owner having appealed to the district court from the award of the commissioners, the company, in order to obtain the right to go on with the construction of its road over the lands, notwithstanding the appeal, filed a bond under § 28 of said chapter, and took possession of the lands. After verdict and judgment in the district court, the company appealed to the supreme court, filing the proper bond for costs, etc. Upon an application to this court by the respondent, alleging the insufficiency of the bond so filed by the company under § 28, for an order requiring the company to file a new bond under that section, and to make a deposit of the damages awarded by the verdict, or that, in default thereof, the appeal be dismissed, *held*, that this court has no authority to require, as a condition of retaining an appeal, that the appellant secure the judgment below. *Rippe v. Chicago, Dubuque and Minnesota R. R. Co.*, 23 Minn., 44, 1875.

221. — In taking an appeal from the assessment of damages for land appropriated by a railroad company to the district court, the appellant is not required by the statute to execute an appeal bond. *Nebraska R'y Co. v. Van Dusen*, 6 Neb., 160, 1877.

222. — Where the appeal bond is not only defective but void, being made payable to a stranger to the record, *held*, that such bond could not be amended. *Lovitt v. Wellington and Western R'y Co.*, 26 Kans., 297, 1881.

223. — Though the mode of taking an appeal from the verdict of the jury of the vicinage to assess damage against the Selma, Rome and Dalton R. R. Co. be prescribed by its charter, yet the general law in respect to amendments of appeal bonds will be applied to such appeals. *Selma, Rome and Dalton R. R. Co. v. Gammage*, 68 Ga., 604, 1879; 1 Amer. & Eng. R. R. Cases, 41.

224. — In a condemnation proceeding the owner of the land took an appeal from the assessment of the commissioners to the dis-

trict court by executing within proper time and with one good surety, an undertaking, which undertaking was approved by the county clerk within proper time, but was not marked filed within proper time. The case was afterwards tried in the district court, the railroad company appearing and contesting the appeal on certain grounds and contesting the damages, but not raising the question that the appeal bond had not been filed in proper time; and no such question is raised in the supreme court by the petition in error, but is raised for the first time by the brief of counsel in the supreme court. *Held*, that the supreme court will not consider the question. *St. Louis, Lawrence and Denver R. R. Co. v. Wilder*, 17 Kans., 239, 1876.

225. Certiorari. *Certiorari* will not lie where the proceedings of the company are void for want of jurisdiction. *Regina v. Bristol and Exeter R'y Co.*, 11 Adolphus & Ellis, 202; 39 E. C. L., 128, 1839.

226. — A *certiorari* will not lie to remove an inquisition on the ground that it was taken before two persons (namely, an assessor and a clerk of the under-sheriff by whom the jury and witnesses were sworn), appointed by the sheriff, but not being any of the persons specially named in the act of incorporation. *Regina v. Sheffield R'y Co.*, 11 Adolphus & Ellis, 194; 39 E. C. L., 124, 1839.

227. — The corporate existence of a company and its right to exercise corporate franchises cannot properly be passed on by the inferior tribunals for assessing damages in condemning lands, and cannot, therefore, be considered on *certiorari* to review their action. *Schroeder v. Detroit, Grand Haven and Milwaukee R'y Co.*, 44 Mich., 387, 1880.

228. — A writ of *certiorari* in cases involving interference with railway construction ought not to be allowed unless applied for as soon as practicable; and if granted after the expiration of the twenty days allowed for an appeal in proceedings to condemn land will not be sustained, unless the delay in suing it out is satisfactorily explained. *Dunlap v. Toledo, Ann Arbor and Grand Trunk R. R. Co.*, 46 Mich., 190, 1881.

229. — The R. S. of 1857, ch. 51, § 6, provided substantially that when a party failed to prosecute a petition for a revision of the

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award of the county commissioners at the next regular term after the filing of the same, it should be dismissed, unless good cause for delay is shown. The determination of the commissioners as to the sufficiency of the excuse offered for delay is not to be reviewed by the supreme court by writ of *certiorari*, even though a warrant for a jury had issued before the order of dismissal was entered. *Portland and Ogdensburgh R. R. Co. v. Commissioners*, 64 Me., 505. 1874.

230. — When, in a proceeding for condemnation of land, the district court makes an order which it has no jurisdiction to make in relation to the use of the property sought to be condemned, and there is no appeal from the order, *certiorari* is the proper remedy, in order to have the order annulled before the damages it purports to authorize have been sustained. *California Pacific R. R. Co. v. Central Pacific R. R. Co.*, 47 Cal., 528, 1874; 7 Amer. R'y Rep., 532.

231. — When a trespass is about to be committed, by authority of an order of court which is void, the fact that the trespass may be enjoined in equity does not prevent the order from being reviewed on *certiorari*, for the mere fact that the order is void will not alone authorize an injunction. *Id.*

232. — The inquisition must be positively sworn to, or a *certiorari* will not be granted to bring up the inquisition of a compensation jury. *Regina v. Manchester and Leeds R'y Co.*, 8 Adolphus & Ellis, 415; 35 E. C. L., 657. 1838.

233. Change of statute. An order was made by the circuit court sending an appeal from an assessment of land damages by the railroad commissioners and selectmen to a referee for trial; but no action was taken under the order, because of exceptions which were transferred to this court. Before the exceptions were reached for decision the statute was amended by excluding such cases from its operation. *Held*, that the order of reference should be rescinded. *Gray v. White Mountains R. R. Co.*, 56 N. H., 182. 1875.

234. Change of title pending appeal. Whenever, in such proceedings, jurisdiction has once attached by due service of the requisite petition and notice upon all parties

having or claiming any estate or interest in the property thereby affected, and an award is regularly made by the commissioners as to each claimant, the rights of the respective parties become definitely fixed, and such award, until modified or changed on appeal, is conclusive and binding, not only upon the parties of record, but upon their privies and grantees. *Trogden v. Winona and St. Peter R. R. Co.*, 22 Minn., 198, 1875; 19 Amer. R'y Rep., 387.

235. — The purchaser of real estate while proceedings are pending, and who has not been made a party, cannot appeal. *Connable v. Chicago, Milwaukee and St. Paul R'y Co.*, 10 Amer. & Eng. R. R. Cases, 520 (Ia.). 1882. See *Cedar Rapids, etc., R'y Co. v. Chicago, Milwaukee and St. Paul R'y Co.*, 10 ib., 522 (Ia.). 1882.

236. Charter. No right of appeal from an award of viewers to appraise damages was given to either party, under the charter of the Philadelphia and Erie R. R. Co. and its supplements. *Cake v. Philadelphia and Erie R. R. Co.*, 87 Pa. St., 307. 1878.

237. — An appeal may be taken from the report of viewers under the act of February 19, 1849, in all cases where the charter of the railroad company is subject to the provision of that act. *Lodge v. Railroad Co.*, 9 Philadelphia, 543. 1872.

238. — Under appellant's charter no appeal lies from a judgment of the district court to review errors occurring during the trial of an appeal to such court, from an award of damages made by commissioners for taking property for the purpose of defendant's road. Neither does such an appeal lie under ch. 86, Gen. St., regulating appeals in civil actions. *Conter v. St. Paul and Sioux City R. R. Co.*, 24 Minn., 313. 1877.

239. — The provisions of respondent's charter (Laws of 1857, ch. 39, s. 9, Spec. Laws of 1866, ch. 12, s. 7) for its obtaining the right of way contemplate a decision by commissioners as to the compensation to be paid the land owner, to be embodied in a report to be filed in the district court, that either the land owner or the company may appeal. But neither by express words, nor by necessary implication, does the charter prescribe the grounds upon which, or the time or manner in which, the appeal may be taken. It pre-

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sents in these respects an instance of *casus omissus*. *Peters v. Hastings and Dakota R'y Co.*, 19 Minn., 260. 1872.

240. Costs; deposit; tender. The owner of lands is not deprived of any rights by the mere deposit, pending appeal, of the sum awarded by the jury, as there is no statute requiring him to take the risk of such a deposit, or depriving him of any rights until he is paid. *Toledo, Ann Arbor and Grand Trunk R'y Co. v. Dunlap*, 47 Mich., 456, 1882; 5 Amer. & Eng. R. R. Cases, 378.

241. — The owner cannot be compelled to determine at his peril whether a jury will regard the land as necessary for public use; he is not, therefore, in fault for refusing a tender when he can have no assurance that the proposed improvement will be sanctioned. *Ib.*

242. Deposit at risk of corporation. Money deposited by a railway company with a county treasurer for the damages awarded by commissioners in condemnation proceedings remains with the treasurer at the risk of the company pending the proceedings, and if the land owner appeal from the assessment of the commissioners, and recover a judgment in the district court, the company is not entitled to have the amount thus deposited credited upon the judgment. *Blackshire v. Atchison, Topeka and Santa Fe R. R. Co.*, 13 Kans., 514. 1874.

243. — withdrawal. Where the railway company has deposited the amount of the award and taken possession of the lands condemned, the owner, on giving the requisite bond, may withdraw the amount so deposited, without prejudice to an appeal from the award. *Weyer v. Milwaukee and Lake Winnebago R. R. Co.*, 57 Wis., 329; 10 Amer. & Eng. R. R. Cases, 508. 1883.

244. — The amount of an award upon the taking of land belonging to several heirs was paid into court by the corporation. With the assent of such heirs, the administrator of their ancestor gave the bond required by § 1850, R. S., and withdrew the money so deposited. *Held*, that the administrator was thereafter estopped to deny that he was a party to the proceeding, and the amount of the award having been diminished by the verdict on an appeal by the company, there was no error in rendering judgment against him for the amount of

such diminution. *Watson v. Milwaukee and Madison R'y Co.*, 57 Wis., 332, 1883; 10 Amer. & Eng. R. R. Cases, 168.

245. — In such a case the railroad company is entitled, also, to recover interest upon the amount by which the award is decreased, from the date of the withdrawal of the deposit. *Ib.*

246. Dismissal. Under the provisions of ch. 34, Gen. Stat., defendant instituted proceedings to condemn plaintiff's land. Both parties appealed from the award of commissioners to the district court for Ramsey county. At the December term, the appeal was placed upon the calendar for trial, and the parties appeared by their attorneys; but during the term, defendant, with the permission of the court (plaintiff objecting) dismissed the proceedings for condemnation, and caused the dismissal to be entered of record. All the proceedings (including the appeals) were duly had as provided by law. *Held*, that the plaintiff cannot, upon this state of facts, maintain an action to recover for his labor, loss of time, and expenses in conducting and attending to the proceedings on his part. *Bergman v. St. Paul, Stillwater and Taylor's Falls R. R. Co.*, 21 Minn., 533. 1875.

247. — Respondent appealed from the commissioners' award of damages for right of way. The appeal coming on for trial, the district court, on his motion, made an order dismissing the petition and all subsequent proceedings thereunder. Order held erroneous and reversed. *Rippe v. Chicago, Dubuque and Minn. R. R. Co.*, 20 Minn., 187. 1873.

248. Effect of appeal. An appeal by a railway company, from the assessment of damages by commissioners appointed in pursuance of its charter, brings up the whole case into the superior court, where the parties can have every right relating to such damages adjudged and determined. Therefore, a separate action involving the same rights will be dismissed. *Phifer v. Carolina Central R. R. Co.*, 72 N. C., 433. 1875. See, also, *Wooster v. Sugar River Valley R. R. Co.*, 57 Wis., 311, 1883; 10 Amer. & Eng. R. R. Cases, 499.

249. — By § 18 of ch. 140 of 1850, the second report of commissioners appointed

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to appraise the damages is made final and conclusive, and on an appeal therefrom only legal errors or irregularities in the proceedings of the commissioners can be considered. *Prospect Park and Coney Island R. R. Co., In re*, 20 Hun (N. Y.), 184. 1880.

250. Evidence. The evidence of value should be directed to the time of taking the land. *Conter v. St. Paul and Sioux City R. R. Co.*, 22 Minn., 342, 1875; 19 Amer. R'y Rep., 407.

251. — Where no objection was made in the court below to direct proof showing the amount of damages sustained by a land owner by reason of the location of a railway across his land, the objection is not available on error. *Republican Valley R. R. Co. v. Hayes*, 13 Neb., 489, 1882; 10 Amer. & Eng. R. R. Cases, 217.

252. Exceptions. The only remedy to redress a mistake in the amount of damages assessed by viewers is by appeal and trial by jury; the court will not pass upon this question on exceptions to the report of viewers. The appeal should be in the same form as that from the award of arbitrators. *Seal v. Northern Central R'y Co.*, 1 Pearson (Pa.), 108. 1856.

253. — amendment. On an appeal to the circuit court from an assessment of damages in a proceeding under § 15, p. 74, 1 R. S. 1876, at any time pending a motion to strike out exceptions to the assessment, the exceptions may be amended by the filing of an additional exception presenting a question proper to be tried on such appeal, as the question of the inadequacy of the damages assessed. *Pittsburgh, Ft. Wayne and Chicago R'y Co. v. Swinney*, 59 Ind., 100, 1877; *Swinney v. Ft. Wayne, Muncie and Cincinnati R. R. Co.*, ib., 205, 1877.

254. Franchise. Power to exercise the right of eminent domain by a railway company in a city is a franchise, within the meaning of that word as used in the constitution, in defining what cases must be taken to the supreme court by appeal or writ of error. It is not essential to a franchise, in its legal sense, that it should, in all cases, be exclusive. *Chicago and Western Indiana R. R. Co. v. Dunbar*, 95 Ill., 571, 1880; 1 Amer. & Eng. R. Cases, 214.

255. — In proceedings to ascertain the

amount of damages that must be paid for land sought to be taken by condemnation for the use of a railway company, the question of a franchise is not directly involved, and the appellate court will take jurisdiction of such a cause on appeal. *Springfield, Effingham and South Eastern R. R. Co. v. Peters*, 8 Bradwell (Ill.), 300. 1881.

256. Husband and wife. One of the claimants in whose favor the award of damages was made by the commissioners was a married woman. Her husband joined in taking an appeal from such award. Upon the trial of the appeal, after claimants had rested their case, a motion was made to dismiss the appeal because of such joinder of her husband, and was denied. *Held*, not error. *Wilkin v. St. Paul, Stillwater and Taylor's Falls R. R. Co.*, 22 Minn., 177, 1875; 19 Amer. R'y Rep., 311.

257. Increase of damages. Where on appeal the damages are increased, but not paid, the land owner is entitled to recover back possession. *Lake Erie and Western R'y Co. v. Kinsey*, 87 Ind., 514. 1882.

258. — The deposit of the original award entitles the company to possession until the determination of the appeal. *Id.*

259. Interest. As a general rule on appeal interest on the damages should be allowed. *Warren v. St. Paul and Pacific R. R. Co.*, 21 Minn., 424, 1875; 19 Amer. R'y Rep., 227.

260. — On a verdict on appeal it is competent for the district court, on motion, to allow interest from the filing of the award to the time of the entry of judgment thereon, and to include the same in the judgment. *Whitacre v. St. Paul and Sioux City R. R. Co.*, 24 Minn., 311. 1877.

261. — If the company is also an appellant, interest should be allowed. By its appeal, the award of the commissioners is superseded, and the power of the owner to enforce payment of his compensation is suspended until the issue is tried. *Mettler v. Easton and Amboy R. R. Co.*, 37 N. J. Law, 222. 1874.

262. — Where on appeal the allowance of damages is reduced the land owner is not entitled to interest. *Reisner v. Union Depot Co.*, 27 Kans., 382, 1882; 10 Amer. & Eng. R. R. Cases, 155.

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263. Intervention by third party. In a condemnation proceeding the owner of the land took an appeal to the district court. While the appeal was pending in the court, a third party filed an independent petition for damages for the same land, and the railway company filed its answer to the petition. Such pleadings were not filed under the direction or with the consent of the court, nor under the direction or with the consent of the appellant or his attorneys. Subsequently the appeal was taken on a change of venue to another district. In the transcript of the appeal case filed in the adjoining district, the clerk inserted copies of said petition and answer. No motion was made to compel the appellant to file a petition or a bill of particulars, and his case was tried on the condemnation and appeal proceedings. The independent petition and answer inserted in the appeal files were entirely disregarded, and judgment was entered for the appellant. *Held*, not error. *Lawrence and Topeka R'y Co. v. Moore*, 24 Kans., 323. 1880.

264. Irregularity. On appeal the proceedings will not be reversed for a mere irregularity. *Louisville, New Albany and Chicago R. R. Co. v. Winderlick*, 10 Amer. & Eng. R. R. Cases, 410 (Ind.). 1882.

265. Issues framed. On appeal to the circuit court from the assessment of damages for a right of way to a railway company, an issue was framed and submitted to a jury in words, "how much compensation is the appellant entitled to for the right of way through his lands." *Held*, that the submission was sufficiently specific to justify the jury, in accordance with the terms of the statute, in estimating not only the value of the land taken, but also such special damage as the construction of the road through his land would cause to the land owner. *Bowen v. Atlantic, etc., R. R. Co.*, 17 So. Car., 574. 1882.

266. Judgment. An appeal taken by the railway company from an award of commissioners under General Statutes, ch. 34, title 1, s. 25, brings before the district court the propriety of an increase as well as a decrease of the damages awarded. *St. Paul and Sioux City R. R. Co. v. Murphy*, 19 Minn., 500. 1873.

267. — execution. Where the verdict of a jury, on an appeal, finds that the land has been taken by the company, and not merely that it is proposed to be taken, it is proper to award execution on the judgment. *Peoria and Rock Island R'y Co. v. Mitchell*, 74 Ill., 394. 1874.

268. Jury. Where the statute requires the jury to be freeholders, the appellate court will presume that they were all so qualified, though not so stated in the record. *Chesapeake and Ohio R. R. Co. v. Patton*, 9 West Va., 648. 1876.

269. Mortgage. Where, in the condemnation of land for railroad purposes, the award of damages was made to the owner and mortgagee jointly, on proper notice to both parties, the owner may prosecute an appeal therefrom without uniting the mortgagee as a party to such appeal. *Lance v. Chicago, Milwaukee and St. Paul R. R. Co.*, 57 Ia., 636, 1882; 5 Amer. & Eng. R. R. Cases, 617.

270. New trial. The superior court may, in its discretion, under the Gen. Sts., ch. 43, § 40, set aside a verdict of a sheriff's jury, where questions of law are reserved at the trial, and fail to be certified to the court by reason of the death of the officer presiding at the trial, and without any fault of the party requesting such questions to be certified; and no exception lies to an order made in the exercise of this discretion. But where a judge does not exercise his discretion, and rules as matter of law, upon the evidence, that a party is entitled to a new trial, his ruling may be revised on a bill of exceptions. *Wamesit Power Co. v. Lowell and Andover R. R. Co.*, 130 Mass., 455. 1881.

271. Notice. An appeal from an award of damages for right of way by the sheriff's jury may be taken by serving the opposite party or his attorney; and it is not essential that service be also made upon the sheriff, nor is it requisite that the report of the jury be filed in the appellate court. The notice of appeal constitutes presumptive evidence that an assessment has been made. *Hahn v. Chicago, Omaha and St. Joseph R. R. Co.*, 43 Ia., 338, 1876; 14 Amer. R'y Rep., 461.

272. — Notice of an appeal from the award of commissioners need not be served upon the opposite party. *Weyer v. Milwaukee and Lake Winnebago R. R. Co.*, 57 Wis.,

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329, 1883; 10 Amer. & Eng. R. R. Cases, 508.

273. — The appeal from an award is an action, and the notice of the appeal may be signed by the attorney of the appellant. *Ib.*

274. — The want of publication of notice to parties interested cannot be insisted upon on appeal where all concerned have voluntarily appeared in the cause. *East Saginaw and St. Clair R. R. Co. v. Benham*, 28 Mich., 459, 1874; 12 Amer. R'y Rep., 356.

275. — Under the defendant's charter, an appeal is required to be made by filing a notice of appeal with the clerk of the district court within thirty days after the award is filed. The appellant failed to perfect her appeal in that manner, but made service of notice upon defendant. *Held*, that the district court acquired no jurisdiction of the case. The defect was not cured, so as to give the court jurisdiction, by the action of the company in executing and filing a bond, immediately after the service of the notice, conditioned to pay appellant whatever sum might be awarded her upon such appeal, nor by moving the court to dismiss the appeal for such want of jurisdiction. *Klein v. St. Paul, Minneapolis and Manitoba R'y Co.*, 30 Minn., 451. 1883.

276. — In a proceeding to condemn land, under the act of 1852, notice of an appeal by the owner of the land to the circuit court from the decision of the commissioners, served upon the attorney of the railroad company, is insufficient. *Hartman v. Belleville and O'Fallon R. R. Co.*, 64 Ill., 24. 1872.

277. — An order appointing commissioners in proceedings under the general railroad act to acquire title to lands situate in C. county was granted in the county of M. October 30, 1873. On November 6, a copy of the order was served by mail on the attorney for the land owners. The latter served notice of appeal May 14, 1874, stating therein that the order was entered November 11, 1873. A motion to dismiss the appeal was made upon the notice and other papers. No other proof of the time of entry of the order appeared. Before the appeal was taken the commissioners made their report. A copy thereof, reciting the

granting of the order, was served on the owner, who appeared and opposed the confirmation thereof. An order of confirmation was made, but the owner did not accept the compensation awarded. The appeal was dismissed by the general term. *Held*, error; that there was no service of notice of the order sufficient to limit the time of appeal, and that the appearance of appellant, in opposition to the confirmation of the report, was not a waiver of the right of appeal. *N. Y. Central and Hudson River R. R. Co., In re*, 60 N. Y., 112, 1875; 10 Amer. R'y Rep., 147.

278. Possession pending appeal. The legislature of 1870 enacted a statute which authorized, on the application of a railroad company, the appointment of commissioners to assess damages caused by the appropriation of land for the right of way, and required the company to deposit the amount of such award with the county treasurer, subject to the order of the land owner. It further provided that the land owner might appeal from such award, but that such appeal should only be as to the amount of damages, and should not delay the prosecution of the work; and that the railroad company, upon giving a bond conditioned for the payment of all damages which should finally be recovered, might enter upon the land and construct its road. *Held*, that such statute was valid; that the occupation by the railroad company pending the appeal was provisional only; and that the land owner seeking to avail himself of the benefit of the appeal must take it subject to the conditions imposed by the legislature. *Central Branch Union Pacific R. R. Co. v. Atchison, Topeka and Santa Fe R. R. Co.*, 28 Kans., 453, 1882; 10 Amer. & Eng. R. R. Cases, 528.

279. — Where land has been taken and a question is pending in a court of law as to the amount of compensation to which the land owner is entitled, he will be protected in his constitutional right to possession of his property until his compensation be ascertained and paid or tendered to him; and the company in whose favor the condemnation is made will not be permitted to take possession of the land on tendering so much of the compensation as is not in dispute, but will be restrained from so doing. *Mettler v.*

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Easton and Amboy R. R. Co., 25 N. J. Eq., 214, 1874.

280. — To secure the land owner in his constitutional right, and at the same time to spare the company unnecessary delay, the court will, on the latter paying the land owner so much of the compensation as is undisputed, and the costs of the suit in this court, and paying into court an amount sufficient to cover the disputed claim, to the end that the land owner may have the same if adjudged by the court of law to be entitled thereto, permit the company to take possession of the land. *Ib.*

281. Practice. Practice on appeal determined. *Cincinnati, etc., R. R. Co. v. Bailey*, 10 Amer. & Eng. R. R. Cases, 513 (Ohio). 1883.

282. — Formation of issue, for assessment of damages in cases of appeal where lands or materials are taken for railway or other roads, discussed, and directions given therefor. *Pittsburgh and Connellsville R. R. Co. v. Watson*, 2 Pittsburgh, 82. 1860.

283. Reversal; possession. The reversal of a judgment, on appeal of the land owner, will not entitle him to bring an action of ejectment for possession. He should have the cause redocketed for another trial as to the amount of damages. *St. Louis, Alton and Terre Haute R. R. Co. v. Karnes*, 101 Ill., 402, 1882; 10 Amer. & Eng. R. R. Cases, 39.

284. Right of appeal. No appeal lies from an order of the circuit court confirming an inquisition condemning lands for the construction of a railroad, unless the court exceeds its jurisdiction in passing such order. *George's Creek Coal Co. v. New Central Coal Co.*, 40 Md., 425, 1874; *Cumberland and Pa. R. R. Co. v. Pa. R. R. Co.*, 57 ib., 267, 1881; *Brown v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 58 ib., 539, 1882.

285. — In proceedings under the statute, where the commissioners have filed with the clerk their certificate of "ascertainment and assessment," and the court or judge has denied the motion of the petitioner or respondent to vacate or set aside the same, there is such a final determination as will authorize a writ of error or an appeal. *Denver and New Orleans R. R. Co. v. Jackson*, 6 Colo., 840, 1882; 10 Amer. & Eng. R. R. Cases, 497.

286. — An order of the circuit court condemning land for the use of a railway company is a final order affecting a substantial right, in a special proceeding, and is appealable. R. S., §§ 1846, 3069. *Wisconsin Central R. R. Co. v. Cornell University*, 49 Wis., 162, 1880.

287. — By § 12 of the Eminent Domain Act, an appeal is expressly given directly to the supreme court from the judgment of the trial court, in a proceeding to condemn land for right of way, and there is nothing in the Practice Act that takes away this right. *Peoria and Pekin Union R'y Co. v. Peoria and Farmington R'y Co.*, 105 Ill., 110, 1882; 10 Amer. & Eng. R. R. Cases, 129.

288. — By the terms of § 17, ch. 119, Laws of 1872, the railway company, as well as the land owner, has the right of appeal to the circuit court from the award of commissioners. This provision of law is valid. *Lee v. Northwestern Union R'y Co.*, 33 Wis., 222, 1873.

289. Separate tracts. When an appeal is taken by the petitioner from an order of the court confirming the report of commissioners appointed to assess damages in a proceeding to condemn land for a public use, if there is more than one tract of land, the order may be reversed as to one of the tracts, and affirmed as to another. *Stockton and Copperopolis R. R. Co. v. Galgiani*, 49 Cal., 139, 1874; 7 Amer. R'y Rep., 263.

290. — In a proceeding to condemn a strip of land for a right of way through a farm, consisting of several tracts, both parties, on the trial, treated the farm as a single tract in their examination of witnesses and instructions, and the jury fixed the compensation and the owner's damages as upon one tract. Upon appeal, the company for the first time objected that the finding should have applied to each tract separately. *Held*, that the objection could not be urged for the first time in the appellate court. *Kankakee and Illinois River R. R. Co. v. Chester*, 62 Ill., 235, 1871; 6 Amer. R'y Rep., 481.

291. — A report of the commissioners which, in form, makes separate awards of \$550 in respect to each of two quarter sections of land, which together constitute but one tract, is, in effect, an award of \$1,100 in respect to the whole tract, and an appeal

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from the whole award should not be dismissed for duplicity. *Weyer v. Milwaukee and Lake Winnebago R. R. Co.*, 57 Wis., 329; 10 Amer. & Eng. R. R. Cases, 508. 1883.

292. Setting aside award. Where, on an application to set aside the report of commissioners, it appears that they had talked privately with a person from whom they had obtained information discrediting the testimony of the claimant, and that the award to him was greatly inadequate, and that the neglect to oppose the confirmation of the report arose from the neglect or misbehavior of his attorney, upon whom the notice of motion was served, *held*, that the report was properly set aside. *New York Central and Hudson River R. R. Co., In re*, 5 Hun (N. Y.), 105. 1875. See *Same Case*, 64 N. Y., 60. 1876.

293. — The supreme court at special term has power to set aside a report and to appoint commissioners. The owner is not confined to the remedy by appeal to the general term given by the general railroad act (§§ 17, 18, ch. 140, Laws of 1850). *New York Central and Hudson River R. R. Co., In re*, 64 N. Y., 60. 1876. See *Same Case*, 5 Hun (N. Y.), 105. 1875.

294. — The court has power to set aside the report of viewers to assess the damages when the sum allowed was exorbitant, but this error must be clearly made out. *Patten v. Susquehanna R. R. Co.*, 1 Pearson (Pa.), 48. 1854.

295. Statute. The statute of 1873, ch. 95, embraces all the subject matter of R. S., ch. 51, § 8, so far as it relates to application for an increase or decrease of damages for land taken for railway purposes, and is, therefore, the only statute in force providing for appeals in that respect. *Knight v. Aroostook River R. R. Co.*, 67 Me., 291, 1877; 16 Amer. R'y Rep., 354.

296. Supreme court. The supreme court has jurisdiction of an appeal from a judgment of the Fayette circuit court confirming the verdict of a jury in proceedings under writs of *ad quod damnum*, had in the county at the instance of appellee, to condemn a part of appellant's land for railway purposes under appellee's charter. *Tracy v. Elizabethtown, Lexington and Big Sandy R. R. Co.*, 78 Ky., 309. 1880.

297. — In reviewing proceedings for the condemnation of lands, the supreme court cannot consider any reasons against the confirmation of the report except those which were presented to the lower court. *Detroit Western Transit and Junction R. R. Co. v. Crane*, 50 Mich., 182, 1883; 10 Amer. & Eng. R. R. Cases, 502.

298. — An appeal will lie directly from the county court to the supreme court in a proceeding to condemn land for a right of way for a railroad, under the Eminent Domain Act. *Kankakee and Seneca R. R. Co. v. Straut*, 101 Ill., 653. 1882.

299. — The supreme court has no jurisdiction to entertain an appeal in special cases, and a proceeding to condemn land for the use of a railway company is a special case. *Stockton and Copperopolis R. R. Co. v. Galgiani*, 49 Cal., 139, 1874; 7 Amer. R'y Rep., 263.

300. Time. An application for a jury to assess damages in Boston cannot be made to the superior court at a time later than the next one after the commissioner's estimate is made known to the parties. St. 1869, ch. 291, § 5. *Roberts v. Boston and Lowell R. R. Co.*, 115 Mass., 57. 1874.

301. — A motion to dismiss an appeal because the appeal is not taken in time will not be considered where the motion to dismiss is made too late. *St. Louis, Kans. and Arizona R. R. Co. v. Quinn*, 24 Kans., 370. 1880.

302. Title. The commissioners made separate awards in favor of respondents as owners, and one K. as mortgagee. Respondents appealed from the award as respected their damages, but K. did not. Pending the appeal K. became the owner of the property by a foreclosure of his mortgage and the expiration of the period for redemption, but no steps were taken for a substitution of parties to the record by reason thereof. *Held*, that on the trial of such appeal before the jury the sole question for its determination was the propriety of the amount awarded by the commissioners to respondents as compensation for their interest and estate in the property, so far as it was injuriously affected or taken by the company, and that such compensation must be ascertained by the jury in reference to

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the same estate and interest, and as of the same time, as was done by the commissioners in making their award. *Trogden v. Winona and St. Peter R. R. Co.*, 22 Minn., 193, 1875; 19 Amer. R'y Rep., 387.

303. Trespass. In an appeal under the act of April 6, 1856, by a railway company, the issue was in the form of trespass *quære clausum fregit*; the court charged that the company had committed a trespass in entering on the land. *Held* to be error. *Shenango and Allegheny R. R. Co. v. Braham*, 79 Pa. St., 447. 1875.

304. Trial. A trial having commenced at one term of court cannot be completed at a subsequent term. *Wright v. Northwestern Union R'y Co.*, 37 Wis., 391. 1875.

305. Verdict. Where the verdict rendered upon the trial of an appeal from an award of commissioners in condemnation proceedings under defendant's charter is for a gross sum as damages, but is silent as to the time when such damages accrued, the presumption is that the verdict, in this respect, relates to the time when the award appealed from was filed by the commissioners. *Whitacre v. St. Paul and Sioux City R. R. Co.*, 24 Minn., 311. 1877.

306. Width of right of way. A judgment condemning a strip of land one hundred and twenty feet wide for a right of way for a railway will not be reversed because the land condemned exceeds one hundred feet in width, when it does not appear from the record that the additional twenty feet was not necessary, nor by the pleadings, and no such objection was raised before the court below, either by demurrer or reasons assigned in arrest of judgment. The objection, not being made below, must be considered as waived. *Booker v. Venice and Carondelet R'y Co.*, 101 Ill., 333, 1832; 5 Amer. & Eng. R. R. Cases, 357.

307. Writ of error; petition. The limitation for filing petitions in error, prescribed in § 12 of the act of April 23, 1872 (69 Ohio L., 88), applies as well to proceedings instituted by the land owner under § 21 of the act as to proceedings instituted by the corporation. *Cleveland and Mahoning Valley R'y Co. v. Wick*, 35 Ohio St., 247. 1879.

7. Costs.

308. Abandonment of proceedings; expenses of land owner. If proceedings are instituted to condemn for public use the property of an individual, and, after the value of the property is ascertained by inquest, the proceedings are abandoned because the price assessed is unsatisfactory, the corporation instituting such proceedings will be answerable to the owner for all damages occasioned by them. Where property against which proceedings to condemn for public use belonged to A. and B., co-tenants, who, in resisting the proceedings, employed different counsel, who severally attended to the management of the cause, *held*, that it was error to permit them to sue jointly to recover damages for counsel fees, etc. *Leisse v. St. Louis and Iron Mountain R. R. Co.*, 2 Mo. App., 105, 1876; affirmed, 72 Mo., 561. 1880.

309. Appeal. Where the judgment appealed from by the land owner is affirmed, the appellant must pay the costs of the appeal. *New Orleans Pacific R'y Co. v. Gay*, 31 La. An., 450. 1879.

310. — Where a railway company instituted proceedings before a superior court clerk to condemn the defendant's land, and appealed to the superior court from the assessment of damages made by the commissioners as excessive, and upon a jury trial the amount of damages was reduced, and judgment rendered therefor in favor of defendant, it was held that no part of the costs were taxable against the defendant. *Carolina Central R'y Co. v. Phillips*, 78 N. C., 49. 1878.

311. — The charter of a railway company providing that, if the owner appeals, and the jury find the same or a less sum than the company shall have offered, or the commissioners awarded, the cost shall be paid by him, *held*, that if the jury find a less sum as the valuation of the land and damages than was awarded by the commissioners, exclusive of interest, the owner who appeals must pay costs, although the company also appeals. *Metier v. Easton and Amboy R. R. Co.*, 37 N. J. Law, 222. 1874.

312. — The party whose land is sought to be taken ought not to be compelled to pay

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costs if the assessment of the commissioners should be affirmed or not increased on appeal. *People ex rel. v. McRoberts*, 62 Ill., 38, 1871; 7 Amer. R'y Rep., 445.

313. — Costs accruing before county commissioners, upon a hearing relative to land damages, are to be paid by the losing party upon appeal, though the verdict of the jury be for a less sum than that awarded by the commissioners. *Goodwin v. Boston and Maine R. R. Co.*, 63 Me., 363. 1873.

314. — The costs on appeal are the same as in other actions, but there can be no extra allowance. *Rensselaer and Saratoga R. R. Co. v. Davis*, 55 N. Y., 145. 1873. See *Syracuse, Binghamton and N. Y. R. R. Co., In re*, 4 Hun (N. Y.), 311. 1875.

315. — notice of appeal. The service of notice of appeal from an award in an *ad quod damnum proceeding* may be made by any one not a party thereto, but if served by another than an officer his fees therefor cannot be taxed as a part of the costs. *Conway v. McGregor and M. R. R. Co.*, 43 Ia., 32. 1876.

316. Conveyance. The execution of a conveyance by the land owner is not a condition precedent to the payment of costs. *Capell v. Great Western R'y Co.*, 10 Amer. & Eng. R. R. Cases, 50; Law Reports, 9 Queen's Bench Division, 459, 1881; *Same v. Same*, Law Reports, 11 Queen's Bench Division, 345, 1883.

317. — The act enabling a railway company to purchase and take land provided that the costs of "contracts, sales and conveyances" should be borne by the purchasers. *Held*, that in such cases the vendors were entitled to be reimbursed the costs of making out their title to the land purchased by the company. *In re London and Greenwich R. R. Co.*, 3 Hare (Eng. Ch.), 22. 1843.

318. Lands taken by different companies. Portions of lands belonging to a corporation were taken by four different companies, the undertakings of three of which afterwards became united. *Held*, that the costs of a joint permanent investment of the purchase moneys must be borne in halves by the subsisting companies. *Ex parte Corpus Christi College, Oxford*, Law Reports, 13 Equity Cases, 334. 1871.

319. Offer by company. An act (4 and 5 W. 4, ch. 25) made provisions for summoning a jury to assess damages; and said act provided that if the jury should assess the amount at more than the sum offered by the company, all the "costs of summoning the jury and expenses of witnesses" should be paid by the company; and if the amount should be less than that offered by the company, one-half such cost should be paid by each party. *Held*, that only jury fees, witness fees, and expenses of summoning witnesses, could be taxed as costs. *Rex v. Gardner, 6 Adolphus & Ellis*, 112; 33 E. C. L., 82. 1837.

320. Power to award costs. Proceedings to take private property for public uses are "special proceedings" under the statute, and the court has power to award costs. *N. Y., Lackawanna and Western R'y Co., In re*, 63 Howard's Practice (N. Y.), 123. 1832.

321. — In proceedings under statutes for the condemnation of lands costs are not recoverable, unless given by the statute; and, if given by the statute, the allowance of them in any case will depend upon the terms of the enactment. *Metter v. Easton and Amboy R. R. Co.*, 37 N. J. Law, 222. 1874.

322. Sheriff's fees. Where a sheriff summoned a jury to assess the owners' damages upon land appropriated for right of way, and on the same day an assessment was made by the same jury for several tracts belonging to different owners, it was *held* that directing the jury to proceed from one tract to another did not constitute a distinct summons, and that the sheriff was only entitled to compensation for summoning the jury to assess the damages on a single tract. *Robb v. Albia, Knoxville and Des Moines R. R. Co.*, 44 Ia., 440. 1876.

323. Witnesses. Costs of witnesses on the hearing before commissioners appointed on a petition for the establishment of a railroad depot were allowed the defendant, the prevailing party; distinguishing the case from cases for the laying out of highways. *Bliss v. Connecticut and Passumpsic Rivers R. R. Co.*, 47 Vt., 715. 1875.

324. Statute. In a statutory proceeding, as in the assessment of damages by viewers, for lands taken by a railway company, the right to costs depends altogether upon the

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wording of the act of assembly providing for such proceeding; therefore, when the act provided, "and if any damages be awarded and the report be confirmed by said court, judgment shall be entered thereon, and if the amount thereof be not paid, execution may issue thereon, as in other cases of debt, for the sum awarded, and the costs and expenses incurred shall be defrayed by the said railroad companies," no costs will be allowed to the owner of lands taken unless damages are awarded and the report confirmed. *Shick's Bill of Costs, In re*, 1 Pearson (Pa.), 266. 1868.

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325. Arbitration. The three months allowed by 8 Vict., ch. 18, § 23, to the arbitrators or their umpire for making their award is not one and the same period, but the umpire has a new period of three months from the time the arbitration devolves upon him. *Skerratt v. North Staffordshire R. R. Co.*, 2 Phillips (Eng. Ch.), 475. 1848.

326. Bankruptcy; proceedings; failure to pay damages. A court of bankruptcy ordered the assignee of a railway company, which had appropriated plaintiff's land to its own use, to pay him \$200 for his damages upon receiving from him a deed to the land. Plaintiff was a party to the bankruptcy proceedings, but he declined to take the money or make the deed. In an action by him against one claiming under the company to recover for the land, *held*, that the order of the bankruptcy court was no judgment and no bar to his recovery. *Burnes v. St. Louis, Kansas City and Northern R'y Co.*, 71 Mo., 163. 1879.

327. Collateral attack. If a jury summoned under proper circumstances has conducted its inquiries legally and with proper regard to private rights, and has reached a legitimate conclusion as to the necessity for the taking and the compensation, the appropriation of the land on payment of such compensation will be lawful and will not be affected by collateral action by the judge or court. *Toledo, Ann Arbor and Grand Trunk R'y Co. v. Dunlap*, 47 Mich., 456, 1882; 5 Amer. & Eng. R. R. Cases, 378.

328. Consolidation of railways. The act (Laws of 1869, ch. 917) authorizing consolidation gave the successor all the rights of every description belonging to the predecessors, and consequently an allegation in the petition that one of the predecessors (naming it) of this company made and filed the proper map, etc., is a sufficient compliance with the statute. *N. Y., West Shore and Buffalo R. R. Co., In re*, 64 Howard's Practice (N. Y.), 216. 1893.

329. Crossings. Before taking these proceedings the company, at respondent's request, had made a certain under-crossing for his accommodation. The provision of ch. 1, Special Laws 1864, subch. 2, s. 2, that the company shall construct and maintain all proper and necessary farm crossings, means crossings from one side to the other of the railroad track, whether by passing over or under it. If such an under-crossing was proper and necessary, the jury were bound to assess the damages on the theory that it would be forever 'maintained. But the fact that it was built at respondent's request, and while the company was using his land under an agreement as to the adjustment of damages, would not estop him from showing that it was not thus proper and necessary. *St. Paul and Sioux City R'y Co. v. Murphy*, 19 Minn., 500. 1878.

330. Death of land owner; rights of executor. Where the owner of land which has been taken by a railway company dies after the land has been appraised, but before the appraised value has been paid, the title passes to his heirs or devisees, together with the right to demand payment, and they alone, and not the executor, can maintain an action for the money; and it makes no difference in such case that in the proceedings to obtain an appraisement a judgment was entered for the appraised value. *Buckner v. R. R. Co.*, 7 So. Car., 325. 1876.

331. Demand on owner. A railway act gave the company power to agree with the owners of lands which it was empowered to take for the purposes of the railway, for the absolute purchase of their interest therein; and provided that if any difference should arise between them as to the value of the lands, or the compensation to be made in respect of them; or if by reason of absence

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the owner should be prevented from treating; or if he should fail to disclose or prove his title to the lands, etc., the amount of compensation should be settled by a jury, in the manner mentioned in the act. Another clause provided that if the owner of any lands, on tender of the purchase money or compensation agreed for, or awarded to be paid in respect thereof, should refuse to accept it; or if he should fail to make out a title to the lands in respect whereof such purchase money or compensation should be payable, to the satisfaction of the company; or if he should be gone out of the kingdom, or could not be found, or should refuse to convey, it should be lawful for the company to deposit the purchase money or compensation payable in respect of such lands in the Bank of England, in the name of the accountant general, and thereupon all the interest of such lands, in respect whereof such purchase money or compensation should have been so deposited, should vest absolutely in the company. *Held*, that this latter clause applied *prospectively* to the period *after* the purchase money was agreed upon, or the amount of compensation was settled by the jury; and therefore that the company could not, immediately upon the finding of the jury, pay the amount awarded by them into the court of chancery, and take possession of the land, but must first call upon the owner to make out a title to the satisfaction of the company, although *before* the assessment by the jury he had failed to disclose or prove his title. *Doe v. Manchester R'y Co.*, 14 Meeson & Welsby (Exchequer), 687, 1845; *Doe v. Manchester R'y Co.*, 2 Carrington & Kirwan, 162; 61 E. C. L., 162, 1846.

332. Deposit; evidence. Where a county treasurer dies holding money received as "condemnation money," the sureties on his bond are liable therefor. *Doolittle v. Atchison, Topeka and Santa Fe R. R. Co.*, 20 Kans., 329. 1878.

333. — The manner of investment of damage money paid into court determined. *Rector of Kirksmeaton, Ex parte*, 10 Amer. & Eng. R. R. Cases, 68; Law Reports, 20 Chancery Division, 203. 1882.

334. Dismissal. The defendants, in 1855, instituted proceedings in the superior court

to have the plaintiff's land condemned for the use of its road, which proceedings were subsequently discontinued by the defendant "without prejudice," and with the understanding that the plaintiff was to suffer no hurt or loss in consequence of such act of the defendant. *Held*, that this did not prevent the plaintiff from pursuing his remedy under the statute, nor did such action prevent the statute of limitations from running. *Vinson v. North Carolina R. R. Co.*, 74 N. C., 510, 1876; 13 Amer. R'y Rep., 396.

335. Distribution of condemnation money. Money deposited as compensation distributed under the facts of the case. *Union R'y and Transit Co. v. Skinner*, 9 Mo. App., 189. 1880.

336. Entry under award; what constitutes an entry. The fact that defendant permitted a telegraph company to construct a telegraph line over and across that portion of plaintiff's lot within the right of way, and allowed the return of award to be recorded, did not amount to a tort, or raise an implied contract to pay the award. *Dimmick v. Council Bluffs and St. Louis R'y Co.*, 58 Ia., 637, 1882; 10 Amer. & Eng. R. R. Cases, 105.

337. Interest of sheriff. That the sheriff is an interested party and thereby disqualified from proceeding with the inquisition is waived by defendant appearing and taking part in the inquisition. *Corregal v. London and Blackwall R'y Co.*, 3 Eng. R. R. & Canal Cases, 411, 1843; *Corregal v. London and Blackwall R'y Co.*, 5 Manning & Granger, 219; 44 E. C. L., 123. 1843.

338. — The interest which at common law disqualifies an officer from acting in a judicial inquiry must be direct and certain, and not merely remote or contingent; and the same principle must be applied to s. 39 of the Lands Clauses Consolidation Act. Where, therefore, at the time of the summoning of a jury and the taking of an inquisition before the sheriff as to the amount of compensation to be paid for the land by a railway company under the powers of their act of parliament, there was an executory agreement not yet carried out, by which that company would ultimately become amalgamated with another railway company, and the sheriff was a shareholder in the latter company, *held*, that the sheriff was not "interested in

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the matter in dispute" within the above section, so as to invalidate the proceedings. *Queen v. Manchester, Sheffield and Lincolnshire R'y Co.*, Law Reports, 2 Queen's Bench Cases, 336. 1867.

339. Lien. By the law of Massachusetts, a person whose land is taken for railway purposes, under the right of eminent domain, has a right to compensation, which, if not strictly a lien, is at least in the nature of a lien or incumbrance upon the land; and this right may be enforced against a corporation which is the successor of the company taking the land. *Drury v. Midland R. R. Co.*, 127 Mass., 571. 1879.

340. — The seventh section of the defendants' charter plainly gives a mortgage lien for condemnation money, such as its terms import, and this court is the proper forum in which to enforce it. *Frelinghuysen v. Central R. R. Co. of New Jersey*, 28 N. J. Eq., 368; *Kennedy v. Same*, ib., 389. 1877.

341. Possession; writ of assistance. By Laws of 1854, ch. 282, § 5, it is provided that in all cases of proceedings for the appraisal of lands taken for a railroad, "the courts before whom the proceedings may be pending shall have the power to make all the necessary orders and give the proper directions to carry into effect the object and intent of this and the aforesaid act." *Held*, to authorize the issue of a writ in the nature of a writ of assistance to put a railroad company in possession of lands taken by proceedings for appraisal. *N. Y. Central R. R. Co., In re*, 5 Thompson & Cook (N. Y. Supreme Ct.), 84; 2 Hun (N. Y.), 483, 1874; affirmed, 60 N. Y., 116, 1875.

342. Refusal of company to have damages assessed; action therefor. The plaintiff, who had a leasehold interest in premises held by a tenant from year to year, received notice from a projected railway company that the premises were required for railway purposes; and the company subsequently arranged with the tenant and received from him the key. The plaintiff thereupon gave the company notice, under § 68 of the Lands Clauses Consolidation Act, 1845, of the amount of her claim and the nature of her interest in the premises, and requiring it to issue its warrant to the sheriff to summon a

jury; and, upon its neglecting so to do, she brought an action for the sum claimed. *Held*, that these facts warranted the jury in finding that the company had *actually taken* the premises, and consequently that it was liable for the amount demanded. *Barker v. Metropolitan R'y Co.*, 17 Common Bench (N. S.), 785; 112 E. C. L., 785. 1864.

343. Specific performance. A party who has received notice from a railway company of its intention, in exercise of powers given by the railway act and the Lands Clauses Consolidation Act, to purchase his lands, may sustain a bill for specific performance of the agreement thereby created; and the court will enforce such agreement by ordering the company to take proceedings prescribed by the statute for ascertaining the amount of purchase money and compensation. *Walker v. Eastern Counties R. R. Co.*, 6 Hare (Eng. Ch.), 594. 1848.

344. Statutes — change of statute. A proceeding was commenced under the act of 1853, but, before a trial was had, the act of 1872 had taken effect, and the damages were assessed according to the provisions of the latter act, which expressly repealed all conflicting laws. *Held*, that the assessment was properly made under the latter act. *Springfield and Illinois South Eastern R'y Co. v. Hall*, 67 Ill., 99. 1873.

345. — Illinois statutes. The statutes of Illinois, in relation to such proceedings, construed. *Chicago, Burlington and Quincy R. R. Co. v. Chamberlain*, 84 Ill., 333, 1876; 16 Amer. R'y Rep., 466.

346. — Indiana statutes. The statutes of Indiana in relation to condemnation proceedings construed. *Swinney v. Ft. Wayne, Muncie and Cincinnati R. R. Co.*, 59 Ind., 205. 1877.

347. — A proceeding to assess damages sustained by a land owner from the taking of his land cannot be maintained by such owner under § 15, 1 G. & H., 509, where there has been an instrument of appropriation filed by the company, as provided in said section. *Indianapolis, Bloomington and Western R'y Co. v. Reed*, 52 Ind., 337. 1876.

348. — Lands Clauses Act. *Held*, that "injuriously affected," in the Lands Clauses Act, does not mean "wrongfully" or "unlawfully," but "injuriously" affected in the

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ordinary and popular sense,—meaning deteriorated in value. *City of Glasgow Union R'y Co. v. Hunter*, 7 Scotch Session Cases (3d series), 408. 1869.

349. — Massachusetts statute. The rights of a land owner under the Gen. Sts., ch. 63, §§ 33, 34, and the St. of 1874, ch. 372, §§ 67, 69, 72, whose land had been taken by the Eastern R'y Co., prior to the St. of 1876, ch. 286, are not defeated or impaired by that act. *Elwell v. Eastern R'y Co.*, 124 Mass., 160. 1878.

350. — Pennsylvania R. R. Co. The general railroad act of 1849, and the supplements thereto of April 27, 1855, and April 9, 1856, had no application to the Pennsylvania R. R. Co., incorporated in 1846, or to any other pre-existing railroad companies; and although the legislature has the power to modify the method by which damages are assessed for lands taken by such companies, the acts referred to are not an exercise of it. *Shick v. Pa. R. R. Co.*, 1 Pearson (Pa.), 264. 1868.

351. — special and general statute. Where a special act incorporating a railway company provided for the manner of taking land for its uses, and a general act was subsequently passed prescribing the manner of taking lands for such purposes, which general act did not repeal or modify the special act, it was held that the company might condemn land under the general statute. *Cascades R. R. Co. v. Sohns*, 1 Washington Ter., 557. 1878.

352. — Vermont statute. The statutes of Vermont, in relation to intersecting railways, construed. *Central Vt. R. R. Co. v. Woodstock R. R. Co.*, 50 Vt. 452. 1878.

353. — West Virginia statute. The statutes of West Virginia, in relation to taking private property, construed. *Chesapeake and Ohio R. R. Co. v. Pack*, 6 West Va., 397. 1873.

354. — Wisconsin statute. Ch. 119, Laws of 1872, is to be regarded as a revision of all former statutes which confer the right of eminent domain upon railway companies; and as such it repeals all conflicting provisions on the same subject contained in such statutes. *Moore v. Superior and St. Croix R. R. Co.*, 34 Wis., 173, 1874; 7 Amer. R'y Rep., 253.

355. — Where the petition of a railway company to the judge of a circuit court for the appointment of commissioners to assess damages for the taking of land was in accordance with the company's charter (granted prior to 1872), but did not, in form or substance, comply with the act of 1872, held, that the appointment of such commissioners was invalid. *Ib.*

356. Tender. Payment into court is a positive admission of damages to the amount of the tender, and when so paid it becomes the money of the party to whom the tender is made. *Oregon R'y and Navigation Co. v. Oregon Real Estate Co.*, 10 Oreg., 444. 1882.

357. Title; change of. The facts examined in relation to change of ownership of a railway; and held that the proceedings were under the new owners. *Williams v. New Orleans, Mobile and Texas R. R. Co.*, 60 Miss., 689. 1882.

358. Tunnels. A railway company was entitled by a special act to acquire compulsorily an easement of tunneling under land, unless a jury should determine that such easement could not be acquired by the company without material detriment to the remainder of such land. Held, that the company might enter upon the land for the purpose of making the tunnel under § 85 of the Lands Clauses Consolidation Act upon depositing the value of the easement, and could not be compelled to deposit the value of the whole land. *Hill v. Midland R'y Co.*, Law Reports, 21 Chancery Division, 143, 1882; 10 Amer. & Eng. R. R. Cases, 79.

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359. Action on verdict of sheriff's jury. In an action on a verdict and judgment obtained in an inquisition before a sheriff's jury under § 68 of the Lands Clauses Consolidation Act, 1845, the inquisition is not conclusive evidence that the plaintiff is entitled to compensation. *Chapman v. Monmouthshire R'y Co.*, 2 Hurlstone & Norman (Exchequer), 267. 1857.

360. Challenge. A fund raised in Detroit by general contribution to aid in the building of a railway to Butler, Ind., was com-

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monly known as the "Butler bonus." But in proceedings to condemn land for a road to be leased to the Butler line, a court could hardly take judicial notice of what the Butler bonus was for the purpose of sustaining a challenge to a juror on the ground that he had subscribed thereto. *Detroit Western Transit and Junction R. R. Co. v. Crane*, 50 Mich., 182, 1883; 10 Amer. & Eng. R. R. Cases, 502.

361. — A challenge to a juror is properly overruled if the judge knows at the time of nothing which would give the juror a bias; and if the challenger knows of facts which would do so, it is not enough to present them for the first time as a reason for refusing to confirm proceedings which have been long in progress at considerable cost, and in which the juror has taken part without any showing of legal cause against his acting. *Id.*

362. Description of land. When a company empowered by parliament has given notice to a land owner to treat for the purchase of a part of it, the sheriff's jury can only assess the value of that part of the land described in the notice to treat. *Stone v. Commercial R. R. Co.*, 4 Mylne & Craig (Eng. Ch.), 122. 1839.

363. New trial; communication with jury. A communication by the successful party to the jurors pending the trial, if casually made, without any intent to influence the verdict, and if the court can clearly see that it could not have had any effect on the minds of the jurors, is not ground for a new trial. *Oswald v. Minneapolis and Northwestern R'y Co.*, 29 Minn., 5. 1881.

364. Officer summoning jury. Where the coroner who summoned the jury was a stockholder, the proceedings were set aside and a *venire de novo* awarded. *Woodstock R'y Co. v. Tupper*, 1 Hannay (New Brunswick), 454. 1869.

365. Order of appointment of viewers. In appointing commissioners under defendant's charter, the order of appointment should have given not only the language of the charter, but also, by way of direction to the commissioners, the construction put upon it by the court. *Bohlman v. Green Bay and Minnesota R'y Co.*, 40 Wis., 157, 1876; 13 Amer. R'y Rep., 421.

366. Private way; power of jury. The jury, under § 68 of the Lands Clauses Consolidation Act, 1845, has no power to inquire into the right of the party claiming damages to a private way, but they are bound to assess compensation upon the assumption that the way exists. *Queen v. London and North Western R'y Co.*, 3 Ellis & Blackburn, 443; 77 E. C. L., 443. 1854.

367. Qualification of viewers. A report of viewers to assess the damage caused by the building of a railroad will not be set aside because one of the viewers had a claim against the company for damages for altering a county road so as to pass through his land. Those persons only are disqualified from acting as viewers whose property immediately adjoins the railroad. *Newbecker v. Susquehanna R. R. Co.*, 1 Pearson (Pa.), 57. 1854.

368. — When a viewer has expressed an opinion as to a former and somewhat similar case, that does not render him incompetent to serve on the view; the party waives objection to a viewer by appearing at the hearing. *Gingrich v. Harrisburg, etc., R. R. Co.*, 1 Pearson (Pa.), 74. 1854.

369. — One who has given his note to a railway company to aid in the construction of its road is disqualified as a juror in proceedings to condemn lands for its right of way. This disqualification cannot be removed by agreement of parties. *Michigan Air Line R'y Co. v. Barnes*, 40 Mich., 333. 1879.

370. — A subscriber to a railway aid fund, who takes no stock in the road, acquires no legal interest in another projected road from the fact merely that it is to be leased to the road which he has aided, and is not thereby disqualified as a juror in proceedings for condemnation of lands, for use of the latter road. *Detroit Western Transit Co. v. Crane*, 50 Mich., 182, 1883; 10 Amer. & Eng. R. R. Cases, 502.

371. Statute. There can be but one jury of damages under the act of 13th March, 1873, relating to Delaware avenue. *Fitzpatrick v. Pa. R. R. Co.*, 10 Philadelphia, 107. 1874.

372. Swearing of jury. The party being present when the jury were sworn, and not having made any objection as to the manner

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thereof at the proper time, he will be deemed as having waived whatever irregularity there may have been. *Rockford, Rock Island and St. Louis R. R. Co. v. McKinley*, 64 Ill., 338. 1872.

373. — In proceedings to condemn lands for the use of a railway, the oath of the jurors is not to be construed by itself, but as a part of the proceedings in which it was taken; and so construed, if everything the statute requires is embraced in substance if not in form, it is sufficient. *East Saginaw and St. Clair R. R. Co. v. Benham*, 28 Mich., 459, 1874; 12 Amer. R'y Rep., 356.

374. — The act of 1872 required commissioners, before entering on the duties of their office, to take the constitutional oath prescribed for state officers to support the constitution of the United States and of the state, and faithfully to discharge their duties to the best of their ability. Defendant's charter, under which commissioners were appointed, required of them no oath; but they took one to execute the trust reposed in them and discharge the duties imposed upon them as enjoined in the charter, pursuant to the provisions of the charter, to the best of their ability. *Held*, that their proceedings were void for want of jurisdiction. *Bohman v. Green Bay and Minnesota R'y Co.*, 40 Wis., 157, 1876; 13 Amer. R'y Rep., 421.

375. Title to land. The 68th section of the Land Clauses Consolidation Act (8 Vict. c. 18), which provides that if any person shall be entitled to any compensation in respect of any lands or any interest therein which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters shall not have made satisfaction, such party may have the amount of such compensation settled by arbitration or by a jury, does not give the arbitrators or jury jurisdiction to inquire into the title of the claimant to the land or other hereditament in respect of which he claims compensation, but only to decide upon the question of amount, — dissenting, Earle, J. *Regina v. London and Northwestern R'y Co.*, 25 Eng. Law & Equity, 37. 1854.

376. Verdict. A motion to set aside the verdict of a jury assessing damages must be addressed to and adjudicated upon by the court in which the verdict is returned.

Burr v. Bucksport and Bangor R. R. Co., 64 Me., 130. 1875.

377. — Where a jury is required merely to determine the damages for taking property for a railway, a finding in general terms is sufficient, and it need not specify the amount allowed for each item of injury. The presumption is that all evident facts bearing on the amount of damages were taken into account. *Michigan Air Line R'y Co. v. Barnes*, 44 Mich., 222. 1880.

378. — conditions. In a proceeding to condemn land for a right of way, the compensation to be ascertained by the jury for the taking of the land must be, in terms, money, and the jury have no power to prescribe the performance of other acts by the petitioners, such as fencing the road, making crossings, etc. *Chicago, Milwaukee and St. Paul R'y Co. v. Melville*, 66 Ill., 329. 1872.

379. View by jury. The statute makes it the duty of the court to permit the jury to go upon the land sought to be taken or damaged, in person; but at what time in the progress of the trial they shall go, is in the sound discretion of the court. *Galena and Southern Wisconsin R. R. Co. v. Haslam*, 73 Ill., 494. 1874.

380. — In case of conflict the jury may view the premises. *McReynolds v. Baltimore and Ohio R'y Co.*, 106 Ill., 152. 1883.

381. — The statute giving the right to have the jury to view the land is imperative, and fixes no time when it shall be allowed. It is error to refuse a motion to have the jury view the premises, even after the evidence has been closed and the arguments heard, but before the instructions are given. *Kankakee and Seneca R. R. Co. v. Straut*, 102 Ill., 666, 1882; 10 Amer. & Eng. R. R. Cases, 440.

382. — The premises to be viewed by the jury under R. S., ch. 18, §§ 12 and 13, embrace the land of the petitioners, both without and within the location of the railway; and it is the right of the jury to view the premises from both these standpoints. The ruling of the presiding officer that the jury must take their view of the premises solely from that portion within the location is erroneous. *Wakefield v. Boston and Maine R. R. Co.*, 63 Me., 385. 1873.

383. — Where the damages are assessed

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by the jury by the consent of the parties upon a view of the premises without evidence, the presumption will be that the assessment is not excessive. *Peoria and Farmington R'y Co. v. Barnum*, 107 Ill., 160. 1883.

384. — The jury are not bound by the testimony submitted to them, but are also expected to use their own judgment and knowledge from a view of the premises and from their own experience as freeholders. *Toledo, Ann Arbor and Grand Trunk R'y Co. v. Dunlap*, 47 Mich., 456, 1882; 5 Amer. & Eng. R. R. Cases, 378.

385. — **change of venue.** Where a company seeking to condemn land for right of way procured the venue of the cause to be changed to another county, *held*, that by taking the change of venue from the only court upon whom the power was conferred under the act of, 1872, to order a personal view by the jury, the company debarred itself of that right and could not be heard to complain of the loss of it. *Rockford, Rock Island and St. Louis R. R. Co. v. Coppinger*, 66 Ill., 510. 1873.

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386. Acceptance of damages. The acceptance of the damages awarded precludes the land owner from making further claim. *Baltimore and Ohio R. R. Co. v. Johnson*, 84 Ind., 502; 10 Amer. & Eng. R. R. Cases, 408. 1882.

387. Buildings erected by land owners during the proceedings. When land was taken by a railway company, a bond filed to secure the payment of its value, an appraisal made, and afterwards all the proceedings except the bond were set aside by the court, if the owner builds houses on the property to prevent the company from taking it, the latter will still be allowed to have it, and need not pay for such improvements. *Schick v. Pa. R. R. Co.*, 1 Pearson (Pa.), 262. 1867.

388. Business, damages to. Where the award provides that if the owners shall retain possession three months they will sustain no damages to their business, but fixes

the amount of damages if possession shall be sooner taken, it is at the option of the railway company to wait three months before taking possession of the condemned property, and thus avoid payment of that class of damages. *Glennon v. Chicago, Milwaukee and St. Paul R'y Co.*, 79 Ill., 501. 1875.

389. — *Held*, by the exchequer chamber, reversing the judgment of the court of common pleas, that an injury to the good will or a loss of profit in the business of a shop, caused by an obstruction, whether permanent or temporary, of a highway, in the lawful execution of the works of a railway company, where no part of the land on which the business is carried on is taken or otherwise injuriously affected, is not the subject of compensation under s. 68 of the Lands Clauses Consolidation Act, 1845. *Cameron v. Charing Cross R'y Co.*, 19 Common Bench (N. S.), 764; 115 E. C. L., 764. 1865.

390. Consequential. The appellants owned several blocks of land in the city of New York, lying between Sixty-fifth and Sixty-sixth streets, intersected by Eleventh and Twelfth avenues. The block lying between Eleventh and Twelfth avenues, a portion of which was taken by these proceedings, was further divided by a strip of land used for respondent's railroad, no right of way over such strip being possessed by the appellants. *Held*, that no consequential damages to the block lying between Tenth and Eleventh avenues, or to that portion of the block between Eleventh and Twelfth avenues which lay on the other side of the railroad track from the portion taken in these proceedings, could be allowed. *New York Central and Hudson River R. R. Co. In re*, 6 Hun (N. Y.), 149. 1875.

391. — The act of February 19, 1849, in terms authorizes compensation for damages purely consequential, and in estimating under said act the damages arising to a land owner from the construction, through his land, of an improvement by a railway or canal company, the consequential damages resulting necessarily from the construction of said improvement are to be considered and not only those which are direct and immediate. *Hoffer v. Pennsylvania Canal Co.*, 87 Pa. St., 221. 1878.

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392. Contiguous land. On the assessment of damages, the inquiry as to damages should be confined to the tract of land described in the petition, in the absence of a cross-bill by the defendant showing that he owns contiguous lands which will be damaged. *Jones v. Chicago and Iowa R. R. Co.*, 63 Ill., 330. 1873.

393. — The true measure of compensation for land not taken by a railway for a right of way is the difference between what the whole property would have sold for, unaffected by the railroad, and what it would sell for as affected by it if it would sell for less. The damages must be for an actual diminution of the market value of the land and not speculative. *Page v. Chicago, Milwaukee and St. Paul R'y Co.*, 70 Ill., 324, 1873; *Eberhart v. Same*, ib., 347, 1873.

394. — The fact that, by the construction of a railroad through a farm, a part of it is cut off, should be taken into consideration in assessment of the damages. *Peoria, Atlanta and Decatur R. R. Co. v. Sawyer*, 71 Ill., 361. 1874.

395. — In the case of damage to a party whose lands are not entered upon, but are injuriously affected by the exercise of the powers of a railway company upon its own lands, or upon the lands of another party, and for which damage compensation is required to be made by § 6 of the Railway Clauses Consolidation Act (8 Vict., c. 20), it is not unlawful for the company to erect the works which occasion the damage before the amount of compensation for the same is ascertained, paid or deposited. *Hutton v. London and Southwestern R. R. Co.*, 7 Hare (Eng. Ch.), 259. 1849.

396. — land not actually taken. The Lands Clauses Consolidation Act and the Railways Clauses Consolidation Act do not contain any provisions under which a person whose land has not been taken for the purposes of a railroad can recover statutory compensation from the railway company in respect of damage or annoyance arising from vibration, occasioned (without negligence) by the passing of trains, after the railway is brought into use, even though the value of the property has been actually depreciated thereby. The right of action for such damage is taken away. *Hammer-*

smith and City R'y Co. v. Brand, Law Reports, 4 English & Irish Appeal Cases, 171, 1868; *Brand v. Hammersmith and City R'y Co.*, Law Reports, 1 Queen's Bench Cases, 130, 1865.

397. — Where a tract of land consists of several parcels, all connected and constituting one body, the jury, in estimating the damages sustained by the owner by reason of the condemnation of a right of way for a railroad across the tract, should consider the injury to the whole and not simply the injury to the parcels touched by the road. *Wyandotte, Kansas City and Northwestern R'y Co. v. Waldo*, 70 Mo., 629. 1879.

398. — lateral support. The leaseholder of a house, with a forecourt abutting on a road, constructed a building on the forecourt, subsequently to which a railway company made a trench in the road for the purpose of constructing its railway, in consequence of which the building was deprived of its lateral support from the adjacent land. A claim having been made for compensation, a jury was summoned under the Lands Clauses Consolidation Act, 1845, 8 and 9 Vict., c. 18, s. 63, who found that the sinking of the ground had been caused by the erection of the new building upon it, and that the lands of the claimant had not been injuriously affected by the works of the company. *Held*, that the jury had exceeded their jurisdiction. *Horrocks v. Metropolitan R'y Co.*, 4 Best & Smith, 315; 116 E. C. L., 314. 1863.

399. Crossings. In a proceeding upon appeal to recover damages for the right of way appropriated to the use of a railroad company, the owner of the land filed a petition setting forth the claim, but made therein no reference to the construction of any crossings or bridges, and no sufficient evidence was offered showing any necessity for the land owner to build a bridge for a farm crossing. *Held*, that a finding of \$85 for a bridge, as an element of damage, could not be sustained. *Atchison and Denver R'y Co. v. Lyon*, 24 Kans., 745, 1881; 5 Amer. & Eng. R. R. Cases, 295.

400. Danger to teams. Danger to teams and persons is too uncertain an element of damage to be considered. *McReynolds v. Baltimore and Ohio R'y Co.*, 106 Ill., 152,

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1883; *Atchison and Denver R'y Co. v. Lyon*, 24 Kans., 745, 1881; 5 Amer. & Eng. R. R. Cases, 295. But see *Parks v. Wisconsin Central R. R. Co.*, 83 Wis., 413. 1873.

401. Depreciation. Depreciation in the value of land, occasioned by the construction of a railroad, is not, in any legal sense, a consequential damage. *Turner v. R. R. Co.*, 8 Philadelphia, 485. 1870.

402. Destruction of building. The law requires that for all the property taken by a railway company for its use, or damaged by it, just compensation must be made to the owners. If a building stands in the way of a road, which it is necessary to destroy, its value must be paid by the corporation, and the jury, in estimating its value, will take into consideration, not the value of the materials composing the building, but the value of the building as such. Should any of the debris remaining on its removal or destruction be appropriated by the owner of the land, to the extent of its value will the claim of the owner be less. *Lafayette, Bloomington and Mississippi R. R. Co. v. Winslow*, 66 Ill., 219. 1872.

403. — To a count alleging that the plaintiff was entitled to support for his house from an adjoining house, and that the defendant wrongfully deprived the plaintiff of the support of the adjoining house by negligently and improperly pulling down the same, without taking any care to secure the plaintiff's house against the consequences of such pulling down, the defendant pleaded (except as to so much of the count as charged it with having negligently and improperly pulled down the adjoining house) that the same was delineated in the plans and described in the book of reference deposited as in its act mentioned; and that because it was necessary in order to make the railway authorized by that act it pulled down the said house. *Held*, on demurrer, that the plea was good. *Knapp v. London, Chatham and Dover R'y Co.*, 2 Hurlstone & Coltman (Exchequer), 212. 1863.

404. Dust and dirt from trains. A land owner, whose property was not taken, used or directly interfered with by the railway company, gave the company notice, under s. 68 of the Lands Clauses Consolidation Act, of his claim for compensation by reason of his

property being "injuriously affected" by the execution of the works, whereby his goods were damaged by the dust and dirt, and customers were prevented from coming to his shop; and required the company either to give a written agreement for payment of the amount claimed, or to issue a precept to the sheriff to summon a jury for settling the compensation. The company filed a bill against the land owner, alleging that the property in question was not "injuriously affected" within the meaning of said section, and praying an injunction to prevent the defendant from proceeding on his notice. *Wigram, V. C.*, granted the injunction, on the authority of *The London and North Western Railway Company v. Smith*, 1 McNaghten & Gordon, 216; 13 Jurist, 417. *Held*, dissolving the injunction, that the right to compensation under s. 68 was not confined to damage sustained by persons whose lands are taken, used or directly interfered with, but extended to consequential damage; that the proper jurisdiction to decide the question of damage, and the quantum, was the sheriff's jury; and that there was no equity for this court to interfere. *East and West India Docks R'y Co. v. Gatlke*, 3 Eng. Law & Equity, 59; 15 Jurist, 261. 1850.

405. Effect upon highway. Where a highway ran through the property, and the railroad went through a part thereof which lay between the highway and the Mississippi river, evidence was held admissible to show what such portion, taken by itself, was worth, without the railroad, at the time of the taking aforesaid, and what the balance would be worth after taking out the piece appropriated by the railroad. *Colvill v. St. Paul and Chicago R'y Co.*, 19 Minn., 233. 1872.

406. Elevator. Where a grain elevator stands on ground considerably above and some distance from a river upon which grain was carried from the elevator, and it appearing that the grain was transferred from the elevator to boats at the wharf through an inclined chute, and that a railway for which a condemnation was sought was proposed to be located between the elevator and the river, and was to be constructed on trestles and elevated entirely

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above the chute so as not to interfere with the transferring of grain from the elevator to the river, it was *held* there was no loss to the owner of the elevator, and therefore could be no damage. *Peoria and Pekin Union R'y Co. v. Peoria and Farmington R'y Co.*, 105 Ill., 110, 1882; 10 Amer. & Eng. R. R. Cases, 129.

407. Entire tract affected. The injury to the entire tract, out of which a part is taken, must be considered. *Reisner v. Union Depot Co.*, 27 Kans., 382, 1882; 10 Amer. & Eng. R. R. Cases, 155; *Sheldon v. Minneapolis and St. Louis R'y Co.*, 29 Minn., 318, 1882.

408. — Where a railway ran through one quarter section of a stock farm of nine hundred and sixty acres, it was held that the damage to the tract as a whole should be considered. *Kansas City, Emporia and Southern R'y Co. v. Merrill*, 25 Kans., 421, 1881; 2 Amer. & Eng. R. R. Cases, 485.

409. — Plaintiff being the owner of six forty-acre tracts lying in one body, over two of which defendant's railway has been built, there was no error in permitting him to prove the diminution in value of the whole of said tract by reason of such taking. *Parks v. Wisconsin Central R. R. Co.*, 33 Wis., 413, 1873.

410. — Part of the respondent's land lay north, and the rest, being an eighty-acre tract, lay south of a public road, running on a line between it and the rest. Respondent testified that he bought said eighty-acre tract in 1858 of K.; that K. occupied it as a separate farm, and had a farm house on it; that the road was there when he bought it; that it was tillable, and had been cultivated by a tenant the last two years. The jury were instructed that, for the purpose of assessing the respondent's damages, his farm must be considered as a unit, but what such unit includes the jury must determine; that the petitioner contended that said eighty acres was a separate parcel of land, and not within the farm, and not to be considered in estimating the damages; that this was a question for them; if it was a part of the farm, they might consider the effect of the road upon respondent's convenience and safety in cultivating it from his dwelling in connection with his other land constituting his

farm, otherwise not. *Held*, proper. *St. Paul and Sioux City R'y Co. v. Murphy*, 19 Minn., 500. 1873.

411. — Where a farm, through which a railroad ran, consisted of two hundred and forty acres, and the petition for the condemnation of the right of way describes the road as running through both the quarter section and the eighty-acre piece, the jury, in assessing damages, should consider the damage done to the whole farm by reason of the construction of the road. *Keithsburg and Eastern R. R. Co. v. Henry*, 79 Ill., 290, 1875.

412. — G. was the owner of a contiguous and compact farm of two hundred and forty acres. Independence creek ran in a curved and irregular line through the southwestern portion of the farm. This creek was the boundary line between Atchison and Doniphan counties, and some sixty acres of the farm were in Atchison, and the balance in Doniphan, county. Proceedings were instituted in Doniphan county to condemn a right of way for the A. and N. R. Co. through this farm. The right of way crossed the farm only in Doniphan county, and touched no part of the land in Atchison. The commissioners, in their report, fixed the value of the land taken, and also awarded damages to the balance of the farm as an entirety. The amount of this award was deposited by the railroad company with the treasurer of Doniphan county. On a trial of an appeal from this award to the district court of Doniphan county, *held*, that such court did not err in permitting an inquiry as to the damages to the farm as a whole, including that part in Atchison county, and in rendering judgment for such damages. *Atchison and Nebraska R. R. Co. v. Gough*, 29 Kans., 94, 1882; 10 Amer. & Eng. R. R. Cases, 151.

413. — In estimating the damages for the location of a railroad over a farm, the injury should not be limited to the legal subdivisions of land traversed by the road, but the injury to the farm as a whole should be considered. *Hartshorn v. Burlington, Cedar Rapids and Northern R'y Co.*, 52 Ia., 613. 1879.

414. — Plaintiff was owner of one hundred and twenty acres of land, consisting of

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three forties in line from east to west. The land was occupied and used by him as one farm, his residence being on the easterly forty. Defendant, having located its line of railway across the two westerly sections, instituted proceedings for condemnation. *Held*, that, in assessing the compensation to be paid to the plaintiff, he is entitled to have the effect of the appropriation of the right of way across the two westerly forties upon the easterly forty considered and taken into account, although the petition for the appointment of commissioners described the two westerly forties only. *Wilmes v. Minneapolis and Northwestern R'y Co.*, 29 Minn., 242, 1882; 10 Amer. & Eng. R. R. Cases, 161.

415. Error without prejudice. A case will not be reversed for an erroneous instruction, where it is apparent that the amount of damages allowed is just. *Chicago and Western Indiana R. R. Co. v. Dooling*, 95 Ill., 202. 1880.

416. Exposure to fire. In awarding damages to the owner of land taken for a railroad, the exposure of his remaining land and buildings to fire from the company's engines is a proper element to be considered in making the estimate. The statute, which imposes on railroad corporations an absolute liability for all damage caused by fires from their locomotives, does not necessarily preclude a recovery of anything for this cause; but the question is, how much will the property be diminished in value by reason of such exposure, considering at the same time the indemnity provided by the statute? *Adden v. White Mountains, N. H. R. R. Co.*, 55 N. H., 418, 1875; 11 Amer. R'y Rep., 246.

417. — Increased exposure to fire by the passage of a railroad track directly through lands near where buildings are already erected may be considered by the jury in estimating the compensation due to the land owner. An instruction is objectionable which tends to mislead the jury into the belief that they should take into consideration the injury to the property for farming purposes only. *Colvill v. St. Paul and Chicago R'y Co.*, 19 Minn., 283. 1872.

418. — Under the statutes of Indiana danger from fire should be considered in the assessment of damages. *Swinney v. Ft.*

Wayne, Muncie and Cincinnati R. R. Co., 59 Ind., 205, 1877; *Lafayette, Muncie and Bloomington R. R. Co. v. Murdock*, 68 Ind., 187, 1879.

419. — Evidence of the value of the buildings and a grove, and the increased hazard from fire by reason of their proximity to the track, is improper. The increased danger of the destruction of buildings, and the like, by fire, is too remote and contingent for legal inquiry. *Lance v. Chicago, Milwaukee and St. Paul R. R. Co.*, 57 Ia., 636, 1892; 5 Amer. & Eng. R. R. Cases, 617.

420. Farm. If the effect of constructing a railway through a farm is to make it more inconvenient and expensive to cultivate and manage the remaining land of the owner, this is a proper element of damage for the consideration of the jury; and a witness who is acquainted with the land and knows the proper mode of cultivating it may give his opinion as to the increased expense to the owner in carrying on the farm, arising from the location of the railway through it. *Tucker v. Massachusetts Central R. R. Co.*, 118 Mass., 546, 1875; 9 Amer. R'y Rep., 279.

421. — In condemning land its value is to be assessed with reference to what it is worth for sale in view of the use to which it may be put, and not simply with reference to its productiveness to the owner in the condition in which he has seen fit to leave it. *Mississippi River Bridge Co. v. Ring*, 58 Mo., 491. 1874.

422. — The value of land for farm use is a proper subject of inquiry. *Michigan Air Line R'y Co. v. Barnes*, 44 Mich., 222. 1880.

423. — In an action to recover damages for right of way through plaintiff's farm, the following question was held not erroneous: "How much less in value was the farm immediately after taking the land for right of way, and in consequence thereof, than it was immediately before, not taking into account any supposed benefits to result from the building of defendant's railroad." *Harrison v. Iowa Midland R. R. Co.*, 36 Ia., 323, 1873; *Brooks v. Davenport and St. Paul R. R. Co.*, 37 ib., 99, 1873.

424. — Two railways, side by side, already crossed the appellee's farm, between his house and barn, within one hundred feet of each. The appellant appropriated for its

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main line a strip seventy-five feet wide along the east line of the farm, about seven hundred feet from the house, and for a switch, to make connection with one of the other roads, a strip from the main line seven hundred feet south of the other roads and curving thence northwesterly and reaching the other roads between the house and barn. The west line of the farm is two and one-half miles east of the court-house in Indianapolis. There was a hamlet of four or five houses abutting the farm on the east. Upon the trial of a suit for the appropriation of such land, an instruction that the condition of the other roads could "only be considered in estimating the value of ingress and egress upon the east of" the farm "to and from the residue not appropriated by the" defendant, was calculated to mislead the jury, and should have been refused. *Union R. R. Transfer and Stock-Yard Co. v. Moore*, 80 Ind., 458, 1881; 5 Amer. & Eng. R. R. Cases, 346.

425. Fence. In estimating the damages the necessity of making additional fences may be properly considered. *Baltimore, Pittsburgh and Chicago R. R. Co. v. Lansing*, 52 Ind., 229, 1875; *New York and Greenwood Lake R'y Co. v. Stanley's Heirs*, 35 N. J. Eq., 283, 1882; 10 Amer. & Eng. R. R. Cases, 345; *Leavenworth, Topeka and Southwestern R. R. Co. v. Paul*, 28 Kans., 816, 1882; 10 Amer. & Eng. R. R. Cases, 490; *Pennsylvania and New York R. R., etc., Co. v. Bunnell*, 81 Pa. St., 414, 1876; 16 Amer. R'y Rep., 1.

426. — While the cost of fencing cannot be allowed as a distinct item of damages, where land has been taken by a railroad company, yet the jury may consider how much the burden of fencing would detract from the value of the land. *Montour R. R. Co. v. Scott*, 1 Pennypacker (Pa.), 503. 1881.

427. — The jury, in their verdict, found the value of the land taken at \$3,000, and the damages, aside from the value of the land taken, to the land owner, over and above the benefits, at \$2,500, making in all \$5,500. It was objected that the verdict was defective in making no reference to the fencing, and keeping the same in repair. It was held that as there was no proof as to the fencing, the jury could not find a verdict as to its cost. *Peoria and Rock Island R'y Co.*

v. Birkett, 62 Ill., 332, 1872; 7 Amer. R'y Rep., 334.

428. — Where a railway company has fenced its track through land it is seeking to condemn for right of way, it is not erroneous to instruct the jury assessing the damages not to consider the failure to maintain the fences as an element of damage. *Jones v. Chicago and Iowa R. R. Co.*, 68 Ill., 380. 1873.

429. — The owner is entitled to recover for the expense of any additional fencing of cultivated lands, made necessary by reason of the construction of the road; but as he is not required by law to fence uncleared or uncultivated land, and the expense of fencing such, should it at any future time be cleared or cultivated, is too remote and uncertain to be estimated, the same should not be taken into consideration. *Raleigh and Augusta R. R. Co. v. Wicker*, 74 N. C., 220. 1876.

430. Form in which land is taken. The manner in which the land is cut, and all the surrounding circumstances, should be considered in estimating damages. *Dreher v. Iowa Southwestern R'y Co.*, 10 Amer. & Eng. R. R. Cases, 221 (Ia.), 1882; *Brooks v. Davenport and St. Paul R. R. Co.*, 37 Ia., 99, 1873.

431. — The damages occasioned by the severance of land should be considered, although such damages are largely conjectural. *McReynolds v. Baltimore and Ohio R'y Co.*, 106 Ill., 152. 1883.

432. — The elements composing the owner's damages for a right of way over his lands include not only the value of the land taken for the way, but also the injury to his remaining land arising from the increased difficulty of communication between the severed parts, the inconvenient shape in which the remaining land is left, the cost of new fences required by the construction of the road, and various other causes not of a remote or speculative character. *St. Louis, Arkansas and Texas R. R. Co. v. Anderson*, 39 Ark., 167, 1882; *Galena and Southern Wisconsin R. R. Co. v. Birkbeck*, 70 Ill., 208, 1873.

433. — The owner of lands severed by the railway preferred a claim for compensation from the company on the ground that there

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was to be a total separation of the land, without any communication being made; and received from the company the amount awarded to him by a jury. *Held*, that the verdict of such jury, and the receipt of compensation under it, was an arrangement with the company, and that the party had no right afterwards to cross the railway for the purpose of the occupation of his lands, and was in so doing a trespasser within the stat. 3 and 4 Vict., c. 97, s. 16. *Manning v. Eastern Counties R'y Co.*, 12 Meeson & Welsby (Exchequer), 237. 1843.

434. — If a railway company takes by its location the exclusive use of a piece of land, leaving other land of the owner on each side of the railway, he is entitled to damages, with interest from the date of the filing of the location; and the fact that, when the road is built, suitable provision is made for the owner to cross and recross the location from one part of his remaining land to the other, and for the drainage of the part of his land which is severed, and that he accepts the same and uses it with the understanding between himself and the corporation that he has a right so to do, is inadmissible in reduction of the damages. *Old Colony R. R. Co. v. Miller*, 125 Mass., 1. 1878.

435. — Where a tract of five acres was by the right of way cut off from the body of plaintiff's farm, it was held that the value of the five acres might be proved. The jury might well consider the value of the component parts. *Harrison v. Iowa Midland R. R. Co.*, 36 Ia., 323. 1873.

436. General rule. The true rule as to measure of damages is the difference in value before and after the taking. *Danville, Hazleton and Wilksbarre R. R. Co. v. Gearhart*, 81½ Pa. St., 260; *East Brandywine and Waynesburg R. R. Co. v. Ranck*, 78 Pa. St., 454. 1875.

437. — The cash value of the property to be taken is the true measure of damages. The cost of improvements upon the land should not be considered, unless they in fact increase its value to the extent of their cost. *Jacksonville and Southeastern R'y Co. v. Walsh*, 106 Ill., 253. 1883.

438. — The jury are to take into consideration the real value of land taken, and the diminished value of the remainder, and may

for that purpose take into account not only the purposes to which the land is or has been applied, but any other beneficial purposes to which it may be applied, which would affect the amount of compensation or damages. *Cincinnati and Springfield R'y Co. v. Longworth*, 30 Ohio St., 108. 1876.

439. — Where land is condemned for railway purposes, the owner is entitled to have as one item of damage, in all cases, the fair market value of the part actually taken. And where a portion of the tract remains, if it can be said with reasonable certainty that the road, properly constructed and carefully operated, will injure it, he is also entitled to recover for that. But injuries merely speculative and contingent upon the improper construction or negligent operation of the road are too remote and uncertain to be considered. *Fremont, Elkhorn and Missouri Valley R. R. Co. v. Whalen*, 11 Neb., 585, 1881; 5 Amer. & Eng. R. R. Cases, 364.

440. — An award of damages, under the statutes, embraces only those damages which may reasonably be anticipated upon the assumption that the line will be built and operated with due care and skill, and with no unnecessary injury to property outside of the right of way. *Burlington and Missouri River R. R. Co. v. Schluntz*, 14 Neb., 421. 1883.

441. — The jury should value the property without reference to the person of the owner or the actual state of his business. *Pittsburgh and Lake Erie R. R. Co. v. Robinson*, 95 Pa. St., 426, 1880; 1 Amer. & Eng. R. R. Cases, 463.

442. — In assessing the damages to another portion of a farm, aside from the value of the land taken for a right of way, the jury should consider the road as running only through the farm, and not consider any general benefit which the road may prove in making a better market or convenience for travel, and in some cases they would be justified in estimating the damages to the farm the same as though the road commenced on one side of it and ran across to the other side, and no further. *St. Louis, Jerseyville and Springfield R. R. Co. v. Kirby*, 104 Ill., 345, 1882; 10 Amer. & Eng. R. R. Cases, 214.

443. — In proceedings by a railway com-

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pany to condemn an entire lot of land to its use, an instruction to the jury that the question for them to determine was what was the value of the property in question on the day when the report of the commissioners was filed, and that it was their duty to return a verdict for the plaintiff for the amount so determined (there being nothing in the case to show that the fee of the land, burdened by the easement which the company seeks to impose on it, would be of any more than nominal value), is not such error as that this court will, on that ground, order a new trial. *Robbins v. St. Paul, Stillwater and Taylor's Falls R. R. Co.*, 22 Minn., 286, 1875; 19 Amer. R'y Rep., 398.

444. Growing crops. If growing crops were destroyed by the appropriation of the right of way and entry thereunder, the owner may prove the value of the crops as an element of damage. *Lance v. Chicago, Milwaukee and St. Paul R. R. Co.*, 57 Ia., 636, 1892; 5 Amer. & Eng. R. R. Cases, 617.

445. Inconvenience. As elements of damage, the fact that the railroad separates the wood, water and timber from the balance of the farm, the inconvenience to the owner from the perpetual use of the track for moving trains over it, danger to stock kept on the farm, and many other things, may be considered, as well as the actual increase or decrease in the market value of the farm occasioned by the road. *Chicago and Iowa R. R. Co. v. Hopkins*, 90 Ill., 316, 1878; *Bowen v. Atlantic, etc., R. R. Co.*, 17 So. Car., 574, 1882; *Hartshorn v. Burlington, Cedar Rapids and Northern R'y Co.*, 52 Ia., 613, 1879.

446. — The inconvenience of having one's land temporarily thrown open in the progress of constructing a railway over the same may be a material element of damage, and justly require compensation. *St. Louis, Jerseyville and Springfield R. R. Co. v. Kirby*, 104 Ill., 345, 1882; 10 Amer. & Eng. R. R. Cases, 214.

447. — There is no error in admitting evidence as to the situation of plaintiff's farm and buildings with reference to defendant's line, and the value of the trees standing on the land taken; nor in permitting witnesses to state their reasons for believing that the farm would be depreciated in value by rea-

son of the railway running through it — such as the inconvenience and danger of crossing the track, the danger to horses and cattle, the liability of teams to be frightened, the danger from fire, etc. *Parks v. Wisconsin Central R. R. Co.*, 33 Wis., 413, 1873.

448. Injury to highway. The sixth section of the Scotch Railways Clauses Act of 1845 (similar to the English act) provides, *inter alia*, that the railway "company shall make to the owners and occupiers of, and all other parties interested in, any lands taken, . . . or injuriously affected by the construction thereof, full compensation for the value of the lands so taken, and for all damage sustained by such owners," etc. And it then cites the Lands Clauses Consolidation (Scotland) Act, 1845, as the machinery by which compensation is to be adjudged. In order to found a claim for compensation under this section, some special or peculiar damage must be done to the lands by reason of the construction of the works, which diminishes the value of the lands, which damage would have been the subject of an action at law before the statute. Where, therefore, an access to private property by a public highway or private way is interfered with by the construction of the works, and the value of the property, irrespective of any particular use which may be made of it, is so dependent upon the existence of that access as to be substantially diminished by its obstruction, then the owner is entitled to compensation for such interference. *Caledonian R'y Co. v. Walker's Trustees*, Law Reports, 7 Appeal Cases, 259; 6 Amer. & Eng. R. R. Cases, 518. 1882.

449. Interest. Interest from the date of the award of the commissioners should, as a general rule, be allowed, not strictly as damages, but as an equitable mode of compensating the owner for the necessary delay in ultimately ascertaining the amount he is entitled to be paid. *Meller v. Easton and Amboy R. R. Co.*, 37 N. J. Law, 222, 1874; *Drury v. Midland R. R. Co.*, 127 Mass., 571, 1879; *Pigott v. Great Western R'y Co.*, Jessell's Decisions, 379; 50 Law Journal Rep. (Ch.), 679; Law Reports, 18 Chancery Division, 146, 1881.

450. — The terms on which the successor

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to an extinct corporation is entitled to equitable relief are held to be that the complainant should pay the value of the land and damages as of the time when the former company took possession, and interest on such valuation from that time. Paying interest on the value of the land and the damages from the time of the original entry is not paying the debt of the defunct corporation; it is only making the recompense which the land owners are entitled to have on the enforcement of an equity against them. *New York and Greenwood Lake R'y Co. v. Stanley's Heirs*, 35 N. J. Eq., 283, 1882; 10 Amer. & Eng. R. R. Cases, 345.

451. — appeal. Where an appeal is taken by the land owner from the award of damages by the sheriff's jury, and upon the trial a larger sum is awarded, it is proper to allow interest thereon from the date of the award appealed from. *Hartshorn v. Burlington, Cedar Rapids and Northern R'y Co.*, 52 Ia., 613, 1879; *Selma, Rome and Dalton R. R. Co. v. Gammage*, 63 Ga., 604, 1879; 1 Amer. & Eng. R. R. Cases, 41; *Sioux City, etc., R. R. Co. v. Brown*, 13 Neb., 317, 1882; 10 Amer. & Eng. R. R. Cases, 406, 1882.

452. — On appeal the damages should be assessed as of the date of the taking of the land and interest added from that date. *West v. Milwaukee, Lake Shore and Western R'y Co.*, 56 Wis., 318; 10 Amer. & Eng. R. R. Cases, 415. 1882.

453. Lease. In a proceeding to condemn land for a right of way, the jury allowed a lessee of the land taken, whose lease had three years to run, the amount of rent he was to pay per acre for the whole farm, as to the land condemned, while he contended that for gardening it might yield much more. There was no proof that it would be used for such purpose, and no other damages shown, and it appeared that the lessee had the option of terminating the lease at any time; *held*, that the verdict would not be set aside as against the evidence, and that future profits of the land taken were too uncertain to be depended upon as a measure of damages. *Booker v. Venice and Carondelet R'y Co.*, 101 Ill., 333, 1882; 5 Amer. & Eng. R. R. Cases, 357.

454. Manufactory; company compelled to take the whole. A tramway company

gave notice to treat for the five cottages in B. row and the yards behind them. The plaintiff gave a counter-notice that the land proposed to be taken was part of premises occupied by him as a manufactory, and calling upon the company to take the whole of the premises; and on the company's refusal he brought an action asking for a declaration that he might not be compelled to sell the part only of his "manufactory buildings and land" which was comprised in the notice to treat; and for an injunction. *Held*, by Hall, V. C., that the whole block of buildings constituted one "manufactory" within the meaning of the ninety-second section of the Lands Clauses Act, and that the company was bound to take the whole. *Richards v. Swansea Improvement and Tramways Co.*, Law Reports, 9 Chancery Division, 425. 1878.

455. Market value. An instruction that the marketable value of property is the amount for which the property would sell if put upon the open market and sold in the manner which property is ordinarily sold in the community in which it is situated is correct, and is not necessarily calculated to raise the inference that a forced sale was meant by the court. *Everett v. Union Pacific R'y Co.*, 59 Ia., 243, 1882; 10 Amer. & Eng. R. R. Cases, 203.

456. Upon the question of the value of the land in controversy, any purpose for which the same is adapted, and which enters into and affects its market value, may be properly considered. *Sherman v. St. Paul, Minneapolis and Manitoba R'y Co.*, 30 Minn., 227, 1883; 10 Amer. & Eng. R. R. Cases, 193.

457. — Where land is taken for a public use, a compensatory, not a speculative, remuneration is guaranteed. The difference in the value of the owner's property with the appropriation, and that without it, is the rule of compensation. This difference must be ascertained with reference to the value of the property in view of its present character and surroundings. It cannot be enhanced by proving facts of a contingent and prospective character, such as the probable rents that may be derived from the property, or its special value as a prospective monopoly of a roadway to the adjoining lands of other persons. *Powers v. Hazelton and Le-tonia R'y Co.*, 33 Ohio St., 429. 1878.

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458. — The true measure of damages is the difference between the market value of the whole tract before the taking, and that of the remainder after the taking, excluding any enhancement of value by the building of the road; and the opinions of witnesses conversant with the land, and its value before and after the taking, are admissible as evidence. *St. Louis, Arkansas and Texas R. R. Co. v. Anderson*, 39 Ark., 167. 1883.

459. Obstruction of lane. Where, after compensation has been made for damages, as well as for the value of the land condemned, by a railroad company, the company threatens not to take more land, but, by a change in the mode of construction of its road across the land (a change from a bridge resting on piers to an embankment, not contemplated when the land was condemned), to deprive the complainant of a lane through his farm, and the company is restrained from obstructing the lane until it makes compensation therefor, but is afterwards permitted to do the threatened injury on securing to the complainant an indemnity which should be satisfactory to the court, the amount of damages is a matter of equitable consideration only. *Carpenter v. Easton and Amboy R. R. Co.*, 26 N. J. Eq., 168. 1875.

460. Orchard. Special damage suffered by an orchard may be allowed. *Selma, Rome and Dalton R. R. Co. v. Redwine*, 51 Ga., 470. 1874.

461. Part of house. The plaintiff was owner and occupier of a house and six acres of meadow land on the west of the Edgware road. He had a large family, and, the ground he had being insufficient for the horses and cows which he kept for their use, he bought six and a quarter acres on the other side of the road, the nearest point being distant one hundred and twenty yards from his entrance gate. At the nearest point of this land were a cow-house, loose box, and a cottage which was occupied by his grooms, because he had no accommodation for them on his own side of the road, and he for a number of years occupied the land for the purpose of feeding the horses and cows requisite for his establishment. *Held*, by Turner, L. J., affirming the decision of Wood, V. C., *dubitante*, Knight Bruce, L.

J., that the six and a quarter acres could not be considered part of the house within the meaning of § 92 of the Lands Clauses Consolidation Act. *Steele v. Midland R'y Co.*, Law Reports, 1 Chancery Appeal Cases, 275. 1866.

462. — Under the Blackwall Railway Act, the company was required to purchase, or pay damages for deterioration of, dwellings within fifty feet of the railway, but was not compellable to purchase any portion of a dwelling more than fifty feet from the railway. Under this act it was held that the company should make compensation for the whole of a public house, where the greater portion of the house was within the fifty-foot limit. *Walker v. London and Blackwall R'y Co.*, 3 Adolphus & Ellis (N. S.), 744; 43 E. C. L., 954. 1842. Such statute is to be construed strongly against the corporation. *Id.*

463. — A public house was bounded on one side by a street, and in front by a vacant piece of ground, not fenced off from the street, and separated from the house only by a narrow foot pavement, also without fence, which was ordinarily used by the public as a thoroughfare, though sometimes closed. The piece of land had been treated as passing to the lessee by every demise of the public house since 1802; it was used by customers of the public house, and it furnished the only means of approach for vehicles to the front door of the house. *Held*, that the piece of land came within the definition of a curtilage, and was part of the house within the meaning of the ninety-second section of the Lands Clauses Act. *Marson v. London, Chatham and Dover R'y Co.*, Law Reports, 6 Equity Cases, 101. 1868.

464. — Trustees of a charity purchased land and covenanted to erect upon it buildings, consisting of a hall in the center, with almshouses (some on each side of the hall, and others forming wings of the main building), with a garden in the center. A portion was to be built within a specified time, and the rest as funds were subscribed. Before more than the center was completed a railway company, under the provisions of the Lands Clauses Consolidation Act, required to take a portion of the land which, when the design was complete, would be part of the

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garden in front of one of the intended (but then unbuilt) almshouses. *Held*, that the land was part of a house within the meaning of § 92 of the act. *Grosvenor v. Hampstead Junction R'y Co.*, 1 De Gex & Jones, 446; 58 Eng. Ch., 445. 1857.

465. — By a railway act (3 and 4 Will. 4, c. 46) it is enacted, in s. 46, that if this company wish to purchase any part of certain property, it shall not be authorized to compel the sale of or to take less than the whole of such property. Sec. 47 provides that the owner of any "house, manufactory, ground or building," situated within fifty feet of the railway, may require the company to purchase the rights and interest in such houses, manufactories, ground or buildings. A piece of ground, held under one lease, contained a principal dwelling-house, yard and garden, occupied by a manufacturer, and a manufactory, and five smaller dwelling-houses in the occupation of under-tenants. The principal dwelling-house and garden only were within the fifty feet of the railway, and the company did not wish to purchase any part of the property. *Held*, that the owner could not compel the company to buy more than the dwelling-house, yard and garden. *Regina v. London and Greenwich R'y Co.*, 3 Eng. R. R. & Canal Cases, 138. 1842.

466. — A man, with his dwelling-house in a piece of ground two and one-eighth acres in extent and surrounded by brick walls, used a part of the land as a nursery garden for trade purposes. *Held*, that he was entitled, under s. 92 of the Lands Clauses Act, 1845, to compel a railway company, proposing, without actually touching the house, to take the greenhouses and a part which has been planted and used for ornamental purposes, to take the whole of the land. *Salter v. Metropolitan District R'y Co.*, Law Reports, 9 Equity Cases, 432. 1870.

467. **Permanent use.** The right of the state to take and appropriate lands required in the construction and operation of public improvements, such as canals, is unquestioned, but there is a recognized distinction between that which is required for permanent use and occupation and that needed for temporary purposes only. Whether said land was appropriated for permanent or

temporary use is a question of fact exclusively for the jury. *Pennsylvania and New York Canal and R. R. Co. v. Billings*, 94 Pa. St., 40, 1880; 10 Amer. & Eng. R. R. Cases, 72.

463. **Private way; damages.** G. was owner of land, appertaining to which was a right of way over a road. A railway company, under the provisions of its act, constructed a railway, crossing the road on a level, and erected gates on the road at each side of the railway, which were kept locked, under the provisions of the act, the servant of the company (who resided between one and two hundred yards from the gate) keeping a key, and G. also having a key. From the nature of the ground, persons crossing the railway by the road would not see a train coming in one direction till it was at a distance ordinarily passed in seventeen seconds. G. claimed from the company more than 50%, on the ground that his land was injuriously affected; and required it, in case it did not pay, to issue a warrant for a jury in twenty-one days. The company not having paid or issued its warrant, defendant brought debt for the amount claimed; and issue was joined on a traverse of the allegation that the land was injuriously affected. The jury found the above facts specially, and also that the land was depreciated in value. *Held*, that the land was injuriously affected, within the meaning of the Lands Clauses Consolidation Act, 1845, and the Railway Clauses Consolidation Act, 1845. *Glover v. North Staffordshire R'y Co.*, 16 Adolphus & Ellis (N. S.), 912; 71 E. C. L., 911; 15 Jurist, 673; 5 Eng. Law & Equity, 335. 1851.

469. **Public house; loss of custom.** In June, 1865, a railway company served on F., a tenant from year to year, the usual notice to treat, and a notice as required by its act, of its intention, at the expiration of six months, to enter and take the premises. F. sent in his particulars of claim to the company, but it did nothing further till 1868. F., in the meantime, continued to carry on his business of a publican on the premises. In March, 1868, a summons was served by the company on F., and in April the question of the compensation to be paid by the company to F. for his interest in the premises was heard before a metropolitan

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police magistrate, under s. 121 of the Lands Clauses Consolidation Act. *F., inter alia*, claimed compensation for the depreciation in the value of such interest, which had taken place in the interval since the expiration of the six months by reason of the execution of the company's works, the custom of the public house having been greatly reduced by the pulling down of the neighboring houses taken under the company's statutory powers. The magistrate having refused to assess this item of compensation, on a rule to compel him to do so, *held*, that this depreciation was not the subject of compensation, and the claim had been rightly rejected. *Queen v. Vaughan*, Law Reports, 4 Queen's Bench Cases, 190, 1868; *Ricket v. Metropolitan R'y Co.*, 5 Best & Smith, 149 and 156; 117 E. C. L., 149, 1864.

470. Race-course. A railroad company applied to acquire a strip of land forming part of an old race-course, which had not been much used for many years. The strip contained about one and one-sixth acres and cut the track into two nearly equal parts. The evidence tended to show that the whole piece of land was worth, as a public race-course, about \$25,000; as a training track, about \$7,000; and that, as agricultural land, the strip taken was worth about \$500. The commission awarded the owner \$2,500 for the strip. *Held*, that the award was moderate and just, and should be affirmed. *New York, Woodhaven and Rockaway R. R. Co., In re*, 21 Hun (N. Y.), 250. 1880. See, also, *N. Y., Lackawanna and Western R'y Co., In re*, 29 Hun (N. Y.), 1. 1883. [See par. 527, *post.*]

471. Rentals. Evidence that a railway made it more difficult for the land owner to rent his property is admissible in assessing damages for constructing the road. *Pittsburg, Virginia and Charleston R. R. Co. v. Rose*, 74 Pa. St., 362, 1873; 6 Amer. R'y Rep., 343.

472. Riparian owners. A railway company sought to acquire a right of way over lands under the waters of the Hudson river which had been granted by the state to the owners of the adjoining uplands, which were brickyards. The company took from one owner a strip about thirty feet wide and one thousand nine hundred feet long, con-

taining about four and a half acres; from the other a strip of the same width and about eight hundred and eighty-three feet long, containing about two acres. The west line of the strips was from one hundred to two hundred and fifty feet east of the brickyards, and the channel of the river was four hundred or five hundred feet east of the proposed road. The construction of the road would damage the brickyards by obstructing the approach thereto from the river. Tramways could be constructed to and across the track, which were to be from one and a half to three feet higher than the hearths of the kilns, to docks which could be constructed on the east of the railway. The commissioners awarded to the owners and tenants of one of the pieces to be taken \$46,729, and to the owners and tenants of the other \$36,800. The award held excessive. *New York, West Shore and Buffalo R'y Co., In re*, 29 Hun (N. Y.), 646. 1883.

473. Smoke, etc. A railroad corporation is not liable for consequential damages caused by acts authorized by the legislature and necessary to the exercise of its franchise, the consequences of which acts lessen the value of the property of others, provided it uses due care and skill in the exercise of such authority and in the performance of such acts. The above principles applied to facts showing that the value of plaintiff's premises was materially lessened, and that her dwelling-house was, and for a long time had been, uncomfortable and unhealthy for habitation by reason of the noise, smoke, cinders, etc., coming from an engine-house erected and maintained by defendant adjacent to her dwelling-house, and the court held that defendant was not liable for such damage, and that an injunction would not go against the acts complained of. *Cogswell v. N. Y., New Haven and Hartford R. R. Co.*, 48 N. Y. Superior Ct., 31. 1881.

474. Subsequent damages. Damages assessed by the proper board for land taken by a railway corporation are in full, and it is not open to the land owner to prove that certain other causes of damage were not considered. *Perley v. B., C. & M. R. R. Co.*, 57 N. H., 212. 1876.

475. Surface water. Interference with the flow of surface water is proper to be

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considered in estimating the damages. *Pflegar v. Hastings and Dakota R'y Co.*, 28 Minn., 510, 1881; 5 Amer. & Eng. R. R. Cases, 85.

476. — A statement of claim alleged that the surface of the defendant's land had been artificially raised by earth placed thereon, and that in consequence rain-water falling on defendant's land made its way through the defendant's wall into the adjoining house of the plaintiff, and caused substantial damage. *Held*, upon demurrer, that the statement of claim disclosed a good cause of action. *Hurdman v. North Eastern R'y Co.*, Law Reports, 3 Common Pleas Division, 168, 1878; 30 Eng. (Moak), 81.

477. Switch connections. In mitigation of damages a railway company may show that it is practicable to make switch connections with a railroad which crosses the land of claimant for damages. *Pittsburgh and Lake Erie R. R. Co. v. Robinson*, 95 Pa. St., 426; 1 Amer. & Eng. R. R. Cases, 468, 1881.

478. Tidewater. If a railway company condemns a part of a lot of flats, and thereby cuts off access from tidewater to the remaining portion, the value of such access is an element proper to be considered by the jury in estimating the injury to the land owner. *Drury v. Midland R. R. Co.*, 127 Mass., 571, 1879.

479. Tunnel; garden. A piece of land, 2a., 2p., 20r. in extent, situate in the neighborhood of, but not within, the city of Bath, was surrounded by a ring fence, and had for many years been used as a market garden. About twenty-five years ago a cottage, consisting of three rooms nine feet in height, with two cellars suitable for storing fruit and vegetables, was erected near a road forming part of the boundary of the land, for the purpose of being occupied by the tenant of the garden. A railway company drove through this piece of land a tunnel, which passed under one corner of the cottage, and divided the land into two portions, one of which was less than half an acre. *Held*, that the company was not bound to take the whole piece of land, but only the part lying above the tunnel, the cottage and the piece of land lying between the cottage and the road; and also, if the owner re-

quired it, the severed portion, which was less than half an acre. *Falkner v. Somerset and Dorset R'y Co.*, Law Reports, 16 Equity Cases, 458. 1873.

480. Time at which damages shall be estimated. The damages shall be estimated as of the time of the taking of the land under the proceedings. Interest may be allowed from such date. *Warren v. St. Paul and Pacific R. R. Co.*, 21 Minn., 424, 1875; 19 Amer. R'y Rep., 227.

481. — The inquiry as to the value of the land should relate to the time of the appropriation, and not to the time of the trial. *Logansport, etc., R'y Co. v. Buchanan*, 52 Ind., 163. 1875.

482. — In a proceeding by a railway company to appropriate land entered upon and occupied by it previous to the institution of such proceeding, the court instructed the jury that their "inquiries as to the amount of damages sustained by the" land owner, "if any, should relate to the time of the filing of the act of appropriation." *Held*, that the instruction was proper. *Lafayette, Muncie and Bloomington R. R. Co. v. Murdock*, 69 Ind., 137, 1879; *Hampden Paint, etc., Co. v. Springfield, Athol and North-eastern R. R. Co.*, 124 Mass., 118, 1878.

483. — The settled rule in Wisconsin, that the value of land taken for railway purposes is to be fixed as it is at the date of the appraisal by the commissioners, and not as at the date of the location of the line of the road thereon, extends to the appraisal of damages resulting from such taking to the contiguous lands of the same owner. *Lyon v. Green Bay and Minnesota R'y Co.*, 42 Wis., 538, 1877; 15 Amer. R'y Rep., 91.

484. Town plat. Where an attempt had been made by the owner to lay out certain land over which a railroad was located into an addition to a town, lots and streets having been surveyed and staked out thereon, and a plat made of the same, though such plat had not been certified and recorded, so as to constitute a valid and legal addition, it was held that evidence of the subdivision and the plat were admissible to show the condition of the property, it being further shown that certain lots upon each side of one of the streets, as surveyed, had been sold, which would render it impossible to restore

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the property to its former condition. *Hartshorn v. Burlington, Cedar Rapids and Northern R'y Co.*, 52 Ia., 613. 1879.

485. — Where a town had been laid out into blocks and streets for many years and the same had always been recognized, treated and dealt with by the owners and the people as blocks and streets so laid out, such blocks should be treated as distinct tracts of land for the purposes of assessment of damages, although the plat of the town may not have been made according to the statute. *Todd v. Kankakee and Illinois R. R. Co.*, 78 Ill., 530. 1875.

486. — When the land in controversy might prudently be laid out in city lots, but in fact is not, evidence as to what its value would be if so laid out is incompetent. *Everett v. Union Pacific R'y Co.*, 59 Ia., 243, 1889; 10 Amer. & Eng. R. R. Cases, 203.

487. — The owner may show that, prior to the commencement of proceedings, he had in good faith laid the same off in lots, streets and alleys, for sale as town lots, and had caused a plat thereof to be made ready for record. He may also show that the land as thus subdivided for sale is more valuable than if sold by the acre or for other purposes, and, in that connection, an unrecorded plat or diagram showing the manner in which the tract has been divided, and how such subdivision is affected by the appropriation, is admissible, not as a valid town plat, but as a scheme or plan for sale affecting the value of the property. *Cincinnati and Springfield R'y Co. v. Longworth*, 30 Ohio St., 108. 1876.

488. — Where the land was so situated that, in order to plat it into village lots with a proper street, it would be necessary to open the street through the lands of other parties, the probable expense of opening such street is not a proper subject for the opinion of a witness. *Watson v. Milwaukee and Madison R'y Co.*, 57 Wis., 332; 10 Amer. & Eng. R. R. Cases, 168. 1883.

489. — Just compensation, under the constitution, to the owner of a city lot, for a part of the lot taken, includes not only the value of the part of the lot so taken but also the injury resulting therefrom to the remaining parts of the lot; and if the ways of access to, and egress from, the lot are obstructed or interrupted thereby, such ob-

struction or interruption forms a part of the injury. *Hooper v. Savannah and Memphis R. R. Co.*, 69 Ala., 529. 1881.

490. Use of railway. The sixty-eighth section of the Lands Clauses Consolidation Act points out the mode for ascertaining and recovering the amount of compensation to be paid to a land owner by the railway company in respect of his claim for compensation, as being injuriously affected by the execution of the works, as well when the injury is alleged to arise from the user of the railway as from the actual formation of the railway. *London and North Western Railway Co. v. Bradley*, 5 Eng. Law & Equity, 100; 15 Jurist, 639. 1851.

491. Value for railway purposes. In proceedings by a railway company, having its terminus at St. Paul, to condemn a strip of land in that city between the foot of the bluff and the Mississippi river, the circumstance that such strip of land affords the only route by which the company can make a connection with other railways terminating at that city is proper to be considered by the jury in their award of compensation to the land owner. *Brisbane v. St. Paul and Sioux City R. R. Co.*, 23 Minn., 114. 1876.

492. — The road of the Troy and Boston R. Co. originally crossed the Hoosac river at two points. Thereafter that company bought certain land, and so turned the course of the river as to leave its road entirely on its east side. By so doing it left a piece of land between the track and the old channel, to which there was no access either by a public or private road. Another railroad company having applied to take a portion of this land, commissioners to appraise the damages were appointed, and a hearing had, at which witnesses called by the petitioners testified that \$50 an acre was a liberal price, while the president of the Troy and Boston R. R. Co. testified that it was worth \$12,000 for railroad purposes. The land was not, however, of that value to the Troy and Boston R. R. The commissioners fixed the damages to be paid by the petitioners at \$5,000, stating that in arriving at that sum they included in it the value of the land, as situated, for general railway purposes. *Held*, on appeal by the petitioner, that the commissioners erred in so doing. *Boston, Hoosac Tunnel and West-*

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ern R'y Co., In re, 22 Hun (N. Y.), 176. 1880.

493. Vendor's lien. The owners of land taken by public companies under their compulsory powers have the ordinary vendor's lien for unpaid purchase money, and they are entitled to enforce that right by a sale of the land. This lien extends not only to the value of the land, but also to the amount of compensation for damages. *Walker v. Ware, etc., R'y Co.*, 35 Beavan (Eng. Ch.), 52. 1865.

494. Vibration. The owner of a house, none of whose lands have been taken for the purpose of the railway, can recover, against the company who constructed the railway, compensation under ss. 6 and 16 of the Railways Clauses Consolidation Act, 1845, in respect of injury to the house (which, though not structural, depreciates its value) caused by vibration, smoke and noise, in running locomotives by another company, with trains in the ordinary manner, after the construction of the railway. So *held*, reversing the judgment of the court of queen's bench, by Bramwell, B., Keating and Montague-Smith, JJ.; Channell, B., dissenting. *Brand v. Hammersmith and City R'y Co.*, Law Reports, 2 Queen's Bench Cases, 223. 1867.

495. — Actual injury to premises from the vibration caused by ballast trains, etc., on the railway, during the construction of the works, is a ground for compensation under these statutes; but, per Lord Campbell, C. J., not injury from that cause after the construction of the railway. *Penny and South Eastern R'y Co., In re*, 7 Ellis & Blackburn, 660; 90 E. C. L., 658. 1857.

496. — In an action against a railroad company for damages arising from a direct physical injury to plaintiff's dwelling by reason of running its trains, evidence is not admissible of the general depreciation in value of plaintiff's property, where the witness is unable to distinguish between damages such as were the result of the injury complained of, and such as arose from general causes. *Chicago and Eastern Illinois R. R. Co. v. Hall*, 8 Bradwell (Ill.), 621. 1881.

497. Work formerly done. A railway company, after expending over \$5,000 in making a rock cutting and constructing embankments, abandoned the route. These proceedings were instituted to acquire title

to this land from the appellant, who had purchased it from the old company. The commissioners allowed him only \$525. *Held*, that he was not entitled to receive the amount expended by the old company, but only the fair market value of the land taken; that it was not the advantage to the company, but the detriment to the land owner, for which compensation was to be made. *Black River and Morristown R. R. Co. v. Barnard*, 9 Hun (N. Y.), 104. 1876.

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498. Canal. A company made a canal through plaintiff's land, and afterwards built a railway through the same land; the fact that the canal was a cheap and sufficient means of conveying his products was material in the assessment of damages; that the defendant owned and might abandon the canal did not vary the case. *Pennsylvania and New York R. R., etc., Co. v. Bunnell*, 81 Pa. St., 414, 1876; 16 Amer. R'y Rep., 1.

499. — Where a canal ceases to be used as such, its right of way cannot be used for railway purposes without compensation to the owner of the fee. *Pittsburgh and Lake Erie R. R. Co. v. Bruce*, 10 Amer. & Eng. R. R. Cases, 1 (Pa.), 1883; *Lafayette, Muncie and Bloomington R. R. Co. v. Murdock*, 68 Ind., 137, 1879.

500. — *railway to canal; transfer of land.* By an act of the 32 Geo. 3, for making a canal in the county of N., the "owners or proprietors of any mines of coal" within certain parishes were empowered to make any railways or roads to convey their coals, etc., to the said canal, over the lands or grounds of any person or persons, paying or tendering satisfaction, etc., for the damage to be thereby occasioned. *Held*, that this power was not limited to persons who were proprietors at the time of the passing of the act, or of the making of the canal, but extended to other persons who had become so since, and that such owners or proprietors were empowered to make railroads to be traversed by locomotive engines. *Bishop v. North*, 11 Meeson & Welsby (Exchequer), 418, 1843; *Bishop v. North*, 3 Eng. R. R. & Canal Cases, 459. 1843.

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501. Crossing rights. The plaintiffs had been entitled, from 1855, to a carriage-way to property of theirs, over a railway by a level crossing. By an act of parliament obtained by the company in 1875, reciting that it was expedient that the rights of way in respect of certain footways which crossed the railway on the level should be extinguished, it was enacted that all rights of way in, over or affecting the footways numbered 2, 4, 5, 6 and 7 on the deposited plans should be extinguished. No provision for compensation was made. The roadway in question was numbered 5 on the deposited plans, and was thereon marked "roadway and footway," the others being simply marked "footway." *Held* (affirming the decision of Malins, V. C.), that upon the true construction of the act it did not interfere with the private rights of way, but only with public rights of footway, and that an injunction restraining the railway company from obstructing the way had been rightly granted. *Wells v. London, Tilbury and South End R'y Co.*, Law Reports, 5 Chancery Division, 126. 1876.

502. Destruction of buildings; tithes. Where buildings were destroyed, and the act provided for indemnity to the rector in respect to his tithes of 2s. 9d. in the pound on the removed buildings, and the company pulled down houses on some of which the tithes of 2s. 9d. in the pound were paid on the full annual value, on others of which the same had been paid by agreement between the rector and occupant at a less rate than the full annual value, and several on which the whole had been remitted by the rector, *held*, that the rector was entitled to tithes from the company at the annual value as last fixed by agreement between the rector and occupant; and where there was no agreement, the sum last collected should be taken as the basis. *Letts v. London and Blackwall R. R. Co.*, 5 Hare (Eng. Ch.), 605. 1847.

503. Ferry. An ancient ferry is "lands" within the meaning of the Lands Clauses Consolidation Act (8 Vict., c. 18), and the diversion of business from such ferry, by a railway bridge, was the proper subject of compensation. *Queen v. Cambrian R'y Co.*, Law Reports, 6 Queen's Bench Cases, 422. 1871.

504. — The owner of a ferry cannot maintain an action for loss of traffic caused by a new highway, by bridge or ferry made to provide for a new traffic. A railway company, under the authority of its act, constructed across a river, half a mile above an ancient ferry, a railway bridge and foot-bridge, the foot-bridge being used by persons going to the railway station and also to other places. The traffic across the ferry fell off, and the ferry was given up. The owners of the ferry claimed compensation under the Lands and Railway Clauses Acts. *Held*, reversing the decision of the queen's bench division, that no compensation could be recovered: First, on the ground that an action could not have been maintained for disturbance of the ferry in respect of the traffic either by the railway or by the foot-bridge, if they had been erected without the authority of an act. Secondly, on the ground that, the injury to the ferry being occasioned, not by the construction but by the working of the railway, the ferry had not been injuriously affected within the Lands Clauses Act or the Railway Clauses Act. *Hopkins v. Great Northern R'y Co.*, Law Reports, 2 Queen's Bench Division, 234, 1877; 20 Eng. (Moak), 295.

505. Fishery; lessee. The lessee of a fishery injuriously affected by the construction of a railway is entitled to compensation. *Alexandria and Fredericksburg R. R. Co. v. Faunce*, 31 Grattan (Va.), 761. 1879.

506. Land under water. Land under water may be taken for railway purposes; and no notice need be served upon the owner of the adjoining upland. *New York, West Shore and Buffalo R'y Co., In re*, 29 Hun (N. Y.), 269. 1883.

507. Mills. Plaintiffs owned certain city lots upon which was a saw mill, and also owned certain other lots fronting on P. street, which were accessible from the mill by means of public streets, and were used by them in connection with their mill for storing lumber. Defendant took a strip of said P. street lots, which was included in said street. *Held*, that plaintiff's damages for the taking of said strip included not only any diminution in the market value of the P. street lots, but also the depreciation in value of the mill property in consequence

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of said property being rendered unsafe for the storage of lumber by the building of the railway thereon. *Chapman v. Oshkosh and Mississippi River R. R. Co.*, 33 Wis., 629. 1873.

508. Mines. Though a mine owner may give notice under the statute, 8 and 9 Vict., c. 20, and c. 33, of his intention to work out the minerals under a railway, the railway proprietors are not bound to any fixed period after that notice within which they must give a counter notice. They can stop the working at any time thereafter that they fear damages to the line, by notice of their willingness to pay compensation for the minerals they desire left standing. *Dixon v. Caledonia, Glasgow and Southwestern R'y Cos.*, Law Reports, 5 Appeal Cases, 820. 1890.

509. — The original special act of a canal company empowered it to control certain works, and provided that nothing in the act contained should be construed to give the company the mines under any land purchased by it under the provisions of that act, unless the same should be expressly purchased and paid for by the company under a special provision thereafter contained, empowering the company to purchase the mines under its works, or within a certain distance from them, if the owner of the mines should give the company notice of his intention to work them, but with that exception all mines should be deemed to be excepted out of every purchase of land by the company. By a subsequent special act the company was empowered to construct additional works, and to acquire additional lands for that purpose, and with this act sec. 77 of the Railways Clauses Consolidation Act, 1845, was incorporated. The act also provided that the works authorized by it should be considered as part of the undertaking of the company, and, subject to the provisions of the act, should for all purposes be treated as if the same had been originally part thereof. *Held*, that the company had power, by virtue of sec. 77 of the Railways Clauses Consolidation Act, 1845, to make an express purchase of the mines lying under part of its works which it had constructed under the powers of its second special act. *Birmingham Canal Co. v.*

Cartwright, Law Reports, 11 Chancery Division, 421. 1879.

510. — A railway company which, by agreement with the owner, has purchased his land for the purpose of its railway, and taken a conveyance in the form prescribed by the Lands Clauses Consolidation Act, 1845, and which, after notice pursuant to s. 78 of the Railways Clauses Consolidation Act, 1845, of the owner's intention to work the minerals under the railway, has refused to make him compensation, is not entitled to the adjacent or subjacent support of the minerals; but the owner is entitled to get them, although the working them may cause the surface to subside. *Held*, accordingly, in the exchequer chamber (affirming the judgment of the court of exchequer), that where, under such circumstances, the company had given notice that the working the mines would destroy the support of the railway, the owner of the minerals was entitled to recover the compensation which had been assessed, under s. 78. *Great Western R'y Co. v. Fletcher*, 5 Hurlstone & Norman (Exchequer), 688, 1860; *Fletcher v. Great Western R'y Co.*, 4 Hurlstone & Norman (Exchequer), 242, 1859.

511. — By the effect of §§ 77, 78 and 79 of the Railways Clauses Consolidation Act, 1845, a railway company on purchasing, under the statute, land for the purposes of the railway, does not become entitled to the land; the owner may work them after notice duly given; and if, after such notice, the company, though desiring to prevent the working, does not give compensation for the minerals, the owner may work them up to and under the railway, working them in a "proper manner" and "according to the usual manner of working such mines in the district." The company cannot, under this statutory purchase, claim the benefit of the right of an ordinary purchaser of the surface to subjacent and adjacent support, the statute having created a specific law for such matters, by which alone the rights of the company and the mine owner are regulated. *Great Western R'y Co. v. Bennett*, 110 E. C. L., 868; Law Reports, 2 English & Irish Appeal Cases, 27. 1867.

512. — By a local act, a company was empowered to take lands,—with an excep-

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tion of mines,—paying the value of the lands, and making compensation for damage sustained by reason of the execution of the work, and for damage, loss or inconvenience sustained by reason of the execution of any of the powers of the act; such value and compensation to be fixed by agreement or assessed by a jury. Mines were required to be worked by the owner, so that no damage be thereby done to the railway, and, in case of damage, the owner to repair it at his own expense, or the company to repair, in case of neglect or refusal, and recover the expense from the owner. The owner of land taken by the company, and for which compensation is paid, cannot, upon afterwards discovering that a mine, to which he is entitled, cannot be worked without doing damage to the railway, claim further compensation in respect of the loss sustained thereby. Compensation in respect of such contingent loss should have been claimed at the time of the original agreement or assessment. *Rex v. Leeds and Selby R'y Co.*, 1 Eng. R. R. & Canal Cases (Appendix), 589. 1835.

513. — A railway company bought lands without the minerals thereunder, and constructed a railway upon the land. The land owner made a lease for fifteen years of the minerals. The lessee gave to the company notice of his intention to work the minerals; the company gave him notice, and paid him, under the Railways Clauses Act, 1845, § 78, compensation for leaving the minerals. The lessee fell into arrear with his rent, and surrendered the lease to the land owner. A purchaser from the land owner gave to the company notice of his intention to work the minerals, and claimed compensation without regard to the payment already made to the lessee, and began to work the minerals so as to endanger the railway. *Held*, that the company had obtained a right to support from the minerals, and that the land owner would be restrained from working the minerals, but might obtain compensation under sec. 6 or sec. 81 of the Railways Clauses Act, 1845, and might have obtained compensation under sec. 68 of the Lands Clauses Act, 1845. *Great Western R'y Co. v. Smith*, Law Reports, 2 Chancery Division, 235. 1875.

514. — There is no distinction between the severance of ownership vertically, that is, of the surface lands from the mines beneath, and the severance of ownership laterally by the taking by successive purchase of surface lands from the same land owner. So a railway company having already acquired surface lands may subsequently purchase compulsorily the minerals under those lands. *Errington and Metropolitan R'y Co.*, Law Reports, 19 Chancery Division, 559, 1881; 6 Amer. & Eng. R. R. Cases, 562.

515. — By s. 81 of 8 Vict., c. 20, it is enacted that a railway company shall “from time to time pay to the owner, lessee or occupier of mines extending so as to lie on both sides of the railway, all such additional expenses and losses as shall be incurred by such owner,” etc., by reason of the severance of the surface land or of the continuous working of the mines being interrupted, or by reason of the same being worked so as not to prejudice the railway; and in case of dispute as to the amount of “such losses or expenses,” the same shall be settled by arbitration. *Held*, that an arbitrator appointed to assess, under this section, the losses or expenses sustained and incurred by a mine owner by reason of his land being severed and the working of his mine interrupted, rightly included in his award items of compensation for additional losses or expenses not then actually sustained or incurred, but which would necessarily be sustained or incurred in working the mines, and which were capable of being immediately estimated with reasonable certainty. *Whitehouse v. Wolverhampton R'y Co.*, Law Reports, 5 Exchequer Cases, 6. 1839.

516. — A railway company was empowered, by statute, to enter upon and use lands for the railway, and to purchase and hold lands; it was also bound to make such alterations as were necessary for the railways then in use for a coal mine belonging to I., over the works of which the railway was to pass; the act was not to give it the mines under any land purchased by the company, but the mine owners might work them, doing no damage to the works of the company or making good the same; the company was to compensate any party interested for any damage or inconvenience

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sustained by the execution of any of the works authorized by the act; such compensation to be assessed, if necessary, by a jury which the company was required from time to time to summon, and which should assess compensation for damages already sustained, and for future, temporary, perpetual or recurring damages. I., being owner of land over the said coal mine, and which land was leased to B., sold the land to the company, the coal mine not being taken into account. Afterwards B., in working the coal mine, damaged the railway and was unable to work so profitably as he otherwise could, lest he should do further damage. *Held*, that B. was not entitled to compensation either for the sum which it cost him to repair the damage done, or for the interruption to the working of his mine. *Rex v. Leeds and Selby R'y Co.*, 3 Adolphus & Ellis, 682; 30 E. C. L., 315. 1835.

517. — By a canal act the mines and minerals within and under the land through which the canal was to be made were reserved to the owners of the land, and the owners were empowered (subject to the restrictions thereafter contained) to work and get such mines and minerals, not thereby injuring the navigation or the works; by subsequent sections the owners of mines were prohibited from getting minerals under or within ten yards from the canal without the consent of the proprietors of the canal, who, if they refused to permit the owner of any mines to work such part thereof as should be under or within ten yards from the canal, were required to compensate such owner in the manner provided by the act. *Held*, that the provisions of the act as to prohibition of working and compensation extended by implication to working more than ten yards from the canal, and that the proprietors of the canal were not entitled, by virtue of their common law right to adjacent support, to prevent the lessee of an adjacent quarry, who derived his title from the person who had sold to the proprietors the land on which the canal was made, from working more than ten yards from the canal so as to endanger the safety of the canal, without paying him compensation in the same manner as if the quarry had been within the ten yards; but that,

upon paying such compensation, they were entitled to stop the working of any mine which would be injurious to the canal. *Held*, also, that the reservation of mines and minerals within and under the land included everything below the surface available for agricultural purposes, which could be made useful for any purpose, and included the right of quarrying as well as underground mining. *Midland R'y Co. v. Checkley*, Law Reports, 4 Equity Cases, 19. 1837.

518. — Under the general railway act of New York a corporation, by proceedings thereunder, does not acquire the fee of the land condemned, but only the right of "use for the purposes of its incorporation during the continuance of its corporate existence." Its acquisitions must, therefore, be limited to its corporate needs; and an objection to a petition asking for a commission to appraise property needed for the location of a railway, that it specifies only the surface use thereof as that to be acquired — the description being drawn in that form to avoid the payment for iron ore supposed to be below the surface — is not well taken, and must be overruled. *Hartford and Conn. Western R. R. Co., In re*, 65 Howard's Practice (N. Y.), 132. 1838.

519. *Plank-roads.* Under § 4 of ch. 19 of 1851, providing that in case any railroad shall occupy or cross any turnpike, or plank-road, the railroad company shall pay such turnpike or plank-road company all damages sustained by reason of such occupancy or crossing, to be ascertained and paid in the same manner as is provided by law in case of taking private property for the use of railway companies, the damages must be appraised and paid before the land of the turnpike or plank-road company can be entered upon. *Jamaica and Brooklyn Plank-road Co. v. New York and Manhattan Beach R'y Co.*, 25 Hun (N. Y.), 585. 1881.

520. — *claim of land owner for damages.* A plank-road company pursuant to its charter, located its road through plaintiff's farm, sequestered his land for its use, and paid the land damages therefor. Many years after defendant's railroad was chartered and constructed over the same route; and by virtue of its charter, defendant sequestered the plank-road company's franchise, and the

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latter company thereupon became disorganized, and its road was thereby destroyed. *Held*, that defendant, by virtue of its charter, had the same right to take the plank-road company's franchise, with all the rights and interests the latter had in and to the land over which the plank-road had been constructed, that it had to take the property of any other party, making due compensation therefor, and was not bound to pay plaintiff land-damages for the land thus taken. *Brainard v. Missisquoi R. R. Co.*, 48 Vt., 107, 1875; 16 Amer. R'y Rep., 380.

521. Private way; damages. The owner of a private way may recover damages for its occupancy, but not necessarily to the amount required to construct another. *Gear v. C. C. and D. R'y Co.*, 39 Ia., 23. 1874.

522. Right to shoot game. By a memorandum not under seal, the plaintiff hired of the owner of land the sole and exclusive liberty of shooting and fishing over it for three years. A portion of the land was (pending the term) sold to the defendant, who constructed a line of railway across it, to the great detriment of the plaintiff's right of sporting. *Held*, that the plaintiff had not such an interest in the land as to entitle him to claim compensation under the Lands Clauses Consolidation Act, 1845. *Bird v. Great Eastern R'y Co.*, 19 Common Bench (N. S.), 268; 115 E. C. L., 267. 1865.

523. Shore rights. The right of eminent domain over the shores and the soil under the waters resides in the state for all municipal purposes, and within the legitimate limitations of this right the power of the state is absolute, and an appropriation of the shores and land is lawful. *Ormerod v. N. Y., West Shore and Buffalo R. R. Co.*, 13 Federal Reporter, 370. 1893.

524. — A proprietor of a lake shore who has lawfully intruded into the water for the construction of a breakwater cannot thereby acquire title in fee to land occupied by such breakwater beyond his original boundary; nor can he, in a proceeding for compensation for the alleged taking of such land, recover for any injury done to the breakwater. *Diedrich v. Northwestern Union R'y Co.*, 42 Wis., 248, 1877; 15 Amer. R'y Rep., 9.

525. — Riparian rights proper rest upon title to the bank, and are the same whether

the riparian owner own the soil under the water or not. *Ib.*

526. — Plaintiff having shown title to the land to the water's edge, defendant introduced evidence that the land taken was not above the water's edge, but was made beyond it by means of a breakwater and cribs extending into the water. *Held*, that there was no error in permitting plaintiff then to show that the breakwater and cribs were not built beyond the water's edge; the evidence being properly in rebuttal. *Diedrich v. Northwestern R'y Co.*, 47 Wis., 662. 1879.

527. Training farm; race-course; damages. A railway company took proceedings to acquire title to a portion of four different tracts of land owned by one Haskin, one of which, containing about two hundred and twenty-three acres, was called the Home Farm. It was used for raising blooded horses and fitting them for the market. The line of the proposed road crossed a half-mile track which had been constructed upon it by Haskin to be used in his business. Testimony was received, against the company's objection and exception, as to what, in the opinion of the witnesses, would be the damage to the farm, as a stock-farm, to have the track destroyed, and as to "the value of the track to the Home Farm, as a stock-raising farm, taking into consideration the stock upon it and its present use." *Held*, that the evidence was competent. *New York, Lackawanna and Western R'y Co., In re*, 29 Hun (N. Y.), 1. 1883.

528. — That the measure of the owner's damages was the cost of constructing another training track upon his farm, and not the damages which he would sustain if the stock, which he was then raising and training, were lost, and this branch of his business destroyed. *Ib.* See, also, *N. Y., Woodhaven and Rockaway R. R. Co., In re*, 21 Hun (N. Y.), 250. 1880.

529. Warehouse. Injury to a warehouse, and to the facilities for using it, properly enters into the measure of damages. *Lafayette, Muncie and. Bloomington R. R. Co. v. Murdock*, 68 Ind., 137. 1870.

530. Watercourses — bridge. The title of one owning lands bounded upon a stream, not navigable, at the common law, extends to the center of the stream. Therefore, if a

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railway company, under its charter, erect a bridge across such a stream, and the property of another bounded by the stream is either taken or damaged thereby, a right of action exists in his favor; but such party can only recover for damages which are special to his property, and not for such as are incidental to and shared by the public at large. *Chicago and Pacific R. R. Co. v. Stein*, 75 Ill., 41. 1874.

531. — diversion. The power conferred on a railway company by the sixteenth section of the Railways Clauses Consolidation Act, to divert the course of a river or road "in order the more conveniently to carry the same over, or under, or by the side of the railway, as its officers may think proper," is to be taken as cut down and qualified by the proviso that it be an act necessary for making, maintaining, altering, or repairing and using the railway. Such a power, therefore, only authorizes such a diversion when the road or river presents an actual obstacle to the construction of the line, and not in a case where the diversion is merely for the purpose of saving the company expense. *Pugh v. Golden Valley R'y Co.*, Law Reports, 15 Chancery Division, 330. 1880.

532. — Section 16 of the General Incorporation Act (1 S. & C., 279) authorizes a railway company, when necessary, in the construction of its road, to cross any stream of water, to divert the same permanently from its "present location or bed." *Valley R'y Co. v. Bohm*, 34 Ohio St., 114, 1877; 21 Amer. R'y Rep., 30.

533. — Where the division of a stream of water from its existing bed or course becomes necessary in the location and construction of a railroad, the power to appropriate land on or through which to construct a new channel for such stream is conferred by § 10 of said act. *Id.*

534. — riparian owner. To entitle a riparian owner to damages for the appropriation by a railway company of land upon the banks of the Mississippi or Missouri rivers, under ch. 35, Laws of 1874, it is not necessary that he should have erected a crib or pier in front of his property. *Renwick, Shaw and Crossett v. Davenport and Northwestern R. R. Co.*, 49 Ia., 664. 1878.

535. — It was competent for the state to

provide, as in the statute cited, that a railway company should not appropriate land for its own use, between high and low water mark, without giving compensation to the riparian owner. *Id.*

536. — The fact that the railway company appropriated a right of way over a fill or embankment, between the main land and a crib which the plaintiff was not authorized to erect, would not deprive him of the right to damages for the right of way so appropriated. *Id.*

537. — The second section of the act of the general assembly of Iowa, entitled "An act in relation to riparian owners on the Mississippi and Missouri rivers," approved March 18, 1874, is not in conflict with any statute of the United States. Where, therefore, the owner of lands on the Mississippi had made an embankment in front of them, and at the outer end, beyond low-water mark, erected, without the consent or direction of the secretary of war, a stone pier or crib, this court affirms the judgment of the supreme court of that state, declaring that under that section a railway company cannot construct its road over the embankment between high and low water mark, unless the damages to such owner shall first be ascertained and paid. *Railway Co. v. Renwick*, 102 U. S., 180, 1880; 5 Amer. & Eng. R. R. Cases, 90.

538. — Where a railway, without touching the plaintiff's land, connected with the river bank above and below the land, so as to cut off access to the river, it was held that the lands were not injuriously affected within the meaning of the statute. *Railway Act*, s. 5. *Widder and Buffalo, etc., R'y Co., In re*, 20 Upper Canada (Queen's Bench), 638, 1861. *Contra, Regina v. Buffalo, etc., R'y Co.*, 23 ib., 208. 1864. *On further proceedings in above cases see Widder v. Same*, 24 ib., 222, 520. 1865.

539. Water-power. Where a party has conveyed land, reserving in his deed the privilege of a water-power, and the right to enter upon so much of the land as may be needful for an abutment on the bank, he has such interest in the land as may be affected by the construction of a railroad, and the railroad company cannot appropriate the land without ascertaining, in the mode

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pointed out in the statute, what damage he will sustain. *Galena and Southern Wisconsin R. R. Co. v. Haslam*, 73 Ill., 494. 1874.

549. — The true test as to the damages to be paid for land taken is its market value, but in estimating the damages reference may be had not merely to the uses to which the land is actually applied, but its capabilities, so far as they add to its market value, may also be taken into consideration. If the land has a mine under its surface, that fact may be considered if the mine adds to the market value of the land, even though said mine has never been used. So of a water power, even though it has never been utilized. *Haslam v. Galena and Southern Wisconsin R. R. Co.*, 64 Ill., 353. 1873.

541. — The damage done to a mill shoal, by taking land for railway uses, should be established by showing the actual value at the time of the taking, and then showing how much it is diminished by the location of the railway. *Selma, Rome and Dalton R. R. Co. v. Keith*, 53 Ga., 178. 1874.

542. Wharves. A person cannot, by any use of a navigable dock, gain such a right of way therein as will enable him to maintain a claim for damages for its obstruction by a railway erected across it on piles without a draw, whereby vessels are prevented from coming up to his own private dock and wharf. *Thayer v. New Bedford R. R. Co.*, 125 Mass., 253. 1878.

548. — By the Hull and Selby Railway Act, 6 Will. 4, c. lxxx, s. 69, it is provided "that where any part of any carriage, horse, or foot-road, railway or tramroad, quay, wharf, slope, or other communication, either public or private, shall be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impossible or inconvenient for passengers, cattle or carriages, or for the transporting, conveying, landing, shipping or depositing of any goods or merchandise, the company shall, at its own expense, before any such road, quay, wharf, slope, or other communication shall be cut through, raised, sunk, taken, or injured as aforesaid, cause another good and sufficient road, quay, wharf, slope, or other communication, as the case shall require, to be set out and made instead thereof, as convenient for passengers, etc., and for transporting, etc.,

of goods and merchandise, as the said road, quay, wharf, slope, or other communication so as to be cut through, raised, sunk, taken or injured as aforesaid, or as near thereto as may be." The plaintiff had a wharf on the river Humber, between which and the low water mark the defendant constructed its railway (in the line prescribed by the act of parliament), thereby rendering the communication between the wharf and the river inconvenient and dangerous. Held, that the plaintiff's wharf was thereby injured within the meaning of this section (which was not confined to an injury done bodily to the wharf itself); that he was entitled to have a new wharf constructed for him by the defendant, and was not bound to apply for compensation under another section of the act, which empowered a sheriff's jury to assess the sum payable for any future temporary or perpetual, or recurring damages, done or sustained by reason of the taking of land for the purposes of the act. *Bell v. Hull and Selby R'y Co.*, 6 Meeson & Welsby (Exchequer), 699, 1840; *Same v. Same*, 2 Eng. R. R. & Canal Cases, 279, 1840.

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544. Allowance of benefits. The benefits are to be considered in assessment of damages. *Chicago and Mexican Central R'y Co. v. Ritter*, 10 Amer. & Eng. R. R. Cases, 202 (Tex.), 1883; *Philadelphia and Erie R. R. Co. v. Cake*, 95 Pa. St., 139, 1880.

545. — The incidental benefits to the owner which may be set off against his incidental damages, in estimating the damages to be paid him for the taking of his land for railroad purposes, do not include the general advance in the value of land resulting from the construction of the road. *Miss. R'y Co. v. McDonald*, 12 Heiskell (Tenn.), 54. 1873.

546. — While the general advantage resulting as well to the public as to the property which is the subject of assessment is not to be considered in estimating the benefits to that property, yet anything and everything connected with the general improvement which tends to increase its value or usefulness to such property may be con-

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sidered. *Pittsburgh and Lake Erie R. R. Co. v. Robinson*, 95 Pa. St., 426, 1880; 1 Amer. & Eng. R. R. Cases, 468.

547. — The benefits attending the construction of the railway may be considered, even although such benefits are only those which affect other lands in the same vicinity. *Credit Valley R'y Co. v. Sprague*, 24 Grant Ch. (Upper Canada), 231. 1876.

548. — That the plaintiffs refused to avail themselves of the advantages which may have been afforded them by the railway is of no moment, for the question is not as to the disposition of the owners of the property, but whether or not the facilities afforded by the improvement have advanced the market value of the property. *Pittsburgh and Lake Erie R'y Co. v. Robinson*, 95 Pa. St., 426, 1880; 1 Amer. & Eng. R. R. Cases, 468.

549. Disallowance of benefits. The proviso in § 3 of the act incorporating the New Jersey Midland R'y Co., requiring the road to be laid out in Sussex county, under the charter of the New Jersey, Hudson and Delaware R. R. Co., is not fulfilled, either in terms or effect, by the report of an assessment made under the charter of the New Jersey Western R. R. Co., which states that the commissioners have taken into consideration the benefits to the owner from such railroad. The benefits should not be estimated. *Swayze v. New Jersey Midland R'y Co.*, 36 N. J. Law, 295, 1873; 12 Amer. R'y Rep., 404.

550. — The damage done to one piece of land, through which a railway is run, cannot be compensated by benefits accruing to another and separate piece of land through which it does not run, although belonging to the same person. *Todd v. Kankakee and Illinois River R. R. Co.*, 78 Ill., 530. 1875.

551. — The owner's damages for the right of way to a railroad over his land cannot be diminished by the estimated benefit likely to accrue to his remaining property by the building of the road. *St. Louis, Arkansas & Texas R. R. Co. v. Anderson*, 39 Ark., 167. 1882.

552. — The jury should assess the compensation due the owner for the land to be appropriated irrespective of benefits, and also his damages by reason of the diminished

value of the remainder of the tract, in consequence of such appropriation. *Cincinnati and Springfield R'y Co. v. Longworth*, 30 Ohio St., 108. 1876.

553. — The benefits caused to the land by drainage from the building of the railroad cannot be considered; § 18, art. 1, of the constitution excludes the consideration of all advantages that may result to the owner on account of the improvement. *Britton v. D. M., O. and S. R. R. Co.*, 59 Ia., 540, 1889; 10 Amer. & Eng. R. R. Cases, 412.

554. — Where the right of eminent domain is exercised to take land for a railroad, the "just compensation" to the owner, required by the constitution, is the fair cash value of the land taken, if the owner were willing to sell and the company to buy that particular quantity, at that place and in that form. This must be actually paid in money and cannot be discharged in benefits to the residue of the land. *Paducah and Memphis R. R. Co. v. Stovall*, 12 Heiskell (Tenn.), 1. 1873.

555. — The constitutional guaranty being regarded, the legislature may, however, additionally award to the owner incidental damages for the taking of the land, and prescribe the manner of their assessment; and may properly, as an offset against these damages, allow incidental benefits and ameliorations. *Ib.*

556. Side tracks. Under the acts of assembly the owners of mills and manufactories may of right connect their private sidings with the railways in their vicinity; and the fact that such right exists in them may largely advance the market value of their property and affect the question of damages for taking a part thereof for railroad uses. *Pittsburg and Lake Erie R. R. Co. v. Robinson*, 95 Pa. St., 426, 1880; 1 Amer. & Eng. R. R. Cases, 468.

557. Set-off against damage to land not taken. The benefits to the remainder of the land may be set off against any damages sustained to the entire tract other than the actual value of the land appropriated. The value of the land actually taken must be allowed in any event. *New Orleans and Pacific R'y Co. v. Gay*, 31 La. An., 430, 1879; *Todd v. Kankakee and Illinois River R. R. Co.*, 78 Ill., 530, 1875; *McReynolds v. Balti-*

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more and *Ohio R'y Co.*, 106 Ill., 152, 1883; *Page v. Chicago, Milwaukee and St. Paul R'y Co.*, 70 Ill., 324, 1873; *Mayor, etc., of Atlanta v. Central R. R. and Banking Co.*, 53 Ga., 120, 1874; *Fremont, Ellchorn and Missouri Valley R. R. Co. v. Whalen*, 11 Neb., 585, 1881; 5 Amer. & Eng. R. R. Cases, 364; *Same v. Ward*, 11 Neb., 597, 1881.

558. What benefits may be considered. The benefits to be offset are only such as the land owner derives over and above his neighbors whose land is not taken. *Tebo and Neosho R'y Co. v. Kingsberry*, 61 Mo., 51, 1875; *Quincy, Mo. and Pacific R. R. Co. v. Ridge*, 57 ib., 599, 1874; *Mississippi River Bridge Co. v. Ring*, 58 Mo., 491, 1874; *Hosher v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 60 Mo., 303, 1875; 9 Amer. R'y Rep., 230; *Wyandotte, Kansas City and North Western R'y Co. v. Waldo*, 70 ib., 629, 1879; *Adden v. White Mountains, N. H., R. R. Co.*, 55 N. H., 413, 1875; 11 Amer. R'y Rep., 246; *Raleigh and Augusta Air Line R. R. Co. v. Wicker*, 74 N. C., 220, 1876; *Chapman v. Oshkosh and Mississippi River R. R. Co.*, 33 Wis., 629, 1873.

VII. STREETS, PARKS AND HIGHWAYS.

1. Streets.

559. Abutting owners can recover damages. The dedication of a street to the public does not authorize it to be used for an ordinary railway track, and the municipal authorities cannot authorize it to be so used without compensation to adjacent owners. *Grand Rapids and Indiana R. R. Co. v. Heisel*, 47 Mich., 393, 1892; 10 Amer. & Eng. R. R. Cases, 260; *Grand Rapids and Indiana R. R. Co. v. Heisel*, 38 Mich., 62, 1878; *Terre Haute and Indianapolis R. R. Co. v. Scott*, 74 Ind., 29, 1881; 3 Amer. & Eng. R. R. Cases, 208; *Cox v. Louisville, New Albany and Chicago R. R. Co.*, 48 Ind., 178, 1874; 8 Amer. R'y Rep., 296; *Jeffersonville, etc., R. R. Co. v. Esterle*, 13 Bush (Ky.), 687, 1878; *Cosby v. Owensboro and Russellville R. R. Co.*, 10 Bush (Ky.), 288, 1874; *Gulf, Colorado and Santa Fe R'y Co. v. Graves*, 10 Amer. & Eng. R. R. Cases, 199 (Tex.), 1883.

560. — Under § 15, art II, of the constitution of the state of Colorado, the owners of lots abutting on a street in a city are entitled to compensation for the use of the street for railroad purposes. *Mollandin v. Union Pacific R'y Co.*, 4 McCrary (U. S. C. C.), 290, 1882.

561. — The owner of an abutting lot cannot prevent the use of a street for a railway when such use is permitted by the city and is authorized by an act of the legislature. This is upon the principle that the adjoining proprietor has no interest in the fee of the street. But where the fee of the street remains in him subject to the public easement, the rule is different. *Stetson v. Chicago and Evanston R. R. Co.*, 75 Ill., 74, 1874; *Indianapolis, Bloomington and Western R. R. Co. v. Hartley*, 67 Ill., 439, 1873.

562. — Although an incorporated town or city owns the fee to the public streets, and may rightfully permit a railway company to occupy and use a public street, yet the railroad company must be held responsible to property owners upon the street for such direct and physical damage as shall result from the construction or operation of the road. *Stone v. Fairbury, Pontiac and Northwestern R. R. Co.*, 68 Ill., 394, 1873.

563. — Where a railway has been constructed in a city street without compensating abutting owners who own the soil of the street, these owners have a right of action for any consequent injury to their freehold, such as injury to its market and rental value, and annoyance to occupation. *Grand Rapids and Indiana R. R. Co. v. Heisel*, 38 Mich., 62, 1878.

564. — Damages may be recovered for the diminution of the value of adjacent property by smoke, sparks, cinders, cracking of the walls of houses, etc. If the railway has been so located as to unreasonably obstruct the abutting lot owner's means of access over the street to and from his lot; or, if his houses have been injured by having smoke, sparks or cinders thrown or blown into or upon them; or if their walls have been cracked by the rapid movement of heavy trains of cars, he is entitled to recover for the damages directly resulting from all or any one or more of these causes. *Jeffersonville, etc., R. R. Co. v. Esterle*, 13

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Bush (Ky.), 667, 1878; *Elizabethtown, etc.*, R. R. Co. v. Combs, 10 Bush (Ky.), 382, 1874.

565. — Where a railway has been so located in a street as to deprive the owner of an adjacent lot of the means of ingress and egress to and from his lot with ordinary vehicles on either side of the road when trains are passing or standing in the street, he may recover from the company such damages as he has sustained thereby. *Id.*

566. — ordinances. Where an ordinance of a town authorizing a railway company to build its road on a street of a town provides that the company shall be bound to pay all damages that may accrue to property owners on such street by reason of the construction of such railroad, an action will lie on the ordinance, against the company, in favor of any property owner whose property is injured by the construction of the road, either by depreciation in value or loss of business sustained during the building of the road and after its construction. *St. Louis, Vandalia and Terre Haute R. R. Co. v. Haller*, 82 Ill., 203, 1876.

567. Abutting owners cannot recover damages. An abutting owner, having no ownership in the soil of a street, cannot recover damages for the use of the street for steam railway purposes. *Greene v. New York Central and Hudson River R. R. Co.*, 12 Abbott's New Cases (N. Y.), 124, 1838; *Houston and Texas Central R. R. Co. v. Odum*, 53 Tex., 343, 1880; 2 Amer. & Eng. R. R. Cases, 503; *Barney v. Keokuk*, 94 U. S., 324; 9 Amer. R'y Rep., 338, 1876; *Botts v. Mo. Pacific R. R. Co.*, 11 Mo. App., 589, 1882; *Rio Grande R. R. Co. v. Brownsville*, 45 Tex., 88, 1876; 13 Amer. R'y Rep., 223; *Elizabethtown and Paducah R. R. Co. v. Thompson*, 79 Ky., 52, 1880.

568. — If the owner of lots fronting on a street in a city does not own the street in front of his lots, subject to a public easement, he cannot maintain an action for damages for building a railroad on the street, except for special damages by reason of a nuisance caused by the obstruction of a public street. *Severy v. Central Pacific R. R. Co.*, 51 Cal., 194, 1875; 12 Amer. R'y Rep., 102.

569. — An abutting owner who does not

own the fee in the street cannot recover for any injury to his freehold resulting from the presence of a railroad in the street, but only for such damages as he can prove arising from such misconduct of the company as constitutes a nuisance, such as leaving cars standing for an unreasonable time in front of the premises, unnecessary noises, and running trains at improper speed. In so far as the proper operation of the road diminishes the value of his estate it is *damnum absque injuria*. *Grand Rapids and Indiana R. R. Co. v. Heisel*, 38 Mich., 62, 1878.

570. — A railway company was authorized by its charter to construct its line to any given point in the town of Warren. It built its road on a public street immediately in front of plaintiff's premises, who brought suit to recover damages for the inconvenience and annoyance occasioned thereby. *Held*, that the discretion of the directors of the company in selecting the route of the road could not be inquired into by the court. *Held*, further, that in the absence of any express provision therefor in the charter, the company was not liable in damages for the annoyance to a property owner fronting on a public street so taken, caused by the passage of trains, the cinders and smoke and the hindrance to the passage of carriages. *Struthers v. Dunkirk, Warren and Pittsburg R'y Co.*, 87 Pa. St., 232, 1878.

571. — A railway embankment was constructed in the middle of street, with the consent of the city of Owensboro, leaving a passway on either side from six to thirteen feet wide, exclusive of the sidewalk, so that vehicles meeting could in most places pass without difficulty. *Held*, that it was not such an appropriation of the street as gave the adjacent lot owners a cause of action against the railway company. *Cosby v. Owensboro and Russellville R. R. Co.*, 10 Bush (Ky.), 288, 1874.

572. — The owners of abutting property in the streets of Dubuque cannot recover damages for the location of a railway on such streets. The city being organized under special charter, the provisions of the Code of Iowa do not apply. *Simplot v. Chicago, Milwaukee and St. Paul R'y Co.*, 16 Federal Reporter, 350, 1883.

573. — Under the statutes of Illinois, an

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adjoining land owner, where no portion of his land is actually taken or sought to be condemned for public use, is not entitled to have proceedings instituted to ascertain what damages his property may sustain in consequence of the construction and operation of a railway upon contiguous or adjacent lands in which he has no interest. *Peoria and Rock Island R'y Co. v. Schertz*, 84 Ill., 135, 1876; 16 Amer. R'y Rep., 434.

574. — property not abutting. Plaintiff is owner and occupant of an unplatted tract of land adjoining a platted tract, and abutting, in part, upon the head of a street, laid out on such platted tract; held, that plaintiff, simply as owner and occupant aforesaid, has no estate or interest in a part of such street upon which his tract does not abut, and that, therefore, he cannot complain of obstructions placed and maintained in such part by a railroad company, upon the ground of an appropriation of the same, without compensation to him made or secured. *Shaubut v. St. Paul and Sioux City R. R. Co.*, 21 Minn., 502; 19 Amer. R'y Rep., 223, 1875.

575. Action for construction without assessment of damages. The Baltimore and Potomac R. R. Co. was authorized by act of congress, May 21, 1872, to lay its track along Sixth street, paying any damage sustained by the owners of property. If the company could not agree with the owner, it was required to cause the damage to be assessed by a jury. This the company neglected to do, and the court decided that the owner could maintain an action on the case for such neglect of the company, and that the plaintiff could recover in such action all the damages resulting to his property. *Dickson v. Baltimore and Potomac R. R. Co.*, 3 MacArthur (Dist. of Columbia), 362. 1879.

576. Additional tracks. Where a railway company has been granted the right by the city council to occupy with its track the street of a city, the laying down of an additional track without the consent of the municipal authorities does not of itself constitute a nuisance or entitle an adjacent property owner to damages therefor. *Davis v. Chicago and Northwestern R'y Co.*, 46 Ia., 389, 1877; 16 Amer. R'y Rep., 45.

577. Alleys. A city may authorize the use of an alley for railway purposes. *Heath v. Des Moines and St. Louis R. R. Co.*, 10 Amer. & Eng. R. R. Cases, 313 (Ia.). 1888.

578. — abutting owner. Where a lot abuts upon an alley upon which a railway is built with the consent of the city authorities, if the owner of the lot is thereby deprived of a public right which he has enjoyed in connection with his premises, and in consequence thereof he sustains damages in excess of that shared by the public generally, he may recover for such excess. *Gottschalk v. Chicago, Burlington and Quincy R. R. Co.*, 14 Neb., 550. 1883.

579. Benefits. Where a lot is divided by a street laid through the same, benefits to one part of the property cannot be set off against damage to the other part on the other side of the street by the laying of railroad tracks in the street so as to prevent access to the same, and excluding ordinary travel on the street. *Pittsburg, Ft. Wayne and Chicago R. R. Co. v. Reich*, 101 Ill., 157. 1881.

580. Bridge. The embankments at the ends of a bridge, made necessary in restoring a highway to its former usefulness, are a part of the railway structure, and a party incidentally injured in their construction has as perfect a remedy against the company for consequential damages as for a direct injury by it in the original construction of the road. *Burritt v. City of New Haven*, 42 Conn., 174. 1875.

581. Change of statute; additional tracks. Where a railroad company duly authorized by an ordinance of a city, and also by virtue of § 1321, Revision, constructed its track along a certain street, it was held that the successor in interest of said company had no right, after § 464 of the Code took effect, to construct switches or side tracks on the street without making compensation to the abutting lot owners for injuries resulting therefrom. *Drady v. Des Moines and Ft. Dodge R. R. Co.*, 57 Ia., 393. 1881.

582. — The compensation provided by § 464, as amended, cannot be limited to damages for change of grade, but it includes all legitimate damages; and where the occupation of the street was unlawful, a party, if injured thereby, may maintain an action for

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the trespass before permanent damages are assessed.' *Ib.*

583. — Where a part of a statute is unconstitutional, that fact does not authorize the court to declare the remainder void if the provisions are distinct and separable. Even if the defendant in this case could not be denied the right to construct the switch in question, yet it can be done only upon making compensation therefor. *Ib.*

584. **Charter.** The grant in a charter to a railroad company to run its road through a town cannot operate as a grant of the use of the street to the company. *St. Louis, Vandalia and Terre Haute R. R. Co. v. Halter*, 83 Ill., 208. 1876.

585. — A charter to build a railroad to a city imports authority to extend the road within the corporate limits, and the statute confers on a railroad having such charter the right to use any public street within such city, without making compensation therefor; the particular street being either agreed upon with the authorities of the city or designated in the manner pointed out by the statute. *Houston and Texas Central R. R. Co. v. Odum*, 53 Tex., 343, 1880; 2 Amer. & Eng. R. R. Cases, 503.

586. **Connecting street.** The Railway Clauses (Scotland) Act provides, by §§ 46 and 49, that where, in the construction of a railway, a road is interfered with so as to become impassable or dangerous, the railway company shall restore it, or provide a substituted one. A railway company having, in the exercise of statutory powers, raised the level of a street, and in so doing closed up one entrance of another street which joined the former at right angles, *held*, that no part of the latter street had been touched or interfered with in terms of the above clauses, and therefore that the railway company was not bound to provide a substituted road. *Law v. Caledonian R'y Co.*, 13 Scotch Session Cases (2d series), 1122. 1851.

587. **Constitutional law.** Section 27, art. 4, Const. of 1865, which provides that "the general assembly shall not pass special laws granting to any individual or company the right to lay down railroad tracks in the streets of any city or town," was prospective in its operation only and did not repeal an act in force at the time of the adoption of

the constitution, giving such a right. *Atlantic and Pacific R. R. Co. v. City of St. Louis*, 66 Mo., 228. 1877.

588. **Cul de sac.** A street or public *cul de sac* on or under which a railway company has been authorized to construct its line may be used by the company without compensation to the abutting property owners. *Souch v. East London R'y Co.*, Law Reports, 16 Equity Cases, 108. 1873.

589. **Ejectment.** An abutting lot owner is seized of the fee to the center of the street, and he may maintain ejectment against a railway company for occupying the same without payment of damages. *Terre Haute and Southeastern R. R. Co. v. Rodel*, 89 Ind., 128, 1883; 10 Amer. & Eng. R. R. Cases, 284.

590. **Embankments.** Where a municipal charter allows, a railroad may be constructed on a street by permission of the municipal authorities, and neither the municipality nor the railroad company will be responsible for the inconvenience and damage resulting from such construction. But this rule applies only to a railroad constructed on the grade of the street, where the only obstruction is the passage of the trains, and not where embankments have been made above the grade, or where the street is used for side tracks or other structures for the convenience of the road. *Tate v. Missouri, Kansas and Texas R'y Co.*, 64 Mo., 149. 1876.

591. — Where a city had established no grade of a street upon which the plaintiff had a lot, and upon which he built a house, and a railway company, with the assent and by permission of the city, filled up the space between an original embankment and the plaintiff's lot, so as to prevent access to his lot by wagons and carriages from the street, it was held that, as this was a special injury to the plaintiff, and peculiar to him, he was entitled to recover for the damages in a suit by him against the city. *City of Pekin v. Winkel*, 77 Ill., 56. 1875.

592. **Excavations.** The owner of property in a city where the fee of the streets is in the public, cannot recover damages for the excavation of an adjacent street by a railroad in making a crossing for its track, under a license properly granted by the city, and when the work is done in a careful and skil-

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ful manner. *Franz v. Sioux City and Pembina R. R. Co.*, 55 Ia., 107. 1880.

593. — In an action for damages, for injuries occasioned to plaintiff's premises by an unauthorized excavation, by defendant, of a public street in front thereof, *held*, that if defendant claims that plaintiff is not entitled to damages for the full amount of the diminution of value suffered by his property, in consequence of the excavation as it is, because that excavation can be refilled at an expense less than the amount of such diminution of value, it is for defendant to establish this claim; and, in order to establish the same, it must necessarily be made to appear that the plaintiff has the right to refill. *Karst v. St. Paul, Stillwater and Taylor's Falls R. R. Co.*, 23 Minn., 401. 1877.

594. — Where a railway company constructed its track along a public street in front of plaintiff's lots, occupied by him for mercantile business, under an ordinance of the town granting the right so to do, but which required the company to pay all damages to the property owners on such street that might accrue in consequence thereof, and the company, in constructing its road, made a deep excavation in the street in front of plaintiff's lots, which diminished the value of the lots and injured the plaintiff's business by making his place difficult of access and hazardous for teams to approach the same, *held*, that the company, by accepting the ordinance and acting under it, became bound, by its terms, to pay the plaintiff all damage caused to his property, and also damages in his business. *St. Louis, Vandalia and Terre Haute R. R. Co. v. Capps*, 67 Ill., 607. 1872.

595. *Grade.* While a railway company may, when licensed by the proper authorities, occupy a street or alley, yet if in laying down its track it so changes the established grade, or in any other manner so lays its tracks as to permanently obstruct access to an adjoining lot, or if it unnecessarily and unreasonably leaves its cars standing on the track so as to interfere with approach to the lot, the lot owner may recover damages therefor, and a petition which in general terms charges such wrongs is good as against attack made simply by objecting to the admission of testimony. *Central Branch Union*

Pacific R. R. Co. v. Twine, 23 Kans., 585. 1880.

596. — In assessing damages for "embankment" and "excavation" in a street in front of property, the burden is on the company to show that there was an established grade of the street to which it conformed. *Pittsburgh, Virginia and Charleston R. R. Co. v. Rose*, 74 Pa. St., 362, 1873; 6 Amer. R'y Rep., 343.

597. — Certain acts of congress authorized the Baltimore and Potomac R. R. Co. to extend its line of railroad into the District of Columbia, and along K street in the city of Washington, upon the established grade of said street. The plaintiff was a lot owner on K street, and sued the company for damage caused to his property by the neglect of the company to provide proper means to carry off the water, which formed into pools and deep holes in front of and near said property, in consequence of the embankment of the road. That said embankment also rendered the plaintiff's lots inaccessible and useless as places of business or residence. *Held*, that as the road was built in conformity to a grade which had been prescribed by acts of congress, it was therefore a lawful road, and the damages resulting therefrom must be borne by the lot owners. *Nottingham v. Baltimore and Potomac R. R. Co.*, 3 MacArthur (Dist. of Columbia), 517. 1879.

598. *Grant of city.* The fact that a city has granted a railway a right to lay its track upon one of its streets does not deprive the owner of adjacent property of the right to maintain an action therefor, if he has suffered special injury not common to the public. *Frith v. City of Dubuque*, 45 Ia., 406. 1877.

599. — In an action by an adjacent owner against a railway company for damages for the occupation of a street, whereby access to his property is obstructed and its value depreciated, the deed of right of way by the owner is admissible as evidence. *Ib.*

600. — The plaintiff in such an action is entitled to recover such special damages as he may have suffered from the time the street was obstructed until the commencement of his action. *Ib.*

601. — The city which has granted the

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railway company the right to use its street does not thereby become liable for its obstruction to the adjacent owner. *Ib.*

602. Injunction. Where the fee of a street is in an adjoining land owner, a railway company will be restrained by injunction from using the street for railway purposes without compensation. *Henderson v. N. Y. Central R. R. Co.*, 17 Hun (N. Y.), 344, 1879; *Same v. Same*, 78 N. Y., 423, 1879; *Railway Co. v. Lawrence*, 38 Ohio St., 41, 1882.

603. — The clause of the constitution which provides that "private property shall not be taken or damaged for public use, without just compensation," must receive a reasonable and practicable interpretation; where the property is not taken, the damages must be real and not speculative. If the property is not worth less in consequence of the construction of the railroad in its vicinity, or upon a street upon which the lots abut, than if no road were constructed, the owner will not be entitled to damages, and cannot enjoin the construction of the road in the street in pursuance of the company's charter and the license of the city authorities. *Chicago and Pacific R. R. Co. v. Francis*, 70 Ill., 238. 1873.

604. Legislative power. Although a highway is devoted to one public use the legislature may devote it, concurrently, to another public use, so far as declaring a necessity for that other use is concerned. *Prospect Park and Coney Island R. R. Co.*, *In re*, 67 N. Y., 371, 1876; 15 Amer. R'y Rep., 102; affirming *Same Case*, 8 Hun (N. Y.), 30, 1876.

605. — A street is a public franchise, and cannot be invaded except by direct legislative grant. *Pennsylvania R. R. Co.'s Appeal*, 93 Pa. St., 150, 1880; 3 Amer. & Eng. R. R. Cases, 507.

606. Levee. The appropriation of a public levee by a railway company, for the purpose of erecting thereon permanent structures, such as depot building, side tracks, etc., would create such obstructions as would defeat or extinguish the public use, and is not within the grant of power, without an agreement with the local authorities as prescribed by the statute. *Oregon R'y Co. v. Portland*, 9 Oreg., 231. 1881.

607. Measure of damages. The measure of damages is the difference between the rental value of the property with the road as constructed, and its rental value if the road had been properly constructed. *O'Connor v. St. Louis, Kansas City and Northern R'y Co.*, 56 Ia., 735, 1881; 5 Amer. & Eng. R. R. Cases, 325.

608. — The recovery of damages against a railroad company for injury to property fronting on a street in a city over which its line passes is confined to the direct physical injury done to the property by the operation of the road; and it is erroneous to permit the plaintiff to prove that the value of the property and its rental value are affected injuriously. *Chicago, Burlington and Quincy R. R. Co. v. McGinnis*, 79 Ill., 269. 1875.

609. — The measure of damages which a lot owner may recover, if entitled to recover at all, is the diminution in value of his houses and lot occasioned by the location of the railway, and the uses to which they are authorized to be put by the grant from the city authorities. If the location and operation of the roads in front of the houses diminished their value, then the diminution should be proportioned to their value just preceding the time at which it became generally known that the street had been selected as the line of the road. *Jeffersonville, etc., R. R. Co. v. Esterle*, 13 Bush (Ky.), 667. 1878.

610. — The principles on which to assess the damages resulting to a freehold from the operation of a railway on the adjacent street are the same as if no street had previously existed; and its existence would only be a circumstance tending to diminish the recovery. *Grand Rapids and Indiana R. R. Co. v. Heisel*, 38 Mich., 62. 1878.

611. — It seems that, in proceedings by a railway company to acquire a right to lay its tracks in a street or highway, the fee of which is in the owner of the adjoining land, the proper compensation is the full value of the land taken, and a fair and adequate compensation for all the injury the owner has sustained and will sustain by the making of the railroad over his land. For this purpose it is proper to determine the effect the conversion of the street into a railroad track will

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have upon the residue of the owner's land. *Henderson v. New York Central R. R. Co.*, 78 N. Y., 423. 1879.

612. — In a proceeding to acquire a right of way for a side track along a street upon which the defendant had twenty-eight lots lying together, and constituting an entire tract, the petition only referred to the lots abutting upon the street, and asked for an assessment of damages in respect to them. On the trial the defendant offered proof of damage to the entire ground, which the court refused. *Held*, that under the petition the court ruled properly. If the defendant had filed his cross-petition, setting up that he was the owner of the other ground not described in the original petition, which would be damaged, and claimed that the damages thereto might be assessed, it seems that he might have had the damages assessed which would be caused to the entire piece of ground. *Mix v. Lafayette, Bloomington and Mississippi R'y Co.*, 67 Ill., 319. 1873.

613. — Where the fee of a street or highway is in the adjacent proprietor, he is entitled to recover damages from a railway company for its occupation of the street; and such damages are to be assessed like damages for the appropriation of right of way. *Kucheman v. C. C. and D. R'y Co.*, 46 Ia., 366, 1877; 16 Amer. R'y Rep., 16.

614. — The owner of adjacent property is not limited in his recovery to the actual value of the land taken, but he may recover all such damages as result proximately from the use for which it is taken. *Ib.*

615. — Where a railway company built its road along the street of a town, under an ordinance granting the right of way upon condition that the company should pay all damages that might accrue to the property owners on such street, by reason of the construction of the road, it was held that the company was liable to a property owner for whatever deterioration in value the real estate may have undergone in consequence of laying the railroad track, and for damages for interruption to his business during such time as it would necessarily require to provide another equally eligible place and remove thereto; and that the damage to his business during such time should be ascer-

tained by proof of the probable reasonable profits which might have been made had there been no interruption to the business. *St. Louis, Vandalia and Terre Haute R. R. Co. v. Capps*, 72 Ill., 188. 1874.

616. — Where the street is unlawfully taken and an action is brought for the wrong, it is error to allow evidence of damages upon the basis of a permanent occupation of the street. *Hartz v. St. Paul and Sioux City R. R. Co.*, 21 Minn., 358, 1875; 18 Amer. R'y Rep., 430.

617. — Individuals owning lands bounded by a public street are entitled to occupy up to the line of such street, and to the use of the street for any purposes connected with such occupation not conflicting with the right and easement of a railway company under a license to lay down its rails on such street; and their damage for the taking by such company of a portion of the land for the use of the railroad should be appraised upon that basis. *Syracuse Northern R. R. Co. v. Alexander*, 3 Thompson & Cook (N. Y. Supreme Ct.), 784. 1874.

618. — In case of the building and operating a railroad through the streets of a municipality under an ordinance granting permission therefor, the owner of lands abutting on such street is not entitled to recover of the railroad company all the damages sustained by him by the location and operation of the road, including the loss by depreciation in the market value of his property, and which are common to other owners or the public, but his right to recover must be limited to such damages as are peculiar to his property, and which are of a physical nature, such as the cutting off of access to his premises, jarring of his buildings, casting smoke and cinders upon his dwellings, etc. *Chicago and Western Indiana R. R. Co. v. Berg*, 10 Bradwell (Ill.), 607; *Same v. George*, *ib.*, 646; *Same v. Phillips*, *ib.*, 648, 1882.

619. — The depreciation of the value of property by reason of the construction and operation of a railway through an adjacent street, or annoyance from noise necessarily attending the same, is no ground for an action by the lot owner; nor is an annoyance from smoke and fire, unless he is damaged by their actual contact with his premises.

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Cosby v. Owensboro and Russellville R. R. Co., 10 Bush (Ky.), 288. 1874.

620. — It was alleged that part of the house of a land owner was over the street line. The court charged "that the true rule was to assess the damages to the property, houses and lots, considering the houses to be on the proper line." *Held*, to be proper. *Pittsburgh, Virginia and Charleston R. R. Co. v. Rose*, 74 Pa. St., 362, 1873; 6 Amer. R'y Rep., 343.

621. — On the assessment of damages to an adjoining lot owner, caused by the establishment of a side track of a railroad in a public street of a town, it is error for the court, by instruction, to exclude from the estimate of damages the obstruction of the street from the necessary running of railway trains. *Mix v. Lafayette, Bloomington and Mississippi R'y Co.*, 67 Ill., 319. 1873.

622. — Damage from smoke, soot or fire from locomotives, thrown or blown into or against adjacent houses, will entitle the owner to recover therefor. *Elizabethtown, etc., R. R. Co. v. Combs*, 10 Bush, 332. 1874.

623. — The measure of damage will be the diminution of the value of the property occasioned by these circumstances, and not the difference between the value of the property before and after the building of the road. *Ib.*

624. Negligence in manner of construction. In an action to recover damages caused by the construction of defendant's road-bed in the street in front of plaintiff's lot, it appeared that the track of the defendant was laid through the street by the consent and permission of the town authorities, but that in front of the plaintiff's lot it was elevated considerably above the street, and ingress and egress to the plaintiff's lot was much impeded thereby. *Held*, that the plaintiff was entitled to recover the damages sustained by him prior to the commencement of the suit. *Ford v. Santa Cruz R. R. Co.*, 59 Cal., 290. 1881.

625. — In an action against a railway company by an adjacent owner for such a negligent or improper construction of its line upon a street as to injure his property, the measure of damages is the difference between the value of the property with the road as constructed and its estimated value with the line properly constructed. *Cadle*

v. Muscatine Western R. R. Co., 44 Ia., 11. 1876.

626. — The owner of adjacent property has an interest in the street, entitling him to maintain an action against a railway company for such a careless or unlawful appropriation thereof, or location of its track thereon, as shall be injurious to his property. *Ib.*

627. — When county commissioners prescribe to a railway company crossing a street the alterations to be made in the same, the manner of making them, etc., no action can be maintained against the corporation for acts properly done within the authority given; but for acts done in excess of that authority, or negligently or unskillfully done though within it, one suffering a special injury different from that of the public at large may maintain an action. *Brewer v. Boston, Clinton and Fitchburg R. R. Co.*, 113 Mass., 52. 1873.

628. Number of tracks. In an action against a railroad company for damages for injury to private property by the construction of its road upon a public street, it was held to be error to instruct the jury to determine whether the company had constructed more tracks or upon different lines than were authorized by the city ordinances. The number of tracks thus authorized was a question of law, respecting which the court should have determined the legal rights of the parties. *Ingram v. C. D. & M. R. R. Co.*, 38 Ia., 669. 1874.

629. Pleadings. In an action against a city and railroad company to prevent the occupancy of a street by the latter, and for damages therefor, it was held that allegations in the petition to the effect that other streets were occupied by other railway companies were immaterial, and might be stricken out upon motion. *Davis v. Chicago and Northwestern R'y Co.*, 46 Ia., 389, 1877; 16 Amer. R'y Rep., 45.

630. — Instructions, in an action to recover damages for injuries to property by reason of the construction of a railroad on the street adjacent, considered, and held erroneous as inapplicable to the issue made by the pleadings. *O'Connor v. St. Louis, Kansas City and Northern R'y Co.*, 56 Ia., 785, 1881; 5 Amer. & Eng. R. R. Cases, 325.

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631. Proceedings. A petition to the common council for the right to construct a railroad track along a public street is sufficient if presented by owners representing more than one-half of the frontage of so much of the street as was sought to be used for railroad purposes. *Schuchert v. Wabash, Chester and Western R. R. Co.*, 10 Bradwell (Ill.), 397. 1882.

632. Power of cities. Under the statute, cities are given exclusive control of all streets and alleys within their corporate limits. The fee of the streets is in the corporation, and its dominion over them is as absolute as that of the owner of other lands. *Chicago and Vincennes R. R. Co. v. The People*, 92 Ill., 170. 1879.

633. — It is well settled in Illinois that a city may authorize the laying of railroad tracks in its streets, and where a city, under a resolution adopted, conveys a street absolutely to a railway company, the resolution and deed will give the company the right to construct, maintain and operate its tracks upon the streets, even if invalid to pass the entire dominion in the street; and when such right is exercised the city cannot resume the grant to the exclusion of the company. *City of Quincy v. Chicago, Burlington and Quincy R. R. Co.*, 92 Ill., 21. 1879.

634. — The public streets of an incorporated city or town, whether dedicated by the owners of the fee or acquired in the exercise of the right of eminent domain, are subject to the sovereign police power of the state; and the legislature may, by express enactment, authorize a railroad company to lay its track across or through them; but where the streets have been dedicated to the public as highways, the ultimate fee remaining in the original owners of the soil, the municipal corporation cannot, in the absence of express legislative authority, allow them to be used for that purpose by a railroad company, to the injury of the succeeding proprietors of the adjacent lands. *Perry v. New Orleans, Mobile and Chattanooga R. R. Co.*, 55 Ala., 413. 1876.

635. — It is competent for the authorities of a city, by voluntary agreement, to convey to a railroad company the same right to occupy the streets and public grounds of a city for railroad and like purposes, as the com-

pany might acquire by calling into exercise the power of eminent domain. *Cook v. Burlington*, 38 Ia., 357, 1873; *Ingram v. C. D. & M. R. R. Co.*, 38 Ia., 669, 1874.

636. — The case of *Cook v. The City of Burlington*, 30 Ia., 94, holding it competent for the city to convey to a railroad company the right of way and other uses connected with its road in respect to certain accretions to a street bounded on the Mississippi river, reaffirmed and followed. *Cook v. Burlington*, 36 Ia., 357. 1873.

637. — In a proceeding to condemn land including certain streets in the city of San Diego for the use of the plaintiff's railroad, it was objected on demurrer that the complaint did not allege that the authorities of the city had granted plaintiff the right to use the streets in question. *Held*, the demurrer was properly overruled. *California Southern R. R. Co. v. Kimball*, 61 Cal., 90. 1883.

638. — After the public authorities have taken and provided compensation for the fee of land appropriated to public use as a highway, the legislature may authorize the construction of a surface railroad there without exacting compensation from the railroad company for the land, or for the consequential injuries to adjacent owners from such use of the highway. *Washington Cemetery v. Prospect Park and Coney Island R. R. Co.*, 4 Abbott's New Cases (N. Y.), 15, 1877; 63 N. Y., 591, 1877.

639. — But such consent only grants the right to take the same so far as the public is concerned. The proprietors of the soil are entitled to compensation. *Ib.*

640. — It is a sufficient defense to an action for location of a railway in a street near a dwelling-house to show that such location was by authority of the city council and legislature. *Koelmel v. New Orleans, Mobile, etc., R. R. Co.*, 27 La. An., 442. 1875.

641. — The owners of abutting lots have no possession, or right to the possession, in fact or in law, of the street or any part of it. *Jeffersonville, etc., R. R. Co. v. Esterle*, 13 Bush (Ky.), 667. 1878.

642. — **consent of city.** A railway company has the right, under § 1262 of the Code, subject to proper equitable control and police regulation, to pass over a street of a city

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without the consent of the city authorities. The word "over," as used in the statute, is synonymous with the word "upon," and has the same meaning and effect. *State v. Davenport and St. Paul R. R. Co.*, 47 Ia., 507, 1877; *Hine v. Keokuk and Des Moines R. R. Co.*, 43 Ia., 636, 1876; *Chicago. Newton and Southwestern R. R. Co. v. Newton*, 36 Ia., 299, 1873.

643. — Prior to the Code of 1873, railroad companies had the right to construct their roads, subject to equitable control, upon the streets of cities and incorporated towns, without their consent and without compensation therefor. *Ingram v. C. D. and M. R. R. Co.*, 38 Ia., 669, 1874.

644. — Owners of lots bordering on streets hold them subject to the right of appropriation of the street to such public uses as the general good of the city or town may require, provided such appropriation is not incompatible with the ends for which the street was established — as a public way for foot-passengers, horsemen, and the vehicles in ordinary use. *Cosby v. Owensboro and Russellville R. R. Co.*, 10 Bush (Ky.), 288, 1874.

645. — The exclusive use of a street is in the public, even when the fee to the center of the street is in the abutting lot owners. *Jeffersonville, etc., R. R. Co. v. Esterle*, 13 Bush (Ky.), 667, 1878.

646. — A public highway is the property of the people of the whole state, and may be disposed of by their representatives at their pleasure. The legislature may authorize the building of a railroad over and along the streets of a city, but the city whose streets are thus taken may regulate and control the operation of such road within its limits. *Atlantic and Pacific R. R. Co. v. St. Louis*, 3 Mo. App., 315, 1877.

647. — Although a city charter may provide that the city council shall have power to make all ordinances necessary and proper for carrying into execution the powers specified in the act, the action of the city council, though in the form of a resolution, in connection with its deed granting the use of streets for railroad tracks, will be a sufficient grant of permission to so use the streets. *City of Quincy v. Chicago, Burlington and Quincy R. R. Co.*, 92 Ill., 21, 1879.

648. — conditions. Since a railway company has the right to occupy the streets of a city with its track, without the consent of the municipal authorities, the city cannot impose conditions upon the railway company by an ordinance granting the right of way, which shall be binding upon the company upon its use of the street, and create an obligation for the performance of the conditions. *Council Bluffs v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 45 Ia., 338, 1876.

649. — repeal of ordinance. Although a railway has been built upon the street of a city in pursuance of a city ordinance, yet the repeal of the ordinance could not render the railroad a nuisance. *Ingram v. C. D. and M. R. R. Co.*, 38 Ia., 669, 1874.

650. Statute. The statute (St. 1871, ch. 343, § 1) in relation to construction of railway tracks in the city of Worcester construed. *Mayor of Worcester v. Railroad Commissioners*, 113 Mass., 161, 1873.

651. — The provision of the Code, with reference to the rights of a railway company over the streets of cities and incorporated towns, do not apply to actions commenced prior to the time when it took effect. *Ingram v. C. D. and M. R. R. Co.*, 38 Ia., 669, 1874.

652. Street railway; steam power. The use of steam power upon a street railway is an illegal use of the street, for which the railway company is liable for special injury to adjoining property. *Stange v. Dubuque Street R'y Co.*, 54 Ia., 669, 1830; *Stanley v. Davenport*, ib., 463, 1880.

653. Subsequent grantee. A party is not entitled to recover damages for the depreciation of his property in consequence of the laying of a railroad track if the property was not owned by him at the time the track was laid. The owner of the land at the time of the injury can alone take advantage of a claim for damages, and if he does not claim, his subsequent vendee cannot. *Dixon v. Baltimore and Potomac R. R. Co.*, 1 Mackey (Dist. of Columbia), 78, 1881.

654. Taking land for a street. Where a railroad company is authorized to appropriate lands only for its own use, for the purposes contemplated by its charter, it is not lawful to add to such use that for street or

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highway purposes, unless additional compensation is made to the owner of the fee. *Strong v. City of Brooklyn*, 68 N. Y., 1, 1876.

655. Title. In a suit for an injury to abutting property by reason of the construction of a railway on a public street or highway, the plaintiff's title may be established by proof of adverse possession. *Lawrence R. R. Co. v. Cobb*, 35 Ohio St., 94, 1878.

656. — The designation of a certain street upon the plat of an addition to the city of Dubuque, made under the provisions of the Code of 1851, held sufficient to constitute a dedication of the fee of such street to the public. *Stange v. West Dubuque Street R'y Co.*, 54 Ia., 669, 1880.

657. Trespass. An owner of land abutting upon a city street, whose title extends to the center subject to the right of the public, may maintain an action of trespass against a company which, without legal authority so to do, runs steam engines and cars propelled by steam thereon to the injury of the premises and of the business carried on by him in the buildings erected upon such street. *Hussner v. Brooklyn City R. R. Co.*, 30 Hun (N. Y.), 409, 1883.

658. — Under the Code of 1873, if the damages are not assessed to abutting owners, such owners may recover damages in an action of trespass. *Mulholland v. Des Moines, etc., R. R. Co.*, 10 Amer. & Eng. R. R. Cases, 99 (Ia.), 1882.

659. — The owner of lots abutting on a public street has such a special interest in the street different from that of the general public as to entitle him to maintain a private suit for damages against a party who wrongfully obstructs the street in front of or near his property, but not upon his soil, so as practically to cut off all public access to it. *Brakken v. Minneapolis and St. Louis R'y Co.*, 29 Minn., 41, 1881; 7 Amer. & Eng. R. R. Cases, 593.

660. — In an action at law to recover damages to the plaintiff's property by reason of the laying of a railroad track, the only recovery which can be had would be in respect of temporary or transitory damages accrued up to the time of the inception of the suit, whereas, a statutory inquisition, which is not a suit in the sense of the law,

is instituted to ascertain for all time the amount of permanent damages sustained. But a proper subject for consideration by a jury on the inquisition would be the recovery which might be had in a pending action at law by way of reducing the amount of their award. *Dixon v. Baltimore and Potomac R. R. Co.*, 1 Mackey (Dist. of Columbia), 78, 1881.

661. Time of completion of road fixed in charter; failure to complete. Individuals may resist the condemnation of their lands for a right of way after the expiration of the time given by the charter of the company for the completion of the road, but cannot interfere to prevent the company extending its road, after the expiration of that time, over a right of way acquired before the expiration. A city is an individual within the meaning of this rule; so that where a railroad company is, by its charter, authorized to build its road along or across the streets of any city or town, a city cannot prevent it from making an extension or building a branch road over one of its streets, on the ground that the time limited by charter for the completion of the road has expired. The state alone can proceed against the company to arrest the work on that ground. *Atlantic & Pacific R. R. Co. v. City of St. Louis*, 66 Mo., 228, 1877.

662. Vacation of streets. P. was the owner of certain lots in an addition to the city of Topeka, a city of the first class; an ordinance was passed by the city council vacating the street in front of her lots; thereafter condemnation proceedings were had in behalf of a railroad company for the condemnation of those lots; in such proceedings the lots were described simply by number, etc., and without any addition of boundaries or other description. *Held*, that, under § 34, ch. 37, Laws of 1881, if the title to such portion of the vacated street as was situated in front of the lots of P. passed to her, such portion became, as it were, an accretion to the lots, a part and parcel of them, and passed under any conveyance or transfer of the lots, *eo nomine*. *Atchison, Topeka and Santa Fe R. R. Co. v. Patch*, 28 Kans., 470, 1882.

663. Watercourse. The act of February 19, 1849, provides "that, whenever any rail-

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road company shall locate its road in and upon any street or alley in any city or borough, ample compensation shall be paid to the owners of lots fronting upon such street or alley for any damages they may sustain by reason of any excavation or embankment made in the construction of the road." The N. C. and F. R. R. Co., in building its road, carried it across Mill street, in the city of Newcastle, the effect of which construction was to impede, by an embankment made, the flow of a natural watercourse, which was thereby dammed up, and flooded plaintiffs' lot and cellar. In a proceeding under the statute to recover damages, *held*, that, so far as the property of the plaintiffs was damaged by the embankment, within the lines of the street, they had the right to compensation, but with the consequences produced by the work outside of these lines the court and jury in this proceeding had nothing to do. *Held*, further, that the defendant had the right to ask the exclusion of the effects of the operation of the road in depreciating the value of the plaintiffs' property from the deliberation of the jury. *Newcastle and Franklin R. R. Co. v. McChesney*, 85 Pa. St., 522, 1877; 18 Amer. R'y Rep., 518.

2. Highways.

664. Abutting owners. Damages which an abutting owner may sustain, other and different from those sustained by the general public, by the occupation of the highway for railway purposes, may be recovered by such owner. *Chicago and Western Indiana R. R. Co. v. Ayres*, 106 Ill., 511. 1883.

665. — The obstruction of the public highway should not be considered in the estimation of the damages to which the owner of adjacent land is entitled for the appropriation of right of way by a railway company. *Gear v. C. C. and D. R. R. Co.*, 43 Ia., 83. 1876.

666. — The protection of the constitution extends to an adjacent owner's fee in a common highway, against its use for the track of a railroad. *Sherman v. Milwaukee, Lake Shore and Western R. R. Co.*, 40 Wis., 645, 1876; 13 Amer. R'y Rep., 459.

667. — Where a railway company occupies a public highway for its track, without

acquiring the right to do so, an owner of abutting lands, having the fee in the lands covered by the highway, may proceed, under § 21 of the act of 1872 (69 Ohio L., 95), to compel the company to appropriate the right of way for its road. *Lawrence R. R. Co. v. Williams*, 35 Ohio St., 168. 1878.

668. Change by railway company. Under a clause contained in its charter, that if a railroad company shall find it necessary to change the location of any portion of any turnpike or other public road, it is authorized and empowered so to do, and to occupy such portions of the turnpike or road as it may deem necessary or expedient, etc., the company is not the sole judge of the necessity or expediency of changing the location, etc. It has no power to change the location whenever it shall decide that it is necessary or expedient, but only when the necessity, in point of fact, exists. *Easton and Amboy R. R. Co. v. Inhabitants of Greenwich*, 25 N. J. Eq., 565. 1874.

669. Change of grade; abutting property. The lowering by a railway company of a highway grade, in order to adjust such grade to that of its track laid across the highway, is a taking of the property of the owners of lots abutting on such highway, for which, and for the consequent injury to such lots, the company must make compensation, although the track itself does not encroach upon that part of the highway of which the fee is in the lot owners. §§ 1828, 1836, R. S., are held to be applicable to such a case. *Buchner v. Chicago, Milwaukee and Northwestern R'y Co.*, 56 Wis., 403. 1882.

670. — After the grade of a highway has been so changed, an injunction will not be granted at the suit of a lot owner whose land, though injured by the change, is not actually encroached upon by the track, either to restrain the company from running its trains or from graveling or repairing the highway, or to compel the restoration of the highway to its original grade. *Id.*

671. — Although the directions by § 29 of defendant's act, as to the finding by the jury, applied in terms to compensation for such land only as should be "taken," and to the ulterior damage consequent upon such taking, yet held that the clause extended also to a case where the land of a party had not

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been "taken," but had been "injuriously affected" by the lowering of a road in front of such land, the access to which was thereby impeded. *Regina v. Eastern Counties R'y Co.*, 1 Gale & Davison (Queen's Bench), 589. 1841.

672. — The statute confers no authority upon any company to occupy any portion of a public highway for the purpose of improving the same by a change of its grade, or otherwise, to accommodate the public travel. The right of use and occupancy obtained by a compliance with its provisions is good only as against the public right of way, and furnishes no protection as against a claim by the owner of the fee of the highway for such private damage as he may sustain by reason of the appropriation thereof by the company. *Kaiser v. St. Paul, Stillwater and Taylor's Falls R. R. Co.*, 22 Minn., 149, 1875; 19 Amer. R'y Rep., 317.

673. Damages. The commissioners to appraise damages should regard the land in a highway as still forming a part of the parcels to which it had belonged, but subject to the easement of a highway, and should award as damages the difference between the market value of the whole property from which the railway was to be severed, before the taking, and its value after the taking, with the railway on the land taken. *Prospect Park and Coney Island R. R. Co., In re*, 13 Hun (N. Y.), 345. 1878.

674. — Where land has been taken for a highway, and the damages are all assessed back upon the adjoining land for benefits supposed to be derived from the opening of the highway, and thereafter the land so taken for a highway is sought to be subjected to the additional burden of having a railroad constructed thereon, the compensation for such additional use should be the same as if the highway had not been opened. *Prospect Park and Coney Island R. R. Co., In re*, 16 Hun (N. Y.), 261. 1878.

675. Ejectment. A highway was laid out over plaintiff's land, opened and used by the public. A railway company appropriated the road and laid its track upon it, without an assessment of damages under the general railway law. The company under the same law made a new road to supply its place, and the old road was abandoned without a

formal vacation. *Held*, that the owner of the soil of the original road might recover it in ejectment. *Phillips v. Dunkirk, Warren and Pittsburgh R. R. Co.*, 78 Pa. St. 177. 1875.

676. Footpath. The Railways Clauses Act, 1845, sec. 16, does not empower a railway company to divert a public footpath so as to place it upon land of which the company has not acquired the ownership. *Rungeley v. Midland R'y Co.*, Law Reports, 3 Chancery Appeal Cases, 306. 1868.

677. Impairment of streets by railway; liability of city. A city is not liable for change in the streets by a railway company, because the only duty resting upon it with regard to streets was imposed by the legislature, and was limited to the making of highways and maintaining them in a condition safe and convenient for the public use. It is not liable for a structure made necessary only by the fact of a railroad crossing the highway. The necessity grew properly out of the existence of the railroad and not out of the demands of public travel. *Burritt v. City of New Haven*, 42 Conn., 174. 1875.

678. Legislative control. The legislature may authorize building a railroad on a public road. *Danville, Hazleton and Wilkesbarre R. R. Co. v. Commonwealth*, 73 Pa. St., 29. 1873.

679. — When the legislature has located a railroad on an avenue or highway, the necessity of notice and agreement with the commissioners of highways is disposed of. *Prospect Park and Coney Island R. R. Co., In re*, 8 Hun (N. Y.), 30. 1876.

680. Obstruction; loss of trade to shopkeepers. Loss of trade, occasioned by the obstruction of a highway during the execution of the works of a railway company, is an injurious affecting of the tradesman's interest in his premises, which entitles him to compensation, under s. 68 of the Lands Clauses Consolidation Act, 1845. *Senior v. Metropolitan R'y Co.*, 2 Hurlstone & Coltman (Exchequer), 258, 1863; *Cameron v. Charing Cross R'y Co.*, 16 Common Bench (N. S.), 430; 111 E. C. L., 430, 1864; *Wood v. Stourbridge R'y Co.*, 16 Common Bench (N. S.), 222; 111 E. C. L., 221, 1864.

681. — Declaration stated that the defendant, under the powers of its act, took a

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portion of a highway from L. to W., and constructed the railway across it, and a deviation road and bridge over the railway, and by the execution of the railway and works houses of the plaintiff were injuriously affected; and set out proceedings in an arbitration under the Lands Clauses Consolidation Act, 1845, by which the umpire appointed by the arbitrators awarded compensation to the plaintiff. Plea, setting out the form of the appointment of the arbitrator on the part of the defendant, and the award, which recited the notice of the plaintiff to the defendant, that, by the execution of the railway and works, it had injuriously affected certain houses of which the plaintiff was lessee, being four houses on the highway, and eight other houses which, at the time of the execution of the works, were in the course of erection for the purpose of being used as dwelling-houses, fronting a new road running at right angles to the highway, and found that, by reason of the obstruction of the highway, by the construction of the railway across the same, the access to the houses of the plaintiff was, notwithstanding the substitution of the deviation road, rendered less convenient for the occupiers, and many persons would be prevented from passing the same, and the houses had thereby been rendered less suitable for being used and occupied as shops, and their value had been greatly diminished. On demurrer, held by this court, and affirmed by the exchequer chamber, that the houses of the plaintiff were injuriously affected within the Lands Clauses Consolidation Act, 1845, 8 and 9 Vict., c. 18, s. 68, and the Railways Clauses Consolidation Act, 8 and 9 Vict., c. 20, s. 6, and therefore the plaintiff was entitled to compensation. *Chamberlain v. West End of London R'y Co.*, 2 Best & Smith, 605; 110 E. C. L., 604. 1862.

682. — narrowing highway. The plaintiff was possessed of a house fronting on a public highway. The defendant, a railway company, under the powers conferred upon it by its special act, erected an embankment on a portion of a highway opposite to the plaintiff's house, thereby narrowing the road from fifty to thirty-three feet, and thus, according to the evidence, materially dimin-

ishing the value of the house for selling or letting, and obstructing the access of light and air to it; *held*, that this was such a permanent injury to the estate of the plaintiff in the premises as to entitle him to compensation under the Lands Clauses Consolidation Act, and Railways Clauses Consolidation Act, 1845. *Beckett v. Midland R'y Co.*, Law Reports, 3 Common Pleas Cases, 82. 1867. But see *Beckett v. Midland R'y Co.*, Law Reports, 1 Common Pleas Cases, 241. 1866.

683. Right to use for railway. A railway corporation has no greater right to occupy land than an individual, except so far as the right is conferred by statute, and it would be responsible for damages for the occupation. *Phillips v. Dunkirk, Warren and Pittsburgh R. R. Co.*, 78 Pa. St., 177. 1875.

3. Parks.

684. Abutting owners. The owner of lands merely cornering upon a park has no such easement in the park as will entitle him to complain of the use of such park for a railway station. *Greene v. New York Central and Hudson River R. R. Co.*, 12 Abbott's New Cases (N. Y.), 124. 1883.

685. Authority to condemn a park. A park, acquired for public use under an act of the legislature, cannot be taken for railway purposes without explicit statutory authority. *New York and Brighton Beach R. R. Co., In re*, 20 Hun (N. Y.), 201. 1880.

686. Common. Where the city authorities of Columbus gave to the Mobile and Girard R. R. Co. a certain tract of ground in a common for the purpose of a depot and yard, etc., necessary for its change of terminus from Girard, in Alabama, to Columbus in Georgia, on its invitation or demand, in view of the Columbus subscription of stock therein, and where the franchise to move into Georgia was authorized by an act of the general assembly of Georgia, empowering the Alabama line to connect with the Georgia Southwestern at Columbus, such use of the common by the city authorities, tending, in their judgment, to its commercial prosperity, was not inconsistent with the great purpose of the grant of the common to the town for the uses for which it was dedicated, and such buildings as are nec-

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essary for the depot and appurtenances were not included in the restrictions then imposed in respect to houses, buildings, etc., in the original acts of dedication. *Crawford v. Mobile and Girard R. R. Co.*, 67 Ga., 405, 1881.

687. Concourse. A railway company cannot condemn for railway and depot purposes a part of a park and concourse road, which has been laid out and improved by the park commissioners. *New York and Brighton Beach R'y Co., In re*, 20 Hun (N. Y.), 201, 1880.

688. Depots. In suit brought by plaintiff as owner of the fee since 1874, of premises situated on the northwesterly corner of Hudson and Laight streets in the city of New York, to recover damages sustained by reason of the closing of St. John's Park, the erection of a freight depot thereon, the construction and continued existence of a steam railway through Hudson street, the operation of a railway and the manner of its operation, *held*, that the plaintiff has no claim by reason of the discontinuance of the park or square or the erection or the mere continuance of a freight depot thereon. *Greene v. New York Central and Hudson River R. R. Co.*, 65 Howard's Practice (N. Y.), 154, 1883.

689. Public squares. Where public squares are used as highways, abutting owners acquire such an easement therein as will entitle them to enjoin the use thereof without compensation by a railway corporation. *Pratt v. Buffalo City R'y Co.*, 19 Hun (N. Y.), 30, 1879.

690. — The facts of this case considered, and *held*, that the county of Blue Earth acquired, as occupant under its deed of conveyance from the judge who entered the town-site of Mankato, as trustee, pursuant to the provisions of the act of congress (Town Site Act), an absolute and unlimited estate in fee simple of "Court House Square," in Mankato, and not a mere limited and special interest, charged with a public trust, under a dedication thereof to public uses by the persons who extended the town plat of Mankato in 1852; that the county being thus the owner in fee with the power to alienate, the decrease in the value of the entire tract, caused by the taking of

a part thereof by the defendant for the purposes of its road, was the measure of damages or compensation which the county was entitled to recover. *County of Blue Earth v. St. Paul and Sioux City R. R. Co.*, 28 Minn., 503, 1881; 10 Amer. & Eng. R. R. Cases, 209.

691. — A railway company was, by an act of the legislature, authorized to construct and operate a railway in a city, "in, over and across and along any and all the avenues, streets, public grounds, squares and alleys" of the city. Under this power, the company claimed the right to construct and operate its road across a public square which had been dedicated by plat to the city. It appeared that city lots had been sold with reference to such square, and around it, which had been improved, the value of which was enhanced on account of the square, and that the city had beautified and adorned the same. The city filed a bill in chancery to prevent the company from appropriating the same for railroad purposes. *Held*, that the railway company should be perpetually enjoined from all attempts to lay down the track of its road through or across the inclosed public square, reversing the decree below. *City of Jacksonville v. Jacksonville R'y Co.*, 67 Ill., 540, 1873.

692. — dedication. Where an owner of land makes and files a map thereof, on which streets and public squares are designated, and thereafter sells lots with reference thereto, the purchasers of said lots, where the public squares have subsequently been used as highways, acquire such an easement therein as to authorize the issuing of an injunction, on their application, restraining a railroad from laying its track therein without compensation made to them therefor. *Pratt v. Buffalo City R'y Co.*, 19 Hun (N. Y.), 30, 1879.

VIII. TAKING LAND FOR DEPOTS AND OTHER BUILDINGS.

693. Additional land; evidence. Where a proceeding was commenced to take additional land, evidence that since the appellant's road was built the place of its junction

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with other lines, as well as at the junction of the switch with them, is almost constantly obstructed by engines, cars and smoke, upon it and the other roads, was held admissible. *Union R. R. Transfer and Stockyard Co. v. Moore*, 80 Ind., 458, 1881; 5 Amer. & Eng. R. R. Cases, 346.

694. Depot grounds. In the city of New York, depots for freight, cattle and live stock are within the purposes for which railroads are constructed; and the lands necessary therefor may be taken by proceedings under the right of eminent domain. *New York Central and Hudson River R. R. Co. v. Metropolitan Gas Light Co.*, 5 Hun (N. Y.), 201, 1875; *Same v. Same*, 63 N. Y., 326, 1875.

695. — A railway company under the power delegated to it by the railroad act, to acquire title to lands for the purposes of its incorporation, has, to a large extent, the right to determine the measure of its wants, and to fix upon the location of land to be appropriated, subject to the qualification that the purposes for which the land is to be taken are strictly within its charter. *Ib.*

696. — Such lands, therefore, and lands necessary to furnish proper, convenient and safe approaches thereto, may be acquired by such proceedings. *Ib.*

697. — A railway company has the right to take land for a station where the statute gives power to take lands for a "railway and works." *Cotter v. Midland R. R. Co.*, 2 Phillips (Eng. Ch.), 469. 1847.

698. Injunction; union depot; estoppel. Where a number of individuals in good faith attempted to organize a corporation for the purpose of building a union depot and several short lines of railway to connect such depot with various railroads in that vicinity, and to accomplish this purpose fully it was necessary to construct a railroad track across the corner of the plaintiff's premises, which premises were near the contemplated depot, and on which premises the plaintiff had a large hotel (the railroad track, however, not interfering with the hotel), and a map, with plans and profiles of said depot and railroad tracks, was duly placed in the county clerk's office, and the company commenced to build its depot and also commenced proceedings to obtain, under the right of eminent domain, a small piece of

the plaintiff's land over which the railroad track was to be constructed, and, after damages were assessed to the plaintiff in such condemnation proceedings, the plaintiff took an appeal from such assessment to the district court, and the defendants continued to construct their depot, expending many thousands of dollars thereon, and after the depot was nearly completed, and while the plaintiff's said appeal was still pending, the plaintiff commenced an action in equity to perpetually enjoin the defendants from ever constructing or using said contemplated railroad track across her premises. *Held*, under the circumstances of this case, that the plaintiff could not maintain the action, even though the defendants might not be a railroad corporation, or any corporation, but only a copartnership or individuals. *Reisner v. Strong*, 24 Kans., 410, 1880; 10 Amer. & Eng. R. R. Cases, 335

699. Site for work-shop. Whether work-shops for repairing and safely keeping the cars and locomotives of a railroad are necessary appendages to a railroad, and whether land sought to be condemned as a site for such work-shop is really needed for that purpose, are questions of fact on which issues may be joined, to be decided at the trial. *Southern Pacific R. R. Co. v. Raymond*, 53 Cal., 223. 1878.

700. Statute. A statute authorized a railway company to take for a passenger station land occupied by another railway. The by-laws of the company provided that the directors might purchase all real estate they deemed necessary for the railway, and exercise all powers granted to the company by its charter for the purpose of locating, constructing and completing the line and all other powers necessary and proper to carry out the objects of the company and the purposes of the charter. *Held*, that an acceptance of the statute by the stockholders was not necessary to authorize the directors to take the land. *Eastern R. R. Co. v. Boston and Maine R. R. Co.*, 111 Mass., 125. 1872.

701. Yards. By a railway act it was provided that if the company should desire to purchase a part of any house, garden, yard, warehouse, building or manufactory, and the owner should signify his desire to sell the whole of such house, yard, garden, etc.,

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he should not be compelled to sell a part only. *Held*, that a yard for bonding foreign timber in which there were a deal shed and two buildings containing saw pits, was not a yard within the meaning of the act. *Stone v. Commercial R. R. Co.*, 9 Simons (Eng. Ch.), 621. 1839.

IX. CONDEMNATION OF CORPORATE PROPERTY.

702. Crossings of railways. A mandatory injunction was issued in effect compelling a railroad company to pull down walls which it had built in order to prevent another railway company from crossing its line. *Great North of England, etc., R. R. Co. v. Clarence R. R. Co.*, 1 Collyer (Eng. Ch.), 507, 1844; *Same v. Same*, 3 Eng. R. R. & Canal Cases, 605, 1845.

703. — One railway company has no right without compensation to take property of another for the construction of its road; the property rights of a railway company in its right of way are protected by the same restrictions against appropriation by any other company for railroad purposes or other public uses as is afforded by the constitution and laws in the case of the private property of an individual. *Grand Rapids, Newaygo, etc., R. R. Co. v. Grand Rapids and Indiana R. R. Co.*, 35 Mich., 265, 1877; 15 Amer. R'y Rep., 317.

704. — Where the right of way is sought across or under the track of another railway company, or through its embankment, the latter company is entitled to receive such sum of money as will enable it to place its track over the point at which the ground is condemned in as safe a condition, as nearly as the nature of the case will admit, as it was before the making of the excavation. The damages should cover additional expense for watchmen when travel over the excavation is rendered hazardous; the expense of building and maintaining permanent abutments, for retaining the walls; losses incident to rebuilding or repairing; and contingent losses by fire or otherwise; and if any other kind of bridge over the excavation is more safe than a wooden one, the compensation should be sufficient to

enable the company to erect and maintain perpetually a bridge of that degree of safety, and likewise to reimburse it for all inconvenience and expense incident to the erection and maintenance of such a bridge. *St. Louis, Jacksonville and Chicago R. R. Co. v. Springfield and Northwestern R. R. Co.*, 98 Ill., 274, 1880; 2 Amer. & Eng. R. R. Cases, 487.

705. — bridge; scaffolding. In making a railway crossing, the company may, in building a bridge, place temporary scaffolding upon the land of the railway company over whose line the crossing is to be made. *Great North of England R'y Co. v. Clarence R'y Co.*, 3 Eng. R. R. & Canal Cases, 605, 1845; *Great North of England, etc., R. R. Co. v. Clarence R. R. Co.*, 1 Collyer (Eng. Ch.), 507, 1844.

706. — Where a railway company was authorized by an act to build its railway to a certain point, and no compulsory power was clearly given for crossing another railway, that had to be crossed to reach the point named in the act, it was held that the crossing could not be effected without consent, even although the failure to obtain consent would prevent the construction of the railway. *Clarence R'y Co. v. Great North of England R'y Co.*, 4 Adolphus & Ellis (N. S.), 46; 45 E. C. L., 46. 1844.

707. Power to take land of one corporation by another. Land already acquired by one railroad corporation, and held for the necessary enjoyment of its essential franchises, cannot be condemned and appropriated in the usual way by another corporation. *Lake Shore and Michigan Southern R'y Co. v. New York, Chicago and St. Louis R'y Co.*, 8 Federal Reporter, 858, 1881; *Cleveland and Pittsburgh R. R. Co., In re*, 2 Pittsburgh, 348, 1862.

708. — One horse railway company has no right, by proceedings of condemnation, to take for its joint use a part of a previously constructed railway of another company in successful operation. A court of equity will enjoin such a proceeding. *Central City Horse R'y Co. v. Fort Clark Horse R'y Co.*, 81 Ill., 523. 1876.

709. — Land, acquired by one railroad company under a legislative grant of the right of eminent domain and unnecessary

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for the exercise of its franchise or the discharge of its duties, is liable to be taken under the law of eminent domain for the use of another railroad company. *North Carolina R. R. Co. v. Carolina Central R'y Co.*, 83 N. C., 489, 1880; *Peoria, Pekin and Jacksonville R. R. Co. v. Peoria and Springfield R. R. Co.*, 66 Ill., 174, 1872.

710. — Although a right of way of a railroad company is limited to the use of the land for the construction and operation of its railroad, this limited use is property, and any interference with it at any point, by condemnation for another railroad, whereby the use is impaired, may be considered in connection with and as affecting its use as an entirety. *Lake Shore and Michigan Southern R'y Co. v. Chicago and Western Indiana R. R. Co.*, 100 Ill., 21, 1881; 2 Amer. & Eng. R. R. Cases, 454.

711. — It is not competent to a later railway company, in the absence of a power for that purpose, given in express terms by its special act, to acquire compulsorily the soil and freehold in lands already vested in, and actually used by, an earlier railway company for the purposes of its undertaking; although the land lies within the "limits of deviation" shown by the parliamentary plans of the later company, and its special act confers upon it the usual general power to enter upon and take such of the lands delineated upon the plans as may be required for the purposes of its railway. *Dublin and Drogheda R'y Co. v. Navan and Kingscourt R'y Co.*, 5 Irish Reports (Equity), 393. 1871.

712. — The condemnation of lands owned by one railroad company — not used for railroad purposes — by another company for use in the construction of a railroad will be unavailable to condemn the franchise of the former. All that will be acquired will be a right of way, and, incidentally, the power to cross the track of the former where the routes of the two roads cross each other. *State v. Easton and Amboy R. R. Co.*, 36 N. J. Law, 181, 1873; 12 Amer. R'y Rep., 417.

713. — In a proceeding to condemn a part of the property of one railroad for the use of another, leading from other and different points and regions of country, the use is not the same as that of the prior road, but is

rather a joint or co-operative use, to be exercised and enjoyed by both railroad companies, so as to furnish the public an additional line of travel and transportation, and may be properly granted by legislative action. *Lake Shore and Michigan Southern R'y Co. v. Chicago and Western Indiana R. R. Co.*, 97 Ill., 506, 1881; 2 Amer. & Eng. R. R. Cases, 440.

714. — In a proceeding to condemn a right of way by one railroad company across the right of way of another company upon certain blocks, the company whose franchise is sought to be taken in part will not be restricted in its compensation to the damage to its right of way or railroad property within the blocks. In such case it will be competent for the defendant to recover for damages it would be subjected to by placing obstructions upon its right of way, in maintaining and operating the proposed new road, whereby access to different parts of its line would be interfered with, and its capacity for the transaction of business destroyed or impaired. *Lake Shore and Michigan Southern R'y Co. v. Chicago and Western Indiana R. R. Co.*, 100 Ill., 21, 1881; 2 Amer. & Eng. R. R. Cases, 454.

715. — Where land has no market value from the fact of its being used as a right of way for a railroad, and devoted to a special use of making railroad transfers, estimates of its value with reference to such use, by those competent to speak in that regard, should be received on the question of compensation to be paid for its condemnation for the use of another railroad company for its right of way, and it is error to refuse such evidence. *Ib.*

716. — constitutional law. A statute authorized a railway company to take for its purposes land occupied by another railway company, and provided that all general laws relating to the taking of land for such purposes should govern the proceedings. *Held*, that the statute was constitutional, although the company whose land was taken was thereby deprived of part of its business. *Eastern R. R. Co. v. Boston and Maine R. R. Co.*, 111 Mass., 125. 1872.

717. — If the legislature has the power to repeal the statute under which a company was organized, it can charter a new one,

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and confer the same powers on it as the former possessed; and, so far as the property or franchises of the old company are necessary to the public use, it can authorize the new one to take them, on making due compensation therefor. *Greenwood v. Freight Co.*, 105 U. S., 13, 1881; 9 Amer. & Eng. R. R. Cases, 526.

718. — A statute which repeals an act of incorporation, and at the same time creates a new one with similar powers, the use of which requires the exercise of the right of eminent domain, is not in conflict with the constitution of the United States, if it provides for compensation for the property of the extinct corporation so taken by the new one. *Ib.*

719. **Proceedings.** If, in an application by one railway company, made in the district court, to condemn the land of another railway company, the defendant, by way of cross-complaint, sets up facts which would be a legal defense to the petition, upon the hearing on the merits, such facts do not constitute a ground for an injunction restraining the plaintiff from entering upon or taking possession of the property sought to be condemned. *California Pacific R. R. Co. v. Central Pacific R. R. Co.*, 47 Cal., 549, 1874; 7 Amer. R'y Rep., 536.

720. — Any facts in such case which show that the petitioner had no power to condemn the lands of the defendant, or that the lands are not necessary and proper for the purposes named in the petition, can be used on the trial, on the day set for the appointment of commissioners, and there is no necessity for an injunction so far as these facts are concerned. *Ib.*

721. — The special term has power to decide as to whether or not the city of Buffalo may lawfully take railway property for the corporate uses of that city. *Buffalo, City of, In re*, 64 N. Y., 547. 1876.

722. **Railway in hands of receiver.** The fact that the property of an insolvent railway company is under the charge of a court does not in anywise secure to the company protection against lawful competition in its business, or secure for its property immunity against liability to lawful condemnation. *Central R. R. Co. of New Jersey v. Pennsylvania R. R. Co.*, 31 N. J. Eq., 475. 1879.

723. **Taking of railway land for street or highway.** Lands taken for depot purposes cannot afterwards be condemned for highway purposes. *Prospect Park and Coney Island R. R. Co. v. Williamson*, 91 N. Y., 552, 1883; reversing *Same v. Same*, 24 Hun (N. Y.), 216, 1881.

724. — A general statutory power, conferred by a city charter, to take lands for public streets, will not authorize the city to take land already lawfully appropriated for a depot building by a corporation duly empowered to acquire lands for such purposes. *St. Paul Union Depot Co. v. City of St. Paul*, 30 Minn., 359. 1883.

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725. **Homestead.** A right of way perfected by a railway corporation under U. S. Rev. Stat., § 2477, cannot be defeated by mere relation back from a homesteader's subsequent patent to the time of his antecedent entry on the land. *Flint and Pere Marquette R'y Co. v. Gordon*, 41 Mich., 420. 1879.

726. — The owner of such homestead is entitled to compensation for improvements made on land over which a railway company has afterwards obtained the right of way. *Ib.*

727. **Property of state; cannot be condemned by a city.** The state of Georgia purchased a tract of land for the purpose of the erection of car shops and other buildings necessary to the successful operation of the Western and Atlantic Railroad. The mayor and council of the city of Atlanta, under the general authority of their charter to lay out streets, etc., and sec. 965 of the Code, sought to appropriate a portion of said land for a street. *Held*, that such contemplated action was properly enjoined. *Mayor, etc., of Atlanta v. Central R. R. and Banking Co.*, 53 Ga., 120. 1874.

728. **Railway construction.** Railways, though not strictly "highways," are highways within the meaning of U. S. Rev. Stat., § 2477, which grants the right of way for the construction of highways across the public lands. *Flint and Pere Marquette R. R. Co. v. Gordon*, 41 Mich., 420. 1879.

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729. — The construction of its road under a public act granting the right of way across the public lands would be both a sufficient and an equitable consideration for the right of way. *Ib.*

XI. EVIDENCE.

730. Award as evidence. The charter of a railway company provided for the appointment of commissioners to estimate the land damage attendant on the lay-out of the track, and provided that parties interested who were dissatisfied with the award of the commissioners might apply for a jury trial; such an application to be heard under the direction of the court "in the same manner that appeals are heard." *Held*, that the award of the commissioners was not admissible evidence to the jury at the trial of such an application. *Ennis v. Wood River Branch R. R. Co.*, 12 R. I., 73. 1878.

731. Corporate power. A railway company sought to condemn a right of way under the Eminent Domain Act. As proof of its corporate existence, the company gave in evidence the special charter under which it claimed to have been organized, and also showed user of the franchises granted by the charter. This was held sufficient to authorize the proceeding. *Peoria and Pekin Union R'y Co. v. Peoria and Farmington R'y Co.*, 105 Ill., 110, 1882; 10 Amer. & Eng. R. R. Cases, 129.

732. — The declarations of the owner of the land as to its value, his offer of it at a fixed price, and sale of a portion of it, are evidence on the question of damages, as constituting his estimate of its value as against the land owner. *East Brandywine and Waynesburg R. R. Co. v. Ranck*, 78 Pa. St., 454. 1875.

733. — Where the land owner died while the proceedings were pending, and a trustee was substituted as a party, under an agreement that no rights of the defendant should be prejudiced thereby, it was held that the agreements, declarations and admissions of the deceased were competent evidence as against the trustee so substituted. *Power v. Savannah, Skidaway, etc., R. R. Co.*, 56 Ga., 471. 1876.

734. Description of premises. The jury are entitled to know the amount of land taken; how it affects the remainder; how it divides the farm. in case of farm lands, as to water, pasturage, improvements, etc.; and also the danger and inconvenience of the perpetual use of the track for moving trains over, and what injury, if any, to stock kept on the farm, and many other things connected therewith, better understood and better to be explained by persons of large experience in such matters; and, as a general rule, any evidence that tends to illustrate these various subjects is admissible. *Rockford, Rock Island and St. Louis R. R. Co. v. McKinley*, 64 Ill., 338. 1872.

735. — Evidence relating to the manner in which the railway affected a farm, how it affected a hog pasture and a stream of water, and access thereto, the size of the stream, the value of the farm and of the farms in that neighborhood, the height of the grade and the depth of the ditches, etc., was properly admitted. *Dreher v. I. S. W. R. R. Co.*, 59 Ia., 599. 1882.

736. Elevator. In a proceeding to condemn a right of way over a strip of land between an elevator and a river, the plans by which the company proposes to build the road, as showing the track is to be laid upon trestles elevated so high as not to interfere with the transfer of grain from the elevator to the river in chutes or conductors, are admissible in evidence on the question of damages and compensation claimed. *Peoria and Pekin Union R'y Co. v. Peoria and Farmington R'y Co.*, 105 Ill., 110, 1882; 10 Amer. & Eng. R. R. Cases, 129.

737. Embankments. It was held proper in a proceeding to appropriate a railroad right of way, to ask a witness to "state how embankments affect communication with different sides of a railroad." The question asks for a fact rather than an opinion. *Smalley v. Iowa Pacific R. R. Co.*, 36 Ia., 571. 1873.

738. Erroneous rulings on introduction of evidence. The award of the jury will not be set aside merely because of the admission of testimony that would not have been admissible under strict legal rules, unless it appears to have caused substantial injustice. *De-troit Western Transit and Junction R. R.*

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Co. v. Crane, 50 Mich., 182; 10 Amer. & Eng. R. R. Cases, 502. 1883.

739. — Ten witnesses were called, who testified that they knew the value of the farm before and after the appropriation, and gave such values. Thereafter two witnesses were called, who stated that they did not know the market value. They were then asked "to state if they knew the per cent. difference, if any there was, in the value of the farm before the taking and after the right of way was taken." This question was objected to, but the witness testified as to the per cent. difference. None of the ten witnesses, who had testified as to absolute values, disclosed in their testimony a less per cent. difference than did these two witnesses; and after all the testimony was received the jury were sent out to view the farm; and their verdict was less than two-thirds of the smallest difference in values before and after the appropriation was disclosed by any of the plaintiff's witnesses. *Held*, under the circumstances, that the admission of the testimony of these two witnesses, if error it be, was not sufficient to justify a reversal of the judgment rendered in favor of the land owner. *Leavenworth, Topeka and South-western R'y Co. v. Paul*, 28 Kans., 816, 1882; 10 Amer. & Eng. R. R. Cases, 490.

740. — When commissioners reject legal and competent evidence, or mistake the principle that should govern their appraisalment, their award will be set aside. *New York Central and Hudson River R. R. Co., In re*, 15 Hun (N. Y.), 63. 1878.

741. Examination of witnesses. It is proper to permit a witness for the railway company, who has given his opinion as to the effect of the railway on the market value of the plaintiff's land, to be cross-examined as to the effect upon such value of the probability or possibility that horses might be frightened or fire communicated by passing engines and trains. *Wooster v. Sugar River Valley R. R. Co.*, 57 Wis., 311, 1883; 10 Amer. & Eng. R. R. Cases, 499.

742. — Where a witness for the land owner has been examined in chief, generally, as to the land, the material it contains, value, etc., it is error to sustain an objection to a question, on cross-examination of such witness, requiring him to state the value of

the land, including all the materials in it, as it lies, how much it is worth per acre in the market, though said witness may have answered such question on his examination in chief. *Pittsburgh, Ft. Wayne and Chicago R'y Co. v. Swinney*, 59 Ind., 100. 1877.

743. — It is improper to ask a witness how much less a farm would be worth by reason of the construction of a railway across it. This would be an indirect mode of obtaining the opinion of the witness as to the amount of damages resulting from the construction of the road. *Baltimore, Pittsburg and Chicago R'y Co. v. Johnson*, 59 Ind., 247. 1877.

744. — It is not admissible to ask a witness at what price he had offered for sale adjoining property. *Montclair R'y Co. v. Benson*, 36 N. J. Law, 557. 1873.

745. — A witness on cross-examination stated at length the grounds for his estimate of the diminished value of the premises, some of which were legitimate and proper, while it was claimed others were not. *Held*, that a refusal to exclude all was not erroneous, as the defendant might, by asking it, have had the court instruct the jury as to their proper effect on the testimony of the witness and his estimate of damages. *Smalley v. Iowa Pacific R. R. Co.*, 36 Ia., 571. 1873.

746. — It is the province of the court, and not of the jury, to exclude improper testimony. *Karnes v. Bellville and Eldorado R. R. Co.*, 89 Ill., 269. 1878.

747. — Where the question asked was much longer than necessary, but inquired, in substance, how much less the land was worth after than before the appropriation, excluding benefits, it was held not erroneous. *Britton v. D. M., O. and S. R. R. Co.*, 59 Ia., 540, 1882; 10 Amer. & Eng. R. R. Cases, 412.

748. Inconvenience. Evidence as to noise of passing trains, and as to the inconvenience and interruption to the use of the property, resulting from the ordinary operation of defendant's road, *held* competent, as bearing upon the question of the diminished value of the property caused by the construction of the road across the same. *County of Blue Earth v. St. Paul and Sioux City R. R. Co.*, 28 Minn., 503, 1881; 10 Amer. & Eng. R. R. Cases, 209.

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749. Killing stock. Evidence as to the danger of killing stock, and the danger of the escape of fire by reason of the construction of the road, is proper to be considered by the jury. Such damages are as much proximate as those growing out of the danger and inconvenience of crossing the road from one part of the farm to another. *St. Louis and Southeastern R'y Co. v. Teters*, 68 Ill., 144, 1873.

750. Limiting number of witnesses. The court has a right to impose a reasonable limit upon the number of witnesses which the parties may call upon the question of the value of the premises taken. *Sheldon v. Minneapolis and St. Louis R'y Co.*, 29 Minn., 318, 1882; *Everett v. Union Pacific R'y Co.*, 59 Ia., 243, 1882; 10 Amer. & Eng. R. R. Cases, 203.

751. Opinions. The evidence of witnesses as to the value of the premises immediately before the condemnation, and the value of the several parcels immediately thereafter, is competent to be considered by the jury. *Indianapolis, Decatur and Springfield R. R. Co. v. Pugh*, 85 Ind., 279, 1882; 10 Amer. & Eng. R. R. Cases, 196; *Curtis v. St. Paul, Stillwater and Taylor's Falls R. R. Co.*, 20 Minn., 28, 1873; *Colwill v. St. Paul and Chicago R. R. Co.*, 19 ib., 283, 1872; *Sherwood v. Same*, 21 ib., 127, 1875; *Sherman v. St. Paul, Minneapolis and Manitoba R'y Co.*, 30 Minn., 227, 1883; 10 Amer. & Eng. R. R. Cases, 193; *Snow v. Boston and Maine R. R. Co.*, 65 Me., 230, 1875; 10 Amer. R'y Rep., 27; *Republican Valley R. R. Co. v. Arnold*, 13 Neb., 485, 1882; 10 Amer. & Eng. R. R. Cases, 219.

752. — It is competent for a witness who has a personal knowledge of the land, and who possesses the necessary information to enable him to form a proper estimate of its value, to state his opinion as to the value of the residue of the land after the appropriation; and it is not necessary that he should know of sales of such tracts of land. *Frankfort and Kokomo R. R. Co. v. Windsor*, 51 Ind., 238, 1875.

753. — Opinions of witnesses as to damages should be carefully weighed, not blindly followed. *McReynolds v. Baltimore and Ohio R'y Co.*, 106 Ill., 152, 1883.

754. — A farmer may, as an expert, give

his estimate of the value as farm land of realty so condemned, but his opinion generally of the value of such realty is inadmissible, since the market value of a farm may be much greater than its agricultural value. *Brown v. Providence and Springfield R. R. Co.*, 12 R. I., 238, 1878; *Kansas Central R'y Co. v. Allen*, 24 Kans., 33, 1880; 5 Amer. & Eng. R. R. Cases, 362; *Same v. Ireland*, 24 Kans., 35.

755. — A witness testified that he knew the property in question "by sight." He had lived for twenty-two years about three miles from the city of Stillwater. The property had been occupied as a tavern stand for about ten years, and lay between Stillwater and his residence. *Held*, that he was acquainted with the property within the rule that, when the value of property is in controversy, persons acquainted with it may state their opinion as to its value. *Lehmiche v. St. Paul, Stillwater and Taylor's Falls R. R. Co.*, 19 Minn., 464, 1873; 10 Amer. R'y Rep., 296.

756. — In an action for damages for the taking of part of plaintiff's block a witness for plaintiff, who had acted for several years as his agent in looking after the block, had paid taxes, given leases and collected rents thereon, received offers to purchase, and was personally acquainted with the block both before and after the taking, was competent to testify not only to the value of the strip taken, but also to the depreciation in value of the remainder of the block, by reason of the taking for railway purposes. *Diedrich v. Northwestern Union R'y Co.*, 47 Wis., 662, 1879.

757. — Where a railway company sought to condemn city lots with buildings thereon for the use of its road, it was held that, as lands and city lots have no standard value, it was right and necessary to take the opinions of witnesses, and to hear the facts upon which such opinions were founded, to enable the jury to fix the compensation to be awarded to the owners. *Lafayette, Bloomington and Mississippi R. R. Co. v. Winslow*, 66 Ill., 219, 1872.

758. — The owner of land taken for right of way by a railway company, having resided upon and improved it for several years, who swears that he knows what it is worth, is a

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competent witness on the question of its value. *Burlington and Missouri River R. R. Co. v. Schluntz*, 14 Neb., 421. 1883.

759. — Market value of land is not a question of science or skill upon which only an expert can give an opinion. *Pennsylvania and New York R. R., etc., Co. v. Bunnell*, 81 Pa. St., 414, 1876; 16 Amer. R'y Rep., 1.

760. — Persons of the neighborhood are presumed to have sufficient knowledge of the market value of the land. *Pennsylvania and New York R. R., etc., Co. v. Bunnell*, 81 Pa. St., 414, 1876; 16 Amer. R'y Rep., 1; *Burlington and Missouri River R. R. Co. v. Schluntz*, 14 Neb., 421, 1883.

761. — Though the knowledge of a witness of the value of lands in the neighborhood may have rested solely upon a few purchases made by the railway company, and from no other sales or purchases in the real estate market, he has some knowledge upon which to base an opinion, and the value of that opinion is for the jury. *Pittsburgh and Lake Erie R. R. Co. v. Robinson*, 95 Pa. St., 426, 1880; 1 Amer. & Eng. R. R. Cases, 468.

762. — The opinions of witnesses as to the amount of damages sustained by a party are not competent evidence. The witnesses must testify as to facts, and the court or jury must determine the amount of damages from the facts proved. *Baltimore, Pittsburgh and Chicago R'y Co. v. Johnson*, 50 Ind., 247, 1877; *Baltimore, Pittsburgh and Chicago R'y Co. v. Johnson*, 59 Ind., 480, 1877; *Same v. Stoner*, ib., 579, 1877; *Brown v. Providence and Springfield R. R. Co.*, 12 R. I., 238, 1878.

763. — The owner of the land taken was asked how much, in his opinion, the railroad had depreciated the value of his farm as a whole. *Held*, that the question referred to the farm as owned by him at the time of the trial, exclusive of the land taken, and was proper. *Wooster v. Sugar River Valley R. R. Co.*, 57 Wis., 811, 1883; 10 Amer. & Eng. R. R. Cases, 499.

764. — Witnesses should not be permitted to give their opinions before the jury of the value of the land, subject to the right of way. This should be left to the jury to ascertain from facts affecting the value, and proper to be considered, uninfluenced by the

opinion of others. *Fremont, Elkhorn and Missouri Valley R. R. Co. v. Whalen*, 11 Neb., 585, 1881; 5 Amer. & Eng. R. R. Cases, 364.

765. — Witnesses should not be permitted to give their opinions as to separate items of damage. *New York, West Shore and Buffalo R'y Co., In re*, 29 Hun (N. Y.), 609. 1883.

766. Pleadings. The evidence will be confined to the particular lands described in the petition, unless the defendant files a cross-petition setting up that he is the owner of ground not described in the original petition, which will be damaged, and makes claim to have the damages thereto likewise assessed. *Chicago and Iowa R. R. Co. v. Hopkins*, 90 Ill., 316. 1878.

767. Practice. Where land, taken for railway purposes, is appraised by commissioners, it is the duty of the circuit court, on exceptions filed, to hear testimony, if offered, as to the adequacy of the compensation awarded. And where such testimony is presented, the refusal of the lower court to consider it will work a reversal of the cause. *St. Louis and Florissant R. R. Co. v. Almeroth*, 62 Mo., 343. 1876.

768. — The commissioners may on their own motion take testimony in relation to damages. *St. Paul and Sioux City R. R. Co. v. Covell*, 2 Dak., 483. 1881.

769. Proceedings; right to examine witnesses. The land owner expressly waived the right to produce and examine witnesses, and consented with the counsel for the railroad company that the commissioners might act upon a view of the premises, which they proceeded to do and make their award. On motion to set aside the award it appeared from the affidavit of the land owner that in declining to produce witnesses he acted upon a misapprehension as to his legal rights, founded upon erroneous information derived by him from another person, to the effect that he would be entitled to rehearing, as a matter of right, before other commissioners, and that on such rehearing he could examine witnesses. *Held*, that the land owner is entitled to the relief asked for by him, on the ground that he was misled to his prejudice by erroneous information as to his legal rights. *New York, Lackawanna and Western R'y*

Evidence.

Co., *In re*, 63 Howard's Practice (N. Y.), 265. 1882.

770. Profits of land. In a proceeding to condemn land for a public use, the fact to be ascertained is the value of the land at the time of the taking; and to arrive at this value, testimony to prove the annual net profits derived from the land for a particular use is not admissible. *Stockton and Copperopolis R. R. Co. v. Galgiani*, 49 Cal., 189, 1874; 7 Amer. R'y Rep., 263.

771. Records. The clerk of the county commissioners, and not their chairman, is the proper officer to attest transcripts of their records; and when an improperly certified copy of such a record has been admitted in evidence at a trial before a sheriff's jury, the production of a properly certified copy at the argument of a question of law in the supreme court does not cure the defect. *Rich v. Lancaster R. R. Co.*, 114 Mass., 514. 1874.

772. Sales of other land. Upon a jury trial upon a land owner's appeal to the district court, the applicant called a witness who testified to sales of other lands sold by him from time to time in the vicinity of the land sought to be condemned, and also gave testimony with reference to the similarity of situation and character of the lands so sold to the land sought to be condemned. *Held*, that evidence of the prices obtained for the lots so sold by the witness, and of the average price obtained for the lots so sold, was incompetent and inadmissible. *Stinson v. Chicago, St. Paul and Minneapolis R. R. Co.*, 27 Minn., 284. 1880.

773. — In a proceeding to condemn an entire lot in a city, evidence of the price per foot an adjoining tract had been sold for, and the price per foot at which other lots had been offered for sale, is competent if offered by the company as evidence in chief, but is not after the defendant has closed. In a proceeding to condemn land, where the petitioner closes his case and the land owner gives evidence of the value of the property sought to be taken, there is no error in refusing to allow the petitioner to prove the price at which an adjoining tract was sold, or at which other lots in the vicinity are offered for sale. Such evidence is in chief and not in rebuttal, and it is a matter of discretion

to open the case and let in proof which ought to have been given in chief. *Chicago and Western Indiana R. R. Co. v. Maroney*, 95 Ill., 179, 1880; 5 Amer. & Eng. R. R. Cases, 360.

774. — Evidence of the price for which land was actually sold after the location of a railway across it may be introduced by the company to prove its real value at that time, and as an admission of such value, on the part of the vendors, and such evidence is entitled to great weight as compared with the mere opinions of witnesses. *Watson v. Milwaukee and Madison R'y Co.*, 57 Wis., 332; 10 Amer. & Eng. R. R. Cases, 168. 1883.

775. — A point was: "To arrive at the value of plaintiff's land, the inquiry is what it would sell for at a fair sale in the market, without reference to its use for any particular purpose; the best evidence of market value is the price paid for land in that neighborhood, making allowance for difference in position and improvements." *Held*, that the point was properly refused. *Pittsburgh, Virginia and Charleston R. R. Co. v. Rose*, 74 Pa. St., 362, 1873; 6 Amer. R'y Rep., 343.

776. — Evidence that some land near by that in controversy was sold ten or twelve years before the trial and at a certain price is too remote to determine the value of the land in controversy at the time of its appropriation. *Everett v. Union Pacific R'y Co.*, 59 Ia., 243, 1882; 10 Amer. & Eng. R. R. Cases, 202.

777. — cross-examination. A witness who has been examined on behalf of the land owners to show that the land was suitable to be platted into village lots, and its probable value when so platted, may be cross-examined in regard to sales of lots in the vicinity, though some of such sales were made four or five years previous. The limits of such evidence is much within the discretion of the trial court. *Watson v. Milwaukee and Madison R'y Co.*, 57 Wis., 332; 10 Amer. & Eng. R. R. Cases, 168. 1883.

778. Sidings. It was error to refuse to permit a railway company to prove that a siding could be conveniently constructed upon the property of the plaintiffs, and to show how such construction might be made useful to the premises. *Pittsburgh and Lake*

Evidence.

Erie R. R. Co. v. Robinson, 95 Pa. St., 426, 1880; 1 Amer. & Eng. R. R. Cases, 468.

779. Timber. It appeared that there was upon the petitioner's remaining land chestnut timber suitable for ties. The respondent offered evidence that there would be a greater demand for such ties in the vicinity by reason of the construction of the railway; and also offered evidence "of a convenient place of delivery at a new depot of said railroad." There was evidence of a station of another line more accessible from the petitioner's woodland by the distance of one-third of a mile. The evidence offered was rejected. *Held*, that the respondent had no ground of exception. *Childs v. New Haven and Northampton Co.*, 133 Mass., 253. 1882.

780. Town plat. Where a town plat, not executed pursuant to the statute, is used to show the intention to dedicate to public use certain lands appearing on it, and other evidence of acts, declarations and circumstances — some tending to prove, and others to disprove, the existence of such an intention — is given, it is not for the court to determine the force and effect of the plat, but the whole question should be left to the jury. *Downer v. St. Paul and Chicago R'y Co.*, 23 Minn., 271. 1877.

781. Value. A witness who had testified fully as to the actual value of a block of ground both before and after the taking, was asked what a particular front of the block was worth before the road was constructed. *Held*, that there was no error in excluding the question. *Diedrich v. Northwestern Union R'y Co.*, 47 Wis., 662. 1879.

782. — The question on trial was the market value of two lots with a dwelling-house and other improvements thereon, in the city of Columbus, on March 30, 1880. *Held*, that testimony that on April 10, 1877, the said lots were bought by D., at administrator's sale, for seventy-five cents each, was erroneously admitted. *Dietrichs v. Lincoln and Northwestern R. R. Co.*, 12 Neb., 225. 1881.

783. — Upon an issue as to the value of real estate, evidence is not admissible to prove what other property in the vicinity has been offered at. *Lehmick v. St. Paul, Stillwater and Taylor's Falls R. R. Co.*, 19 Minn., 464, 1873; 10 Amer. R'y Rep., 296.

784. — A witness was properly allowed to be asked what another portion of the property was valuable for, and to answer that it would be valuable for building and residence purposes. *Colvill v. St. Paul and Chicago R'y Co.*, 19 Minn., 283. 1872.

785. — Proof of the value of the land to the railway company is not admissible. *Selma, Rome and Dalton R. R. Co. v. Keith*, 53 Ga., 178. 1874.

786. — On a trial before a jury on appeal, there is no inflexible rule which limits the period over which inquiry may be extended as to the market value of the lands taken. How long anterior or subsequent to the first appraisement the investigation may be carried must be left in a great measure to the sound discretion of the court. *Montclair R'y Co. v. Benson*, 36 N. J. Law, 557. 1873.

787. — The respondent being called as a witness in his own behalf was asked: "What was the farm worth at the time of the commencement of these proceedings in 1870, without the railroad being upon the farm, and what was its value at that time with the railroad upon the farm?" *Held*, proper. *St. Paul and Sioux City R'y Co. v. Murphy*, 19 Minn., 500, 1873; *Colvill v. St. Paul and Chicago R'y Co.*, 19 Minn., 283. 1872.

788. Verdict. Evidence held sufficient to sustain a verdict for damages. *Republican Valley R. R. Co. v. Boyse*, 14 Neb., 130, 1883; 10 Amer. & Eng. R. R. Cases, 191; *Brunswick and Albany R. R. Co. v. Toomer*, 61 Ga., 253, 1878.

789. — Evidence held insufficient to sustain the verdict. *Fremont, etc., R. R. Co. v. Ward*, 10 Amer. & Eng. R. R. Cases, 223; 11 Neb., 597. 1882.

790. View of the premises. Where, on appeal, the jury, under charge of an officer, examined the premises, it was error to instruct the jury that the testimony bearing upon the subject in controversy, and such reasonable deductions as were legitimately to be drawn from it, in connection with such facts as presented themselves in viewing the premises, constituted the only proper basis on which to rest their verdict. It is impossible to know what facts might present themselves to the jury upon the view of

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the premises. *Pittsburg, Ft. Wayne and Chicago R'y Co. v. Swinney*, 59 Ind., 100. 1877.

791. Watercourse. Upon the assessment of damages it appeared that the estate out of which the land was taken was a farm, and that the land taken was on the bank of a river. The bill of exceptions stated that a farmer who had lived many years in the vicinity, and had known of sales of land in the neighborhood, and was allowed without objection to testify as to the value of the land taken, and of the inconvenience resulting to a farmer from being deprived of access to the river, was asked what, in his opinion, was the damage to the remainder of the farm by the loss of the river bank, which was excluded; that the petitioner also claimed damages by reason of being excluded from the river bank for the purposes of fishing and from a fishing ground, but that it did not appear that the witness had any special or superior knowledge on the subject inquired about; and that other witnesses for the petitioner testified to the value of the river bank as affording facilities for fishing. *Held*, that the bill of exceptions disclosed no error in the exclusion of the testimony. *Boston and Maine R. R. Co. v. Montgomery*, 119 Mass., 114. 1875.

XII. STATUTORY REMEDY EXCLUSIVE.

792. Exclusive remedy. The statutory remedy in the taking of private property is exclusive of all other remedies. *International and Great Northern R'y Co. v. Benitos*, 10 Amer. & Eng. R. R. Cases, 122 (Tex.), 1883; *Cairo and Fulton R. R. Co. v. Turner*, 31 Ark., 494, 1876; *Johnson v. St. Louis, Iron Mt. and Southern R'y Co.*, 32 Ark., 753, 1878.

793. — The statutes relating to the appropriation and assessment of the value of lands for railway uses, have taken away the common law remedy of trespass *q. c. f.*; and the damages alleged to have been sustained by the owner of lands thus appropriated must be assessed in the manner prescribed in the general law, as contained in the Revised Code, ch. 61, § 10, unless special provision is made in the charter for that purpose. *Hol-*

loway v. University R. R. Co., 85 N. C., 452, 1881; 10 Amer. & Eng. R. R. Cases, 36.

794. — The plaintiff occupied a cottage and a small piece of land, on a level with and abutting on a public high road, from which a short way or passage over the plaintiff's land afforded access to his cottage. A railway company, in the execution of the works of its railway, lowered the public high road seven feet, leaving the plaintiff's land and cottage on the edge of a precipice of that height, and thereby obliging the plaintiff to make use of a step ladder in order to obtain access from the public high road to the way or passage leading over his land to his cottage. An action having been brought by the plaintiff against the railway company under the Railways Clauses Consolidation Act, 1815, the action was held not maintainable. The injury was of a permanent nature, and damages should be assessed under the statute. *Moore v. Great Southern and Western R'y Co.*, 10 Irish Common Law, 46 1858. See, also, *Tuohey v. Same*, ib., 98. 1859.

795. Ejectment. While the remedy provided by the statute (Rev., § 1317) for the assessment of damages sustained by a land owner in the taking of land for railroad right of way is exclusive of all other remedies for that purpose, it is not exclusive of an action of ejectment if his property has been taken by the railroad company without tender of compensation being made. *Daniels v. Chicago and Northwestern R. R. Co.*, 35 Ia., 129, 1872; 5 Amer. R'y Rep., 82.

796. Statutory remedy not exclusive. The owner of land taken by a railway without compensation is not debarred from an action of trespass by the fact that the charter points out a particular mode of assessing damages. *Atlantic and Gulf R. R. Co. v. Fuller*, 48 Ga., 423, 1873; 11 Amer. R'y Rep., 403.

797. — The company, in the execution of the powers of its act, had erected a railway station and embankment near a house used as a starch manufactory, and had thereby obstructed its lights and caused damage to it by the dust and dirt drifted from the station, etc. The house was erected before the 30th November, 1835, had not been specified in the schedule nor omitted therefrom by

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mistake, and no consent in writing to the construction of the station or embankment had been obtained from the owner or any other person interested in the house. *Held*, that the company was liable in an action on the case at the suit of the reversioner for such damage, and that the plaintiff was not confined to the remedy provided by the act for compensation. *Turner v. Sheffield and Rotherham R'y Co.*, 3 Eng. R. R. & Canal Cases, 222. 1842.

798. — A railroad company having a right of way absolutely by its charter, subject only to damages for taking land for compensation, is not liable to the action of trespass for doing so. The remedy provided by act of January 22, 1855 (Gould's Dig., 884), for assessment and payment of damages, is exclusive. But companies organized under general acts under the constitution of 1868 have no such general right to enter upon and use lands. They must first make or provide for compensation for them, or they will be liable in trespass for the entry upon and taking of the land. If a railroad company belong to the class not liable to the action of trespass, it must show it in its answer to such action; otherwise, the general rule applies, which makes corporations, as well as individuals, liable for civil torts. *Little Rock and Ft. Smith R. R. Co. v. Dyer*, 35 Ark., 360, 1880; 10 Amer. & Eng. R. R. Cases, 83.

799. — The Michigan statute for the condemnation of lands to railway uses does not empower a party aggrieved by its unauthorized occupancy of land to resort to the statutory remedy of appraisal for compensation, but he has a right of action in the ordinary way. Until the proper body has passed upon the necessity for the railway the question of compensation by statutory appraisal cannot arise. *Grand Rapids and Indiana R. R. Co. v. Heisel*, 47 Mich., 393, 1882; 10 Amer. & Eng. R. R. Cases, 260.

800. — For land appropriated for the building of a railroad chartered under the general law since the constitution of 1870, the owner may commence suit by petition for a jury of inquest, or may bring an action on the facts of the case to recover the value of the land and damages. The entry and construction of the road, without taking any

steps to condemn the land, will be regarded as an appropriation of so much of the land as the law authorized. *Duck River Valley R. R. v. Cochran*, 3 Lea (Tenn.), 478. 1879.

801. — If the railway company, in its notice to treat, does not include the minerals, it is liable for taking such minerals in an action for damages. The land owner is not limited to the remedy given by the Railways Clauses Consolidation Act of 1845. *Loosemoore v. Tiverton and North Devon R'y Co.*, Law Reports, 22 Chancery Division, 25. 1882.

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802. Appeal — executor. Where the defendant in condemnation proceedings has died, his executor cannot properly take an appeal therein, unless it affirmatively appears that the executor has some interest in the land by will of the testator. Nothing being shown to the contrary, it will be assumed the fee is in the heirs, and in such case the heirs alone can prosecute an appeal. *Bower v. Grayville and Mattoon R. R. Co.*, 92 Ill., 223. 1879.

803. — vendor and vendee. Where a vendor is, by virtue of an agreement for the sale of lands, in equity, trustee for the vendee, and the lands are condemned by a railway company, under its charter, if the vendee desire to appeal from the award, he may do so in the name of the vendor, and equity will protect his rights in the appeal as against the vendor. *McIntyre v. Easton and Amboy R. R. Co.*, 26 N. J. Eq., 425. 1875.

804. Conflicting claims; assignment. After a railway company had filed a location of its line over A.'s land, A. conveyed a portion of the land to B. by a warranty deed containing a covenant against incumbrances. Both A. and B. filed petitions against the company for the assessment of damages for the land taken; and, B. having become insolvent, his assignee assigned to the corporation the claim of B. under his petition for the land taken and damages caused by the laying out of the railway, with full power to prosecute the petition to final judgment, and to avail itself of all remedies both in law and in

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equity in relation to said claim. A. subsequently recovered judgment against the company for damages for all the land taken. *Held*, on a bill in equity by the corporation against A., to restrain him from enforcing his judgment so far as the damages sustained by B.'s land were concerned, that the claim of B. against A. for breach of the covenant of warranty did not pass by the assignment to the company; and that the bill could not be maintained. *New York and New England R. R. Co. v. Drury*, 133 Mass., 167, 1882; 10 Amer. & Eng. R. R. Cases, 518.

805. Contiguous property. The title of a land holder cannot be litigated before the commissioners; and his averment, in answer to the petition for the condemnation of a particular lot, that this and certain other specified lots, lying together, constituted his homestead, and that he occupied them as such, was held sufficient to raise the question of injury to the contiguous lots. *Port Huron and Southwestern R'y Co. v. Voorheis*, 50 Mich., 506. 1888.

806. — Where proceedings are taken to condemn a portion of a city lot, and the lot is part of a homestead lying on both sides of an alley, the award of damages cannot be confined to the land actually taken, but must cover such actual injury as is done to the entire homestead, including the easement in the alley. *Ib.*

807. Death of land owner. The guardian of the minor children of a deceased land owner is the proper person to sue for damages, even if the property had been sold after the damages were done. *Mumma v. Harrisburg, etc., R. R. Co.*, 1 Pearson (Pa.), 65. 1854.

808. — In an action for a writ of assessment against a railway company for an entry upon lands claimed by the plaintiff by inheritance since such entry, a failure to allege in the complaint that the ancestor was the owner at the time of the entry is fatal, as is also a failure in such an action by any one to refer therein to the law authorizing the entry. *Church v. Grand Rapids and Indiana R. R. Co.*, 70 Ind., 161, 1880; 3 Amer. & Eng. R. R. Cases, 198.

809. Equitable interests. It is no part of the duty of commissioners appointed under proceedings to condemn lands by a railroad

company to assess the damages of a party claiming an equitable interest in the lands. Their province is to estimate the value of the land and the damages by reason of the taking of it, and all claims of equitable estates or liens in or on the land are to be left to be disposed of by agreement of the parties or by the appropriate tribunal. *McIntyre v. Easton and Amboy R. R. Co.*, 26 N. J. Eq., 425. 1875.

810. Estoppel. Petition for condemning right of way must designate, and notice must be given to all parties intended to be included as owners and interested persons, and the company is estopped from proving before the commissioners that the party alleged in its petition to be the owner has not title. *Peoria, Pekin and Jacksonville R. R. Co. v. Laurie*, 63 Ill., 264, 1872; 7 Amer. R'y Rep., 214.

811. Failure to pay damages. The charter of C., a railway company, authorized it to acquire lands by statutory proceedings, the land to "vest in said company in fee simple as soon as the valuation thereof may be paid, or tendered and refused." In 1860 C. commenced proceedings to acquire title to a parcel of A.'s land. It was valued, and C. appealed from the valuation, but did not prosecute the appeal. C. took possession of the land, and having become insolvent, in 1866 all its property was sold and purchased by S., another and a distinct railway company, which thereupon took possession of the land. In 1872 A. commenced his action against S. to have the valuation paid or the land restored to him; *held*, that he was entitled to the relief he demanded. *Gillison v. Savannah and Charleston R. R. Co.*, 7 So. Car., 178. 1875.

812. Fund in court considered as real estate. Purchase money paid into court by a railway company under section 69 of the Lands Clauses Consolidation Act, 1845, for land of which an infant is absolutely seized in fee, remains impressed with the character of real estate, and on the death of the infant descends to his heir at law. *Kelland v. Fulford*, Law Reports, 6 Chancery Division, 491. 1877.

813. — taxes. The rule is the same in regard to distribution of award where land has been condemned for railway purposes,

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and a claim is made under an assessment for taxation or for a local improvement, to a portion of the sum awarded as compensation therefor, which has been brought into court to be distributed among the parties "owning or interested in the real estate" (§ 16, ch. 140, Laws of 1850). The claim cannot be maintained upon any ground which would be insufficient in a direct proceeding to sustain a sale of the property or uphold a tax title. *New York Central and Hudson River R. R. Co., In re*, 90 N. Y., 342. 1882.

814. Intangible property. Condemnation proceedings usually apply to tangible property, but it is no objection to them that intangible rights are necessarily taken if remuneration is made therefor. *Dunlap v. Toledo, Ann Arbor and Grand Trunk R'y Co.*, 50 Mich., 470, 1883; 10 Amer. & Eng. R. R. Cases, 185.

815. Joint owners. Where the interest of two owners in the lands sought to be taken is treated as joint by the petition, and they appear jointly, and demand a jury, it is not improper for the jury to award an individual sum to the two; their own action precludes them from insisting that their interests should have been separately regarded. *East Saginaw and St. Clair R. R. Co. v. Benham*, 28 Mich., 459, 1874; 12 Amer. R'y Rep., 386.

816. — An award was sustained where it expressed the gross sum allowed to all joint claimants and specified how much of it was for each of those interested as mortgagees. *Michigan Air Line R'y Co. v. Barnes*, 44 Mich., 222. 1880.

817. Lease. The lessee having a hope or expectation of a renewal of a lease cannot have damages for injury to such expectation by the location of a railway. *Rex v. Liverpool and Manchester R'y Co.*, 4 Adolphus & Ellis, 650; 31 E. C. L., 289. 1836.

818. — When a deduction is made from the landlord's damages, under appropriation by the sovereign for the time the lease has to run, and awarded to the lessee, it in equity belongs to the lessor, as he is deprived of recourse to the land for his rent. *Fitzpatrick v. Pa. R. R. Co.*, 10 Philadelphia, 141. 1874.

819. — If the right of the lessee is worth no more than he has agreed to pay in future for it, the expropriator of that right would

pay him nothing, as it is worth nothing. But if the right of lease will bring a greater sum than it is to cost the lessee, the latter is entitled to be paid the amount of such excess, which amount cannot be charged upon the sum fixed for the rights of the owner, unless the owner has received the rent in advance, or unless the value of his right has been fixed by reference to the present actual value of the lease. The true test of the value of the rights of the lessee is found in the excess which it will now sell for over the amount he agreed to pay for it. *Morgan R. Co., In re*, 32 La. An., 371. 1880.

820. — A statute required a railway company, in taking land for its road, to take the whole of a dwelling-house, manufactory, etc., where a part of it came within fifty feet of the railway. *Held*, that where the fifty-foot line ran between a dwelling-house and a manufactory, the fact that both the dwelling and the manufactory were held under one lease would not be sufficient to compel the company to take both premises. *Regina v. London R'y Co.*, 3 Adolphus & Ellis (N. S.), 166; 43 E. C. L., 681. 1842.

821. — A. agreed to let, and B. agreed to hire, a piece of land containing about fifteen acres, at an annual surface-rent, B. to use the land for the purpose of making bricks, and to pay A., his executor, etc., 3s. per one thousand on the quantity made, the quantity made to be not less than four millions annually; the ground not to be excavated beyond the depth of eight feet, without the special permission of A. in writing. A portion of the land being required by a railway company, B.'s claim for compensation in respect of his estate and interest in the land so required, and for deterioration to the residue, was referred to arbitration, under the provisions of the Lands Clauses Consolidation Act, 1845, 8 and 9 Vict., c. 18. The umpire, by his award, found that the interest of B. under the above agreement was that of merely a *tenant from year to year*; and he assessed the compensation upon that basis. *Held*, that the construction put by the umpire upon the agreement was correct; and that evidence tending to show that, by the custom of the brick-making trade, brick land is never hired *from year to year*, was properly rejected. *Stroud, In re*,

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8 Manning, Granger & Scott, 502; 65 E. C. L., 500. 1849.

822. — The fact that a railroad company is in possession of lands as lessee under an unexpired lease is no impediment to proceedings on its part under the general railroad act to acquire title in fee; the condemnation of the title does not impair the obligation of a covenant to surrender, or any other covenant in the lease, but simply transfers the title to the company. *Kip v. New York and Harlem R. R. Co.*, 67 N. Y., 227, 1876; 15 Amer. R'y Rep., 98; affirming *Same v. Same*, 6 Hun (N. Y.), 24, 1875.

823. Life estate. It is proper for the court to lay down a rule as to the value of a life estate, as an independent estate entitled to damages. *Pittsburgh, Virginia and Charleston R'y Co. v. Bentley*, 88 Pa. St., 178. 1878.

824. — The true rule for valuing the damages as a whole is the difference between the value of the property before the making of the road and its value after the road is made, as affected by it, and of this difference the life-tenant is entitled to the proportion of the whole which the value of the life estate bears to the whole difference. *Ib.*

825. — The annual value of the premises, multiplied by the years of the life-tenant's expectancy of life, and reduced by calculation to a present cash value, is not a proper mode of determining the value of the life-estate as compared with the value of the remainder in fee. *Ib.*

826. — Upon the construction of the sixty-first and sixty-sixth sections of the 7 Geo. 4, c. 49, *held*, that the tenant for life of lands taken by the railway company was to pay the expenses of the interim investment of the purchase moneys which had been paid into court. *Ex parte Cooke*, 3 Eng. R. R. & Canal Cases, 135. 1843.

827. Mortgage. In proceedings to condemn lands, mortgagees of the land must be defendants; and a discontinuance as to them without adjudicating on their rights is fatal to the proceedings. *Michigan Air Line R'y Co. v. Barnes*, 40 Mich., 383. 1879.

828. — A mortgagee, out of possession, whose mortgage is recorded, should be made a party to proceedings instituted by a railway company before county commissioners

to ascertain the damages of land owners for land taken for its road. *Wilson v. European and North American R'y Co.*, 67 Me., 358, 1877; 16 Amer. R'y Rep., 357.

829. — A railway company requiring land paid a sum of money into court, and gave the usual bonds to the land owner and to his mortgagees by deposit, and took possession of the land. The company proceeded with the inquiry into the amount of compensation as against the land owner, the mortgagees being aware, though without formal notice, of the inquiry, but taking no part in it. The compensation awarded was less than the amount in court, and was not sufficient to pay the debt due to the mortgagees, and a suit being instituted by them, the sum in court was transferred to that suit, and ordered to stand as a security under the Lands Clauses Consolidation Act. On the cause being heard, *held* (reversing the decision of Stuart, V. C.), that the mortgagees had no lien on the sum in court. *Martin v. London, Chatham and Dover R'y Co.*, Law Reports, 1 Chancery Appeal Cases, 501. 1886.

830. — A railroad company having entered into possession of lands by consent of the owner under an agreement with him to purchase, on the foreclosure of a prior mortgage of which the company had constructive notice, the company is bound to contribute to the payment of the mortgage to the extent of the value of the part appropriated by it, and damages, at the time of such appropriation, with interest thereon, without regard to the condition of the premises at the time of the foreclosure or the improvements put thereon by the company; and the value of the land and damages may be ascertained by proceedings to condemn, under its charter, instituted after the foreclosure bill is filed, or by a reference to a master. *North Hudson County R. R. Co. v. Booraem*, 28 N. J. Eq., 450, 1877; 14 Amer. R'y Rep., 202.

831. — The company is not in default as to the mortgage until the amount of the deficiency is ascertained by the sale of the residue of the mortgaged premises. *North Hudson R. R. Co. v. Booraem*, 28 N. J. Eq., 593. 1877.

832. — The commissioners having appor-

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tioned the amount of their award between the owner of the land taken and a mortgagee thereof, on an appeal by the owner, the railroad company failed to make any proof of the mortgagee's interest in the land. *Held*, that a judgment in favor of the owner, making no provision for the payment to the mortgagee of any part of the sum awarded by the verdict, was not erroneous. *Wooster v. Sugar River Valley R. R. Co.*, 57 Wis., 311, 1883; 10 Amer. & Eng. R. R. Cases, 499.

833. — The railroad company might pay the amount of the judgment into court, and apply for an order that the sum awarded to the mortgagee by the commissioners be paid to him from such deposit. *Ib.*

834. — In a mortgage foreclosure, where the land has been conveyed, since the mortgage, to a railway company for its use, its value (for the purpose of determining the rights of the company, under §§ 16 and 21, ch. 119, Laws of 1872) must be estimated *as it was when the company acquired the title*, without improvements made by the company; and if its actual market value was *then* enhanced by the projected and prospective construction of the company's road, it must be estimated at such enhanced value. *Aspinwall v. Chicago and Northwestern R'y Co.*, 41 Wis., 474, 1877.

835. — By virtue of an agreement made subsequent to a mortgage with the grantees of the mortgagors, a railroad company claimed the right to construct approaches to its tunnel, over lands and railroad track covered by the mortgage, thereby inflicting serious damage, and proposing to allow no compensation, except the cost of the alteration at the crossing. *Held*, that such right would not be determined on a petition for an injunction to prevent the injury, filed by the receiver of the mortgagors, as auxiliary to a bill to foreclose, where the respondents were not parties to such bill. They should be made parties in order that the question may be directly litigated. *Coe v. New Jersey Midland R'y Co.*, 28 N. J. Eq., 27, 1877; 14 Amer. R'y Rep., 5.

836. Obligation of company; breach by company; subsequent grantee of land owner. On December 24, 1863, Alice Broome was the owner of a certain quarter section of land in Leavenworth county. A proceed-

ing was then pending in the district court of said county, instituted by the railway company, for the purpose of obtaining a certain strip of said land one hundred feet wide for railroad purposes. On that same day said court, with the consent of both parties, rendered a judgment investing the railway company with the title in fee to said strip of land, upon condition that the railway company should immediately pay therefor to said Alice Broome \$400, and before May 1, 1864, make certain improvements thereon, and afterward keep said improvements in repair. Said sum was immediately paid, but the improvements have never been made. In 1864 Alice Broome sold and conveyed said quarter section of land to L., who, in 1865, conveyed the same to Piper. *Held*, in an action brought by Piper to recover damages from the railway company because said improvements have not been made, that Piper could not maintain such an action; that the obligation imposed upon the railway company by said judgment in favor of Alice Broome is not such an obligation as will continue to run with the land; that Broome's grantee, merely as owner of the land, whether before or after the obligation was broken, acquired no right to recover damages for a breach of such obligation. *Piper v. Union Pacific R'y Co.*, 14 Kans., 565, 1875; *Same v. Same*, *ib.*, 574.

837. Owner defined. The word "owner," as used in the Nebraska statute, applies to any person having an interest in the estate. *Gerrard v. Omaha, Niobrara and Black Hills R. R. Co.*, 14 Neb., 270, 1883; 10 Amer. & Eng. R. R. Cases, 506.

838. — The charter of the E. and A. Co. distinguishes between the owner and person interested in the proceedings to condemn lands. By owner is meant the person having some legal estate which the company proposes by condemnation to acquire. Under the expression "person interested" are included not only the owner whose estate it is intended to acquire, but also other persons having some independent right or interest therein, or lien or incumbrance thereon. *State v. Easton and Amboy R. R. Co.*, 36 N. J. Law, 181, 1873; 12 Amer. R'y Rep., 417.

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839. Partition; appeal. A partition of the premises pending the appeal does not have the effect to dismiss it. The right of way is acquired when the damages assessed are paid to the sheriff, and all conveyances made afterward are subject to the title of the company to such right of way. *Ruppert v. Chicago. Omaha and St. Joseph R. R. Co.*, 43 Ia., 490, 1876; 14 Amer. R'y Rep., 470.

840. Partition of award among land owners. Where commissioners of appraisal have fixed the compensation at a certain sum in gross, and have also awarded specified portions of that sum to several parties for their respective interests in the land, the railway company has no interest in the partition of the sum among the owners of the separate interests, and can appeal only from the gross award. *Spaulding v. Milwaukee, Lake Shore and Western R'y Co.*, 57 Wis., 304, 1888; 10 Amer. & Eng. R. R. Cases, 401.

841. — But in such case, where, because it obtained no jurisdiction of an appeal, the judgment of a circuit court is void, the supreme court has jurisdiction of an appeal from, and may reverse, such void judgment. *Ib.*

842. Pipe line for oil. Under the general railway law, the owner of the soil retains the enjoyment of the fee, subject to the right of way of the railway company. He is entitled, therefore, to drive pipes under the railway for the conveyance of oil, etc., such use being shown not to interfere with or imperil the easement of the railroad company. Interference with such right may be restrained by injunction. *Hasson v. Oil Creek, etc., R. R. Co.*, 8 Philadelphia, 556, 1871.

843. Pleading. Where a railway company condemns real estate as the property of a person named, it cannot, on appeal from the award, at least without tendering an issue to that effect, disprove such ownership. *Republican Valley R. R. Co. v. Hayes*, 13 Neb., 489, 1882; 10 Amer. & Eng. R. R. Cases, 217; *Gerrard v. Omaha, Niobrara and Black Hills R. R. Co.*, 14 Neb., 270, 1888; 10 Amer. & Eng. R. R. Cases, 506; *Dietrichs v. Lincoln and Northwestern R. R. Co.*, 14 Neb., 355, 1883.

844. — By instituting the proceeding

against the defendant, the petitioner admits his ownership. *St. Louis and Southeastern R'y Co. v. Teters*, 68 Ill., 144, 1873.

845. — The company, in its petition for the appointment of commissioners, avers the title to the property sought to be condemned to be in the claimants who bring the appeal. In such case no evidence is required by the latter in support of such alleged title, on the trial of the appeal. *Knauff v. St. Paul, Stillwater and Taylor's Falls R. R. Co.*, 23 Minn., 178, 1875; 19 Amer. R'y Rep., 307. See, also, *Warren v. St. Paul and Pacific R. R. Co.*, 21 Minn., 424, 1875.

846. — The persons named in the petition as owners of the land sought to be taken may, before the commissioners, as well as on appeal, dispute the statements of the petition as to their title and estate, and show their real title and estate; and the issue thus made is proper to be passed upon by the commissioners in determining the question of damages, and their decision thereon is reviewable, on appeal, in the district court. *Brisbane v. St. Paul and Sioux City R. R. Co.*, 23 Minn., 114, 1876.

847. Possession. Actual possession and use of real estate by a person are *prima facie* evidence of title in fee to the same in him, at least as against a stranger. *Sherwood v. St. Paul and Chicago R'y Co.*, 21 Minn., 127, 1875; 11 Amer. R'y Rep., 870.

848. — In a proceeding instituted by a railway company for the purpose of procuring the right of way for its railroad through the various tracts of land along its route, a person who is in possession of one of said tracts, but who has no title thereto, or interest therein (the land belonging to the United States), cannot recover damages for injury done merely to the land itself. *Rosa v. Missouri, Kansas and Texas R'y Co.*, 18 Kans., 124, 1877; 15 Amer. R'y Rep., 210.

849. Private way. Lynch had the possessory title to certain land, including land that was laid down on the official maps of Virginia City, but never opened to the public as a street. The railroad company obtained from the city the right of way to lay its track upon said street, and in so doing excavated it in such a manner as to render the access to his dwelling-house difficult, and entirely destroyed a public road leading

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across said street to a quartz mill owned by him. *Held*, that it was immaterial whether the title in fee was in the United States or in Virginia City in trust for the public; that the prior rights which Lynch had acquired by possession could not be destroyed by the railroad company without compensation. *Virginia and Truckee R. R. Co. v. Lynch*, 13 Nev., 92. 1878.

850. Remainderman. Where a railroad company, with the consent of the devisee for life and the trustee in possession of the property, having made compensation to them for their interest, had entered upon lands for the construction of its railway, and had almost completed it, an injunction sought by certain persons claiming to be remaindermen, but whose claim was disputed, was denied, it appearing that the conduct of the railroad company had been *bona fide* and with due regard to the interests of all the parties. *Lanternman v. Blairstown R. R. Co.*, 28 N. J., Eq., 1, 1877; 14 Amer. R'y Rep., 1.

851. Tax title. Where an owner received back his land from the federal government, after it had acquired the same under the direct tax law of 1863, and a railway had been built upon it while the land was held by the government, *held*, that the owner had no claim against the railway company for damages. *Sams v. Port Royal and Augusta R'y Co.*, 15 So. Car., 484; 10 Amer. & Eng. R. R. Cases, 683. 1882.

852. Tenants in common. Where a railway company applies for the appointment of commissioners to assess the damages for right of way across land held by tenants in common, it should cause the damages to be awarded separately if the owners' interests can be ascertained. But a failure to procure such award and a settlement with one of the owners does not deprive the others of right of appeal. *Ruppert v. Chicago, Omaha and St. Joseph R. R. Co.*, 43 Ia., 490, 1876; 14 Amer. R'y Rep., 470.

853. — An acceptance of the sum awarded by the commissioners by one of the tenants in common does not conclude the other, and he is still entitled to compensation for his interest. *Ib.*

854. — Where the plaintiff failed to establish title except to an undivided interest, but the jury assessed and allowed him dam-

ages as the owner of the entire tract, it was held that a new trial should be granted. *Morin v. St. Paul, Minneapolis and Manitoba R'y Co.*, 30 Minn., 100, 1882; 10 Amer. & Eng. R. R. Cases, 223.

855. — Where the petition embraces several tracts of land, and avers that those several tracts are owned by several persons named, in the absence of anything to the contrary in the record it will be presumed that the several persons named are tenants in common. In such case it would not be necessary for the jury to make a separate assessment upon such tract, so as to show the proportion of the judgment belonging to each of the owners. *Grayville and Mattoon R. R. Co. v. Christy*, 92 Ill., 337. 1879.

856. — Where the whole parcel is required it is necessary to have all the tenants in common thereof before the court; and it is not competent to proceed separately against the owners of an undivided interest while another undivided interest remains outstanding. *Grand Rapids, etc., R. R. Co. v. Alley*, 34 Mich., 16, 1876; *Ib.*, 18.

857. — A dismissal of such proceedings as to a portion of the joint owners, for want of service, is practically a dismissal as to all, since it leaves the court without power to proceed further with the inquest. *Ib.*

858. — Where the land belongs to two or more as tenants in common, it is not essential to the jurisdiction of the court that all the owners shall be brought into court. The court has power to hear and determine the case as to those before it. *Bowman v. Venice and Carondelet R'y Co.*, 102 Ill., 459. 1882.

859. — The commissioners should not make a separate award to each tenant in common of a single tract of land of which a part has been taken for railway uses. And where such commissioners, after fixing the value of the land taken and the damages to the remainder of the tract, have apportioned the whole amount among the several tenants in common, an appeal by the railway company should be from the gross award. On such appeal the tenants in common and all other parties in interest are plaintiffs, and are not entitled to separate trials. *Watson v. Milwaukee and Madison R'y Co.*, 57 Wis., 332; 10 Amer. & Eng. R. R. Cases, 168. 1885.

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860. Title bond; incumbered land. Where a railroad company, by condemnation proceedings, procures a strip of land for railroad purposes, and the person who is in possession of the land, and who claims to be the owner thereof, has no deed therefor, but only a title bond from a person who holds the legal title to the land, and the person in possession owes the person who holds the legal title \$2,000 for the land, and is not to receive a deed for the land until said \$2,000 is paid, and is then to receive the deed, said person in possession must be regarded as the real owner of the land, and is entitled to the full damages to the same caused by the railroad company. *St. Louis, Lawrence and Denver R. R. Co. v. Wilder*, 17 Kans., 239. 1876.

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861. Constitutional law. Sec. 13, ch. 1, Laws 1857 (ex. sess.), provides that, upon condemnation of land for the purposes of its railway, the company shall acquire "an absolute estate in fee simple" in the land condemned. *Held*, that if by reason of any constitutional provision the company could acquire nothing more than an easement by condemnation, this provision, § 13, would be qualified accordingly. *Scott v. St. Paul and Chicago R'y Co.*, 21 Minn., 322, 1875; 18 Amer. R'y Rep., 421.

862. — A statute granting a title in fee simple is constitutional; for, in the exercise of its power to devote private property to public use, the legislature is the exclusive judge of the degree and quality of interest which are proper to be taken, as well as of the necessity of taking it. *Challiss v. Atchison, Topeka and Santa Fe R. R. Co.*, 16 Kans., 117. 1876.

863. — Sec. 4 of art. 12 of the constitution is not a grant of power to appropriate private property to public use, but a restriction upon the exercise of such power; and the term therein used, "right of way," is not used as defining the quantity of estate to be appropriated, but as meaning the right of passage, irrespective of the estate or title to be acquired. *Ib.*

864. Defective title. The fact that a railway company has constructed and commenced operating its road in reliance upon a title subsequently found to be defective is no objection to proceedings on its part to perfect its title to lands so occupied, under the provisions of the general railroad act (§ 21, ch. 140, Laws of 1850), authorizing railroad corporations to perfect defective titles. *Prospect Park and Coney Island R. R. Co., In re*, 67 N. Y., 371, 1876; 15 Amer. R'y Rep., 102; affirming *Same Case*, 8 Hun (N. Y.), 80, 1876.

865. Ejectment. A railway company may, in ejectment, rely upon the title acquired under the statutes, and will not be required to prove strictly the title of its grantors. *Great Western R'y Co. v. Lutz*, 33 Upper Canada, Common Pleas, 166. 1881.

866. Excavations. A railway company, under its compulsory powers, is not entitled to acquire the fee simple in land for the mere purpose of excavating soil in order to construct an embankment. *Eversfield v. Mid-Sussex R'y Co.*, 1 Giffard (Eng. Ch.), 168. 1859.

867. Grass. Where there is no testimony before the jury as to the actual extent to which the company will use the land appropriated, and the court instructs the jury in general terms that the fee simple title remains in the plaintiff, subject to the use by the company for the purposes of its road, *held*, that a refusal to instruct specifically that "he has the right to every use of it which can be made without interfering with the operation of the road, and to all grass and other vegetation which shall grow thereon," is not error. *Leavenworth, Topeka and Southwestern R'y Co. v. Paul*, 28 Kans., 816, 1882; 10 Amer. & Eng. R. R. Cases, 490.

868. Nature of title acquired. In right of way proceedings an easement is all that can be acquired by a railway company. A title that may be freed from public use cannot be acquired by a private corporation by eminent domain. Land can only be taken for the particular use for which it is sought to be appropriated. *Oregon R'y and Navigation Co. v. Oregon Real Estate Co.*, 10 Oreg., 444. 1882.

869. — A "right of way," in its legal and generally accepted meaning in reference to

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a railway, is a mere easement in the lands of others, obtained by lawful condemnation to public use, or by purchase. *Williams v. Western Union R'y Co.*, 50 Wis., 71, 1880; 5 Amer. & Eng. R. R. Cases, 290; *Kansas Central R'y Co. v. Allen*, 22 Kans., 285, 1879.

870. — The former proprietor of the soil still retains the fee of the land, and his right for every purpose not incompatible with the rights of the railroad company. *Kansas Central R'y Co. v. Allen*, 22 Kans., 285, 1879.

871. — The title acquired by railroad companies in condemnation proceedings, under ch. 124 of the Laws of 1864, was an absolute title in fee simple, and not a mere easement. *Challiss v. Atchison, Topeka and Santa Fe R. R. Co.*, 16 Kans., 117, 1876.

872. — It is within the power of the legislature to determine what estate shall be taken for public use, and to authorize the taking of a fee or any less estate in its discretion. Where a statute authorizes the taking of a fee it cannot be held invalid, or that an easement only was acquired thereunder, on the ground that an easement only was required to accomplish the purpose in view. *Sweet v. Buffalo, New York and Philadelphia R'y Co.*, 79 N. Y., 293, 1879; affirming *Same v. Same*, 13 Hun (N. Y.), 643, 1878. See, also, *Same v. Same*, 79 N. Y., 623, 1879.

873. — The expropriation laws of Louisiana authorize the taking of the fee if necessary for public purposes. But if the public needs do not require it, and a less estate will meet the public wants, the fee cannot be taken. The constitution only allows private property to be taken to the extent that the public interest demands. *New Orleans Pacific R'y Co. v. Gay*, 32 La. An., 471, 1880.

874. **Payment.** It is payment which causes the title to pass to the railway company. *St. Louis and Southeastern R'y Co. v. Teters*, 68 Ill., 144, 1873; *Chicago and Iowa R. R. Co. v. Hopkins*, 90 Ill., 316, 1878.

875. — The corporation must, under the constitution, either pay or secure payment before entering upon possession. *Colgan v. Allegheny Valley R. R. Co.*, 3 Pittsburgh, 394, 1872.

876. — Payment of compensation must precede occupancy by the railway company. *Chambers v. Cincinnati, etc., R. R. Co.*, 10 Amer. & Eng. R. R. Cases, 376 (Ga.). 1883.

877. — Payment of the compensation finally determined by the judgment of the circuit court on appeal will be a condition precedent of any permanent use or occupancy of the property under the power of eminent domain. *Lee v. Northwestern Union R'y Co.*, 33 Wis., 222, 1873.

878. — Prepayment is a condition precedent to acquiring title by condemnation, but the land owner may be estopped from proceeding by ejectment for non-payment by his acquiescence in the construction of the railway. *Provolt v. Chicago, Rock Island and Pacific R. R. Co.*, 57 Mo., 256, 1874; 9 Amer. R'y Rep., 161.

879. — **mortgage of railway.** The defendant, M., etc., R. R. Co., constructed its line across the land of the oratrix, a married woman, without complying with the statute as to taking land for railway purposes, without her consent, and without any action of hers that amounted to an estoppel. And the road was surveyed and located, but before the oratrix's land was taken the M., etc., R. R. Co. was mortgaged to secure its bonds owned by the defendant, the Conn. and Pass. R. R. R. Co., and leased to the defendant, E. C. R. R. Co. The mortgage was foreclosed and the title established in the bondholders. A bill having been brought to enjoin the defendants from occupying the oratrix's land, *held*, that the defendants should be enjoined unless they pay the land damages. *Kendall v. R. R. Co.*, 55 Vt., 438, 1882.

880. — **waiver.** The owner may waive the right to exact prepayment of damages by consenting, expressly or by clear implication, to extend a credit to the person condemning, allowing the damages to remain as a debt; but such waiver is not to be inferred without a clear indication, by words or acts, that the owner will not insist on his constitutional right. *New Orleans and Selma R. R. Co. v. Jones*, 68 Ala., 43, 1880; 2 Amer. & Eng. R. R. Cases, 425.

881. **Possession.** Under the act of 1852, relating to the right of way, where an appeal was taken from the award of the commissioners, if the party seeking the condemnation desired to enter upon the property pending the appeal, it was necessary that a bond should be given. Possession taken

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forcibly pending an appeal, without giving such bond, is illegal, and may be recovered back in an action of forcible entry and detainer. *Mitchell v. Illinois and St. Louis R. R. and Coal Co.*, 63 Ill., 286. 1873.

882. — after payment of award. Under the provisions of the act of 1873, prescribing the mode of proceeding for condemnation of lands, upon filing the report of the commissioners, and payment of the amount awarded to the party entitled thereto, or, on its refusal to accept it, upon payment thereof into the circuit court of the county where the lands lie, the company may enter at once into possession of the land condemned, and proceed with the construction of its road, at any time before an appeal is taken from the report. *Mercer and Somerset R'y Co. v. Delaware and Bound Brook R. R. Co.*, 26 N. J. Eq., 464. 1875. An appeal subsequently taken will not deprive the corporation of the right of possession. *Ib.*

883. Removal of buildings by land owner. An award of damages, although not contemplated in the statute (Gen. Stat., sec. 97, p. 191), contained a provision that the party owning the premises, part of which were taken for a right of way, might "move back his house" therefrom. *Held*, valid. *Omaha and Northwestern R. R. Co. v. Menk*, 4 Neb., 21. 1875.

884. — After the condemnation of land in favor of a railroad, the building thereon belongs to the railway, and if the former owner removes any of it he will be liable to an action of trespass. *Mississippi River Bridge Co. v. Ring*, 58 Mo., 491. 1874.

885. Rights of common. Under ss. 99-107 of the Lands Clauses Consolidation Act, if a railway company take possession, by virtue of its act, of land over which there are rights of common, after payment to the lord of the manor of compensation in respect of his ownership in the soil and a conveyance by him to the company, and constructs its railway on the land without having first paid compensation to the commoners in respect of their rights of common, a commoner may maintain an action against the company for the disturbance of his rights of common. *Stoneham v. London, Brighton and South Coast Railway Co.*, Law Reports, 7 Queen's Bench Cases, 1. 1871.

886. Rights of land owner. As a matter of law, the railroad company has the paramount right to the land, and the land owner must yield to the superior claim secured by the condemnation proceedings, and he cannot, in any mode or for any purpose, interfere with the use of the property so taken for railroad purposes. Whether the necessities of the railroad require *exclusive* occupancy of the land is a question of fact and not of law. *Kansas Central R'y Co. v. Allen*, 22 Kaus., 285. 1879.

887. Telegraph lines. Where a railway company, by mere acquiescence of the land owner, constructs its railway over his land and occupies the same for railway purposes for a width of less than sixty feet, the company cannot thereafter lawfully erect telegraph poles on the land at a distance from the center of the track beyond the land actually occupied by it. *Prather v. Jeffersonville, etc.*, R. R. Co., 52 Ind., 16. 1875.

888. Timber. After damages have been assessed on a condemnation of land for a railroad, the trees which may be useful in the construction of the road, standing on the tract taken, become the property of the company. *Taylor v. New York and Long Branch R. R. Co.*, 38 N. J. Law, 28. 1875.

889. Width of right of way. Where, in condemnation proceedings under the statute of 1864, the full legal notice was given, the affidavit of publication filed in the county clerk's office correctly, showing due and legal publication, the subsequent proceedings being all regular, except that in copying into the record in the office of register of deeds the proof of publication a clerical mistake was made by which the first publication was made to have been on the 28th instead of the 25th, and so less than thirty days before the time fixed for the meeting of the commissioners, and where the damages awarded to the owner of a certain tract were paid to and accepted by him, and the road actually constructed and in operation through his land, although only a strip of about twenty feet in width was actually occupied by the railroad company, and the balance of the hundred feet strip condemned was used by the previous owner for the same purposes as the remainder of his tract, and where, after such condemnation proceedings and pay-

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ment and receipt of damages, and during such occupation by said company, said owner sold and conveyed the entire tract by warranty deed, *held*, that the purchaser acquired no title to any portion of the one hundred feet strip. *Challiss v. Atchison, Topeka and Santa Fe R. R. Co.*, 16 Kans., 117. 1876.

890. Window lights. A railway company purchasing land for the railway acquires an absolute fee simple, but such fee simple is acquired solely for the purpose of constructing and using the railway. A railway company has no right to erect hoardings to prevent prescriptive rights being acquired for windows looking across the line of railway. *Norton v. London and North Western Ry Co.*, Law Reports, 9 Chancery Division, 623, 1878; 26 Eng. (Moak), 394.

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891. Damages; trespass outside of right of way. An appeal from the award of commissioners takes to the district court only those matters covered by the award. It does not include wanton or negligent injuries done to growing crops outside of the right of way during the construction of the road. *Burlington and Missouri River R. R. Co. v. Sohluntz*, 14 Neb., 421. 1883.

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892. Appeal. An appeal will lie to the supreme court from the judgment of a circuit court condemning land under the act of 1853. The right of a party in such case to have the decision of the circuit court reviewed by this court is a constitutional right, conferred by that clause in the constitution defining the jurisdiction of the supreme court. *St. Louis and Southeastern Ry Co. v. Lux*, 63 Ill., 523. 1872.

893. Award. Where commissioners were appointed to pass upon the necessity of taking land for a railway company, their finding "that the taking of said strip or parcel of land was required and necessary for the constructing and operating of said railroad and a necessary public use thereof," was

held sufficient under § 2 of art. XVIII of the state constitution. *Morgan v. Chicago and Northeastern R. R. Co.*, 39 Mich., 675. 1878.

894. Charter. Art. V of amendments to the constitution of the United States, which provides that private property shall not be taken for public use without just compensation, only applies to the exercise of the right of eminent domain by the United States. The charter of the Cairo and Fulton R. R. Co. granted it the right to enter upon and appropriate a right of way over all lands along the line of its road. A subsequent act, approved the 23d of January, 1855, provided a method of assessing damages in favor of the land owner, upon the application of either party. The constitution of 1868, subsequently adopted, provided that no right of way should be appropriated by any corporation until compensation therefor had been first paid, or deposited in money, for the owner. After the adoption of the constitution of 1868, the Cairo and Fulton R. R. was constructed; and an act to ascertain damages in such cases upon the application of the corporation, and in harmony with the provisions of the constitution of 1868, above referred to, was passed by the legislature. *Held: First*, that the right of way, acquired under the charter of the corporation, could not be affected by the subsequent constitutional provision. *Second*, that the act of 1855, prescribing the manner of assessing damages, was not repealed, as to the Cairo and Fulton R. R. Co., by the subsequent enactment, or constitutional provision, but, as to it, continued in force. *Third*, that the statutory remedy in favor of the land owner was exclusive, and he could not maintain ejectment for land appropriated for a right of way. *Cairo and Fulton R. R. Co. v. Turner*, 31 Ark., 494. 1876.

895. — A section in a railroad charter, passed under the constitution of 1843, which allowed the taking of lands of persons for right of way by condemnation proceedings before either ascertainment or payment of compensation, was not in violation of such constitution. *Townsend v. Chicago and Alton R. R. Co.*, 91 Ill., 545. 1879.

896. Compensation. Before private property can be taken for public use just compensation must be first assessed and ten-

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dered. *Oregonian R'y Co. v. Hill*, 9 Oreg., 377, 1831; *Sherman v. Milwaukee, Lake Shore and Western R. R. Co.*, 40 Wis., 645, 1876; 13 Amer. Rep., 459.

897. — A provision in defendant's charter authorizing it to take land upon payment of the value of the land taken would be construed as requiring payment of the just compensation required by the constitution, which includes damages accruing to the residue of the owner's land from such taking; and, so construed, the charter would be upheld. *Bohlman v. Green Bay and Minnesota R'y Co.*, 40 Wis., 157, 1876; 13 Amer. R'y Rep., 421.

898. — Section 1249, C. C. P., which provides that, for the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, is not inconsistent with § 14 of art. 1 of the constitution. *California Southern R. R. Co. v. Kimball*, 61 Cal., 90, 1882.

899. — The constitutional inhibition against taking private property for public use without compensation to the owner has reference solely to the taking of the private property for public use under the right of eminent domain. *Norris v. City of Waco*, 57 Tex., 635, 1882.

900. — Under the constitution of 1851, the owner of land taken by a railway company cannot be required to commence proceedings, under the statute, for the assessment of damages for such appropriation; it is the duty of the company to have the damages assessed, and to tender the same before taking the land. This necessarily follows from the provision of the constitution, that no man's property shall be taken by law without just compensation, nor, except in case of the state, without such compensation being first assessed and tendered. All decisions of this court asserting a contrary doctrine are overruled. *Cox v. Louisville, New Albany and Chicago R. R. Co.*, 48 Ind., 178, 1874; 8 Amer. R'y Rep., 296.

901. Contract. When a land owner enters into a written agreement with a railway company to sell and, within a specified time, to convey to such company a strip of ground for its road-bed, and gives possession to the purchaser, who thereupon proceeds to

construct the road through the land, the vendor cannot enjoin the use and possession thereof by the company, when the latter is not in default in performing the terms of the contract. By the agreement to sell and convey, the seller waives his constitutional right to have his damages assessed and tendered before possession can be taken by the company. *Baltimore, Pittsburgh and Chicago R. R. Co. v. Highland*, 48 Ind., 381, 1874.

902. Delegation of power to corporation.

The general railroad law, in respect to the delegation of the power of eminent domain to corporations organized under it, is constitutional. *National Docks R'y Co. v. Central R. R. Co. of New Jersey*, 32 N. J. Eq., 755, 1880.

903. Jury trial. The constitutional guaranty that the right of trial by jury shall be inviolate imposes no restriction on the exercise of the power of eminent domain. *Central Branch Union Pacific R. R. Co. v. Atchison, Topeka and Santa Fe R. R. Co.*, 28 Kans., 453, 1882; 10 Amer. & Eng. R. R. Cases, 528.

904. — Section 23 of "An act to provide for a general system of railroad incorporation," approved July 23, 1868, is in conflict with article V, section 48, of the constitution, and all proceedings had in conformity to, or in the manner prescribed by, said section, for the condemnation of lands for public or railroad uses, are invalid. There must be a jury of twelve men, not merely five commissioners. *Whitehead v. Arkansas Central R. R. Co.*, 28 Ark., 460, 1873.

905. — In such proceedings, while the legislature must provide an impartial tribunal to assess the compensation to be paid, and an opportunity to the parties interested to be heard before it, it may determine what that tribunal shall be, whether a jury, a court without a jury, or commissioners to be appointed by the court. *Ames v. Lake Superior and Mississippi R. R. Co.*, 21 Minn., 241, 1875.

906. — The provisions of the constitution of 1870, giving the right of trial by jury in all cases for the condemnation of land, were in force from the adoption of the constitution, without specific legislation to enforce them, and repealed so much of the act of

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1852 as authorized the land to be entered upon before a trial by jury. *Mitchell v. Illinois and St. Louis R. R. and Coal Co.*, 68 Ill., 286. 1873.

907. — The provision in the charter of the plaintiff authorizing proceedings for condemnation to be commenced in the chancery court is not unconstitutional. The court may, on appeal, allow a jury trial. *New Orleans, Baton Rouge, etc., R. R. Co. v. Drake*, 60 Miss., 621, 1882.

908. — The bill of rights provides that private property shall not be taken or damaged for public use without just compensation; and that such compensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law. The requirement that the compensation shall be ascertained by a jury is affirmative in its character, and must imply an exclusion of any other mode of fixing the compensation. If there was no law under which a jury could be impaneled for the ascertainment of such compensation, and the legislature neglected to provide one, the constitution would not, for that reason, be in abeyance; but until such law was provided, the right of eminent domain could not be exercised. *People ex rel. v. McRoberts*, 62 Ill., 38, 1871; 7 Amer. R'y Rep., 445.

909. Limitations. The constitutional provision forbidding the taking of private property for public use without just compensation does not exact that the compensation shall precede the taking; it suffices that the law authorizing the taking provides for the compensation and designates an impartial tribunal for its assessment; and it is competent to restrict the property owner to a given time for the enforcement of his rights. The statute of limitations will apply in such cases. *Simms v. Memphis, Clarksville, etc., R. R. Co.*, 12 Heiskell (Tenn.), 621. 1874.

910. Notice of proceedings. The legislature being prohibited (Oregon Const., art. 1, § 18) from taking private property for public use without just compensation therefore, it is necessarily implied thereby that the owner of the property so taken shall have notice of the proceeding for appropriation, and an opportunity to be heard thereon. *Burns v. Multnomah R'y Co.*, 8

Sawyer (U. S. C. C.), 543, 1883; 10 Amer. & Eng. R. R. Cases, 289; 15 Federal Reporter, 177.

911. — The right to compensation, under the constitution, necessarily implies that the land owner shall have notice of the proceedings and the right to be heard thereon. *Ib.*

912. Possession — compensation. The "compensation" to be paid to the owner for damages, spoken of in § 34 of the Railroad Act of 1861, as amended in 1863, is that which shall be awarded to the owner of the land on proceedings for condemnation, if the land is finally taken for public use. *Davis v. San Lorenzo R. R. Co.*, 47 Cal., 517. 1874.

913. — If the railroad company is placed in possession during the pendency of the proceedings, no provision is made in said act for securing to the owner compensation for the use of the land, and for waste committed on it, while the corporation was in possession; provided the proceedings shall ultimately fail. *Ib.*

914. — If the court or judge makes an order permitting a railroad company to occupy and use land pending the proceedings for condemnation, and under said order the corporation enters into possession of the same, it is a taking of private property for public use, within the meaning of the constitution. *Ib.*

915. — That portion of the Railroad Act of 1861, as amended in 1863, which permits the court or judge, on proceedings for the condemnation of land, to make an order allowing the company to enter into possession and use the land sought to be condemned during the pendency of the proceedings, without providing compensation for the use and waste committed if the proceedings finally fail, is in violation of the clause in the constitution which prohibits private property from being taken for public use without compensation. *Ib.; California Pacific R. R. Co. v. Central Pacific R. R. Co.*, 47 Cal., 528. 1874.

916. — The constitution makes the prepayment of just compensation a condition precedent, without which the title of the owner to the land, or any easement therein, is not divested or affected. *New Orleans*

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and *Selma R. R. Co. v. Jones*, 68 Ala., 48, 1880; 2 Amer. & Eng. R. R. Cases, 425.

917. — That section of the general railroad law which authorizes a railroad corporation to enter on lands and begin constructing its road, after paying into the circuit court of the county where the lands lie the amount awarded, pending their appeal from such award, is unconstitutional, in that compensation, or a tender thereof to the land owner, does not precede the use and occupation of his lands; and for want of such tender he may enjoin the company from entering upon his lands and constructing their road thereon. *Redman v. Philadelphia, Marlton and Medford R. R. Co.*, 33 N. J. Eq., 165, 1880; 1 Amer. & Eng. R. R. Cases, 1.

918. — Under the provisions of the constitution of the United States and of the state of Kansas, it is held that the payment of compensation to the owner of private property taken for a public use is a condition precedent to any right divesting the owner of his possession, and that a judgment in his favor for the value of the land, unpaid and unsecured, is not compensation, and does not justify his eviction. *Prybylowicz v. Missouri River R. R. Co.*, 3 McCrary (U. S. C. C.), 586. 1881.

919. — A provision in the charter of a railroad company, organized under act of assembly passed since the adoption of the amended constitution, which authorizes the company, upon tender simply of the damages awarded by viewers, to enter upon and appropriate land and materials for the construction of its road, without awaiting the issue of an appeal taken by the land owner, is clearly unconstitutional. *Watson v. Pittsburgh and Connellsville R. R. Co.*, 2 Pittsburgh, 99. 1860.

920. Power to condemn property. The construction of a railway is a public necessity in contemplation of law, and the taking of private property for its construction is legal. The manner of the taking is in the discretion of the legislature. *Secombe v. Milwaukee and St. Paul R'y Co.*, 49 Howard's Practice (N. Y.), 75; *Secombe v. R. R. Co.*, 23 Wallace, 108, 1874; 11 Amer. R'y Rep., 355.

921. Private use. The legislature cannot, in the exercise of the power of eminent do-

main, take private property for a purely private industry, such as to enable a person to build a flume on the land of another to carry off the tailings from his mine, or to enable him to deposit the tailings on such land. *Consolidated Channel Co. v. Central Pacific R. R. Co.*, 51 Cal., 269. 1876.

922. — The Pittsburgh Coal Co. owned mines five miles distant from the San Joaquin river, and, in order to secure convenient transportation for its coal, the Pittsburgh R'y Co. was incorporated by the stockholders of the coal company. The articles of incorporation declared the purpose of the new company to be to transport freight and passengers. Upon this representation, and in the belief that the land was required for a public use, the district court, by the usual judicial proceeding, authorized the corporation to take land, which was the private land of R., for its railway. The railway was constructed and was operated exclusively for the transportation of the coal — no passenger or other cars being provided for the use of the public. Held, that the proceedings in condemnation amounted to an imposition upon the court. In such a case it is competent for the state, upon discovering the misuse of its authority, by which private property has been wrongfully taken, to interpose, by its attorney-general, to correct the abuse. *People ex rel. v. Pittsburgh R. R. Co.*, 53 Cal., 694. 1879.

923. Securing compensation by bond. The undertaking of sureties upon a bond to answer for damages that may be awarded for the taking of private property for a public use is not "just compensation" within the meaning of the constitution, art. I, sec. 8. Sec. 1254 of the Code of Civil Procedure is unconstitutional. *Vilhac v. Stockton and Ione R. R. Co.*, 53 Cal., 208. 1878.

924. — Full compensation must be first made in money, or secured by a deposit of money, before any right of way can be appropriated to the use of a corporation. *St. Joseph and Denver R. R. Co. v. Callender*, 13 Kans., 496. 1874.

925. — This imperative rule of the constitution is not relaxed by the fact that the land owner has appealed from the assessment of his damages by the commissioners, nor by the fact that on such appeal he has

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recovered a judgment for the amount thereof. *Ib.*

926. State railways. The Statute of 1878, ch. 277, authorizing the manager of a railway owned by the commonwealth to take land for a passenger station for the use of that and other lines, and providing no other mode of compensation to the owner of the land so taken than that such land shall be paid for from the earnings of the railway owned by the commonwealth, is unconstitutional, even if such earnings will probably be sufficient to meet all claims for land damages. *Connecticut River R. R. Co. v. Commissioners Franklin County*, 127 Mass., 50, 1879.

927. — The owner of land taken by the manager of a railway owned by the state, under a statute which does not make adequate provision for the payment of compensation for the land so taken, may have a writ of prohibition to the county commissioners to prevent them from proceeding with the assessment of the damages caused by the taking. *Ib.*

928. Statute; Michigan. An act entitled "An act to revise the laws providing for the incorporation of railroad companies, and to regulate the running and management and to fix the duties and liabilities of all railroad and other corporations owning or operating any railroad in this state," is not unconstitutional on the ground that the title provides for more than one object, its object being to consolidate the legislation concerning the management of railways. *Toledo, Ann Arbor and Grand Trunk R'y Co. v. Dunlap*, 47 Mich., 456, 1882; 5 Amer. & Eng. R. R. Cases, 378.

929. Value. Defendant's charter merely empowers the commissioners to determine "the value of the land taken" for the use of the company. *Held*, that these words will be construed as meaning the "just compensation" required by the constitution of Wisconsin, which includes "not only the value of the portion taken, but also the diminution of the value of that from which it is severed." *Parks v. Wisconsin Central R. R. Co.*, 33 Wis., 413. 1874.

930. — Where commissioners are appointed by a circuit court, under s. 11 of ch. 42 of the Code of West Virginia, to ascer-

tain the value of the land proposed to be taken for a railroad and damages to the residue of the tract, etc., ascertain the actual value of the land at the time when taken, without reference to any enhanced value given thereto and common to other land owners along the line of the road by reason of the prospective construction of the railroad through the land, such value, so ascertained, is a just compensation for the land, to the land owner, within the meaning of the constitution. *R. R. Co. v. Tyree*, 7 West Va., 693. 1874.

931. Watercourse; change of channel. A railway company may, under ch. 191, Laws of 1880, condemn land for right of way for a channel and change the course of a stream, when the safety of the traveling public would be promoted thereby. For such object the land would be taken for a public use, authorizing the exercise of the right of eminent domain, and for that purpose the statute is not unconstitutional. Whether such right exists where merely the convenience and economy of the company would be promoted, not determined. *Reusch v. Chicago, Burlington and Quincy R. R. Co.*, 57 Ia., 687, 1882; 11 Amer. & Eng. R. R. Cases, 559.

XVII. LICENSE.

932. Damages; entry under license. Where a railway company, having power to acquire lands for its use, has been permitted by the owner to enter into possession and construct its track upon the premises without compensation first made, in subsequent proceedings to condemn, the measure of compensation is the value of the land and damages at the time of the entry, and interest from such entry, irrespective of the improvements afterwards put upon it by the company. *North Hudson County R. R. Co. v. Booraem*, 28 N. J. Eq., 450, 1877; 14 Amer. R'y Rep., 202.

933. Damages; value of railroad previously constructed. Where it was alleged that a railroad had been previously constructed on the same land sought to be taken with the owner's consent, which was not denied in the pleadings, it was held that in the assessment of damages the land owner

Contract — Surveys and Location.

was not entitled to the value of the road structure as a part of his land. *Emerson v. Western Union R. R. Co.*, 75 Ill., 176. 1875.

XVIII. CONTRACT.

934. Construction. A stipulation fixing the amount of damages is not a judicial proceeding, but an agreement between the parties. *Michigan Air Line R'y Co. v. Barnes*, 40 Mich., 383. 1879.

935. — The railway was built and in operation in the fall of 1865 over the land in question with respondent's consent, "the question of damages for the right of way to be adjusted after the road was in operation." *Held*, that this means the question as to how much the land owner should receive in compensation for the easement the railroad company might acquire through a special proceeding, and that the understanding of the parties must be taken to have been that such question should be adjusted, in default of purchase or voluntary gift, by such a proceeding. *St. Paul and Sioux City R. R. Co. v. Murphy*, 19 Minn., 500. 1873.

936. Crossings. Where the owner of real estate conveys to a railway company a right of way over his premises, with the proviso that the company shall construct adequate crossings over its road, it cannot, after its acceptance of the grant and the construction of its road, exonerate itself from its obligation to construct the crossings by a condemnation of the right of way under the provisions of the statute. *Gray v. Burlington and Mo. River R. R. Co.*, 37 Ia., 119. 1873.

937. — Where a person has made a special agreement as to crossings on a line of railway running through his land, if, from particular circumstances, that agreement is not carried into effect, he cannot, on the ground of any general rights, claim to have other crossings made according to the discretion of the court, for that would be to get the court to substitute a new agreement, not to enforce the performance of the original. *Earl of Darnley v. London, Chatham and Dover R'y Co.*, Law Reports, 2 English and Irish Appeal Cases, 43. 1867.

938. Injunction. A railway company may compel specific performance of a contract to convey a right of way where it has complied with the conditions of its contract, and is entitled to an injunction to restrain an assessment of damages under *ad quod damnum* proceedings. *Chicago and Southwestern R. R. Co. v. Swinney*, 38 Ia., 132. 1874.

939. Removal of building. Upon one lot owned by plaintiffs and appropriated by defendant there was a building, which had been removed therefrom by plaintiffs, before the examination and award of commissioners, upon defendant's agreement that, if plaintiffs would remove the same, the company would pay for removing and making it as good as before. *Held*, that it was error to include, in the award for the appropriation of such lot, the expense of removing the building and making the same good. *Sherwood v. St. Paul and Chicago R'y Co.*, 21 Minn., 122, 1874; 11 Amer. R'y Rep., 364.

940. To pay damages. An agreement as follows: "This agreement, made . . . between A. L., . . . and F. F. B., and others, party of the second part, witnesseth, that in consideration of \$1, and in further consideration that the said party of the first part will permit the Gulf R. R. Co. to build and complete the said road through the northwest quarter, etc., . . . without any hindrance or obstruction whatever, the said parties of the second part hereby agree to pay to the said party of the first part forthwith, on demand, all damages which the commissioners of Cherokee county may assess to be done to said land by the building of said railroad through said premises without any appeal whatever," is a valid and binding contract. *Botkin v. Livingston*, 16 Kans., 39. 1876.

XIX. SURVEYS AND LOCATION.

941. Location of route of railway; proceedings. Where commissioners proceed to lay off a railroad route, after proper notice by publication has been given, and after concluding their labors for several days adjourn, subject to the call of the president of the board, and embody their doings in a written

Injunctions.

report, and file the same in the office of the county clerk of the county through which the proposed railroad is located, and thereafter convene again without notice to any one and proceed to lay off a further route, *held*, that such subsequent proceedings are utterly void as to all parties without notice of the subsequent meeting. *Memphis, Kansas and Colorado R'y Co. v. Parsons Town Company*, 26 Kans., 503. 1881.

XX. INJUNCTIONS.

942. Abandonment of proceedings. Defendant commenced proceedings, under the statute (Laws of 1850, ch. 140), to acquire for the purposes of its railroad certain real estate of the plaintiff, and commissioners were appointed who made their report; and on application of the defendant, upon notice to plaintiff, an order was made that the proceedings be abandoned and discontinued on payment by defendant to the attorneys of the plaintiff of certain costs and expenses, the amount being fixed in the order. The amount, as fixed, was tendered, but refused. The report was directed to be filed, but its confirmation was denied without prejudice. This action was brought to obtain either the confirmation of the award and its payment by the defendant to the plaintiff, or the payment by defendant to plaintiff of his costs and expenses in the matter, which were alleged to be \$5,000. On motion by plaintiff for an injunction restraining the defendant from taking any other proceedings to condemn said lands during the pendency of the suit, and also restraining it from entering into or taking possession of the property, and requiring it to restore certain portions of it to its original conditions, *held*, that as the case stood a preliminary injunction restraining further proceedings by the company under the statute would not be proper. *Watson v. New York, West Shore and Buffalo R. R. Co.*, 64 Howard's Practice (N. Y.), 220. 1882.

943. Arbitration; bond. The conditions of a bond under § 85 of 8 Vict., ch. 18, examined. The bond being in an improper form, an injunction was granted until a

proper bond should be executed. *Poynder v. Great Northern R. R. Co.*, 2 Phillips (Eng. Ch.), 330. 1847.

944. Estoppel. The owner of real estate upon which a railway company, empowered by parliament, is about to enter, is not entitled to an interlocutory injunction to restrain such entry, if by his silence and conduct he has permitted the company to carry on its works on the supposition that it was entitled to enter on and take the land in question. *Greenhalgh v. Manchester and Birmingham R. R. Co.*, 3 Mylne & Craig (Eng. Ch.), 784. 1838.

945. Failure to pay assessment. Pending an appeal from an assessment of damages, an agreement was entered into between the land owner and the railway company, by which judgment was entered in the circuit court for a specified amount with stay of execution "or other proceeding to collect the judgment for two years." *Held*, that the agreement did not amount to a sale of the right of way, nor did it confer authority to enter into possession; that at the expiration of the two years, upon default of payment by the company, injunction would lie restraining it from the use of the right of way. *Irish v. Burlington and South Western R. R. Co.*, 44 Ia., 380. 1876.

946. — Where a railway company, after assessment of damages, became insolvent, and its property was sold without payment of the damages, held a proper case for the interposition of equity. *Gammage v. Ga. Southern R. R. Co.*, 65 Ga., 614, 1880; 10 Amer. & Eng. R. R. Cases, 371.

947. — Under the right of eminent domain, private property may be taken for public use before compensation made, but in such case only after certain provision therefor. In case of failure of payment an injunction against the use of the land will be awarded. *White v. Nashville and Northwestern R. R. Co.*, 7 Heiskell (Tenn.), 518, 1872; *Provolt v. Chicago, Rock Island and Pacific R. R. Co.*, 69 Mo., 633, 1879.

948. Leased lines. Where a railway company took land, but did not pay the entire purchase money, and then leased its line to another company, it was held that, in default of payment, both companies would be restrained from using the land. *Cosens v.*

TRESPASS.

Bognor Railway Co., Law Reports, 1 Chancery Appeal Cases, 594. 1866.

949. — The fact that proceedings to condemn land were taken and prosecuted by direction of the lessee of the railroad, but in the name of the lessor, held, not a sufficient ground for enjoining them at the suit of the owner. *Gottschalk v. Lincoln and North-western R. R. Co.*, 14 Neb., 389, 1883; 10 Amer. & Eng. R. R. Cases, 118.

950. To restrain assessment of damages. The lessee of an inn and premises, situate near the tunnel of a railway, was prevented by the vibration caused by the passing of the trains, from keeping his beer in his cellars in a fit state for consumption, and the value of the house was alleged to be materially lessened by the consequent loss of custom, and the impossibility of using it as a public house. He thereupon gave notice to the company of his claim for compensation under s. 68 of the Lands Clauses Consolidation Act, and was prosecuting the remedy given by that section when the company filed a bill, and obtained an injunction to restrain him from proceeding further under it. The lord chancellor, on appeal, however, dissolved the injunction. *London and North Western R'y Co. v. Bradley*, 6 Eng. R. R. & Canal Cases, 561. 1851.

951. — The right of one railway company to condemn a portion of the lands of another company can be tried in the condemnation proceedings, and an injunction will therefore not issue to restrain such proceedings. *Cumberland and Pennsylvania R. R. Co. v. Pennsylvania R. R. Co.*, 10 Amer. & Eng. R. R. Cases, 351; 57 Md., 267. 1882. See, also, *Brown v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 10 Amer. & Eng. R. R. Cases, 424; 58 Md., 539. 1882.

952. Trespass. An injunction refused, where a railway company, previous to notice of entry, had entered upon lands and dug a small trench — it appearing that the company did not intend again to enter upon the land until legal steps should be taken to secure its permanent occupancy. *Fooks v. Wills, Somerset and Weymouth R'y Co.*, 5 Hare (Eng. Ch.), 199. 1846.

953. — A party who has been damaged by the location of a railway through his

premises, where the damages awarded have not been deposited with the probate judge, as provided by § 97, Gen. Stat., 191, may bring his action for the amount of the award, to enjoin the operating of the road across his premises until payment is made, or he may sue in trespass for the unauthorized entry thereon. *Omaha and North-western R. R. Co. v. Menk*, 4 Neb., 21, 1875; *Ray v. Atchison and Neb. R. R. Co.*, ib., 439, 1876.

954. — The owner of land taken by a railway company, without any valid proceeding for that purpose, is entitled to an injunction restraining the company from constructing its road on the land. *Bohlman v. Green Bay and Minnesota R'y Co.*, 40 Wis., 157, 1878; 13 Amer. R'y Rep., 421.

955. — Taking the allegations of the bill as being *prima facie* true, the order of injunction appealed from was properly made, sufficient equity appearing on the face of the bill. The bill alleged that after assessment of damages the defendant had entered upon the premises without payment of compensation. *Freshwater v. Pittsburgh, Wheeling and Ky. R. R. Co.*, 6 West Va., 503. 1873.

XXI. TRESPASS.

956. Appeal; non-payment. The owner of land taken for railroad purposes may demand payment of his damages as a condition precedent to the appropriation. But if he waives this right and permits the company to proceed in the construction of its work, he may nevertheless have his action at any time for the injury done to his property. Where the company fails to deposit with the clerk the amount assessed as damages (Wagn. Stat., 327, § 3), but appeals from the report of the commissioners, any further interference with the property till the question of damages is determined would be a trespass and render the company liable to an action therefor. *Ring v. Mississippi River Bridge Co.*, 57 Mo., 496. 1874.

957. — It is no defense to the suit that defendant had commenced proceedings for condemnation of the property, and had appealed to the supreme court from the report of the commissioner. The appeal bond

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would not be held as an indemnity for plaintiff's damages. *Ib.*

958. Assessment of damages; prior trespass. If the question of damages before the filing of the award is, in fact, litigated, in connection with the matter properly before the commissioners or the appellate tribunal, as the case may be, submitted for determination, passed upon, and the amount of the damages included in the award (as shown by the award itself), and payment thereof received by the land owner, the result is a conclusive settlement and satisfaction of such damages, notwithstanding the irregular character of the proceedings. *Leber v. Minneapolis and Northwestern R'y Co.*, 29 Minn., 256. 1882.

959. Ejectment. A railway company which occupies with its track land over which it has not acquired the right of way is a mere trespasser, and a purchaser of the land after such occupation may maintain an action to recover the value of the land appropriated, and the damages occasioned by the trespass since his purchase. *Donald v. St. Louis, Kansas City and Northern R'y Co.*, 52 Ia., 411. 1879.

960. — A railway company appropriated right of way without compensating the owner therefor, although damages had been assessed. *Held*, that ejectment would lie, but that execution for possession should not issue until the company had been granted a reasonable time, fixed by the court, in which to pay the assessed damages and interest thereon from the date of assessment, at the rate of six per cent. *Conger v. Burlington and South Western R'y Co.*, 41 Ia., 419. 1875.

961. Fixtures erected by trespassers. Whether a structure is a fixture or not depends on the nature and character of the act by which the structure is put in place, the policy of the law connected with its purpose and the intentions of those concerned in the act. Where a railway company was a trespasser, and its entry upon land not in conformity with law, these irregular proceedings did not operate as a dedication to the land owners of the property of the company, placed upon the land, so as to entitle the land owners to include said property in an assessment of damages under the railway law, and recover their value as an accession to the value of the

land taken by the company. *Justice v. Nesquehoning Valley R. R. Co.*, 87 Pa. St., 28. 1878.

962. — If a railway company, under proceedings for condemnation, enters on the land under an order of the county judge, and constructs its line across a tract of land in such manner that it is imbedded in the soil and becomes a part of the realty, and if the proceedings are dismissed and new proceedings for the condemnation of the land are commenced, the owner is not entitled to have the value of the ties and iron constituting the track included in his damages upon the final condemnation. *California Pacific R. R. Co. v. Armstrong*, 46 Cal., 85, 1873; 7 Amer. R'y Rep., 259.

963. — A railway track or other improvement wrongfully placed upon land by a railway company, and not abandoned to the owner of the premises, cannot be treated as a part of the realty for the purpose of increasing its value in estimating the damages due to the owner in subsequent proceedings to condemn the land for the use of the company. *Toledo, Ann Arbor and Grand Trunk R'y Co. v. Dunlap*, 47 Mich., 456, 1882; 5 Amer. & Eng. R. R. Cases, 378.

964. — In assessing damages, work already done by the railway company upon the land cannot be regarded as part of the realty for the purpose of increasing the damages. *Morgan v. Chicago and Northeastern R. R. Co.*, 39 Mich., 675. 1878.

965. — The charter of defendant, in terms, authorized it to enter upon lands, and construct and operate its road over them, in advance of making compensation for the lands taken. Some years before instituting proceedings to obtain the right of way over lands of plaintiff, it entered upon a strip of land belonging to plaintiff, constructed its road over it, and has been in possession of and operating its road over the same ever since. In so taking possession of said strip, and constructing its road over it, it intended to make such strip a part of its general line, and ultimately to secure, in the manner provided by law, the right to retain and use the land for that purpose. In proceedings to ascertain the compensation to be paid to the owner for right of way across the land, *held*, that although the clause in the charter au-

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thorizing the defendant to enter upon and construct its road over lands, without having first made compensation for the lands taken, was void, and the defendant was a trespasser in so entering, and whatever it affixed to the soil became a part of, and strictly belonged to, the owner of the soil, yet, as in these proceedings the question is, what is just, fair and equitable compensation to be paid to the owner for taking the land, and damages arising from taking the same, such owner is not entitled to have included, as a part of such compensation, the value added to the land by the road-bed, ties, rails, etc., placed on it by defendant. *Greve v. St. Paul and Pacific R. R. Co.*, 26 Minn., 66, 1879.

966. — The maxim of the common law, that everything affixed to lands becomes a part of the freehold, was always subject to exceptions, and these exceptions have multiplied with the increasing value of personal property, and the varied necessities of society; yet, it is generally true that where there is a tortious entry upon lands, and the tortfeasor makes improvements, annexed to the soil for the better use and enjoyment of the lands, such improvements become a part of the realty, and the owner of the lands is under no obligation to make compensation for them, or to suffer them to be dissevered and removed. *Jones v. New Orleans and Selma R. R. Co., etc.*, 70 Ala., 227, 1884.

967. — This principle as to improvements erected by a trespasser cannot justly be applied in eminent domain proceedings in the present case; the railway company having entered on defendant's land, and constructed its road through them, without his consent, and without a resort to statutory proceedings to condemn the right of way, and the defendant having allowed ten years to elapse without instituting proceedings to obtain compensation. The just measure of compensation, under these circumstances, is not the increased value of the land at the time the proceedings are instituted, caused by the improvements erected by the company, but the value of the land when taken, and the injury or diminution in the value thereby caused to the contiguous lands; and interest on the sum thus ascertained, *it seems*, should also be allowed. *Ib.*

968. — Where a railway company by trespass lays its track upon the land of another, and afterwards proceeds to have the premises condemned under the right of eminent domain, the value of the track and improvements placed upon the premises will be considered in estimating the damages. The fixtures placed on land by a trespasser belong to the land owner. *Van Sise v. Long Island R. R. Co.*, 3 Hun (N. Y.), 613, 1875.

969. — The compensation of a land owner for property taken for public use is to be estimated as of the time of the award of the commissioners, or, where the assessment is made by a jury, as of the time of trial. This rule is not changed by the fact that a railroad company has, without the consent of the land owner, entered upon the premises and constructed its road prior to acquiring the right of way by appropriate legal proceedings. A company cannot take land by trespass and then claim that in subsequent condemnation proceedings the value shall be estimated at the time of the trespass. *County of Blue Earth v. St. Paul and Sioux City R. R. Co.*, 28 Minn., 503, 1881; 10 Amer. & Eng. R. R. Cases, 209.

970. Non-payment of damages. Where a judgment for damages is not paid, and it appears that pending the appeal the railroad company entered upon the land and constructed its road, and it does not appear that the land owner had any actual knowledge of such entry and occupation, or in any manner consented thereto, a judgment in favor of a land owner in an action of ejectment for the recovery of possession will not be reversed. *St. Jos. and Denver R. R. Co. v. Callender*, 13 Kans., 496, 1874.

971. Subsequent purchaser. When a railroad company appropriates land for its road-bed and track without the consent of the owner of the land and without condemning the land under the charter, a right of action accrues to such owner. But a subsequent purchaser cannot sustain an action against the company for the value of the land, nor for the use and occupation of the right of way, as on an implied promise to pay him therefor. *McLenden v. Atlanta and West Point R. R. Co.*, 54 Ga., 293, 1875.

972. Tender; interest. Action of trespass, in which defendant justifies its appro-

Compensation — Liability to Company for their Negligence.

priation of plaintiff's land by setting up a condemnation and award, under and in compliance with the statute, and a due tender of the amount awarded. The award was filed December 2, 1870, at which time it must be taken to have been made. The alleged tender was made December 4, 1870, so soon after the filing of the award that the plaintiff's claim that the tender should have included interest on the award may be disregarded. *Held*, that the jury were correctly instructed as follows: "If you find from the testimony in the case that the plaintiff was, immediately after the filing of the award, notified of the fact and of the amount of the award to him, and that, after said notice, and before the defendant entered on said premises, the defendant, by its agent or otherwise, offered to pay him (the plaintiff) the amount of the award, and had the means and money then and there to pay him, and he refused to accept the same, it released the defendant from any further obligation, except to keep the money so offered in readiness to be paid, at any time thereafter, on demand." *Scott v. St. Paul and Chicago R'y Co.*, 21 Minn., 322, 1875; 18 Amer. R'y Rep., 421.

973. Unlawful taking; assessment of damages. Where possession was taken without condemnation and without license, though not wilful, and the damages are assessed, the land owner is entitled to the value at the time of the entry, with interest. *Williams v. New Orleans, Mobile and Texas R. R. Co.*, 60 Miss., 689. 1883.

974. — Where the company has in fact constructed its road over the land of another without authority, and proceedings are afterwards taken to condemn the land, the measure of appraisal is the value which the land taken would now have if the road had not been constructed upon it, together with the difference between the present value of the owner's contiguous land, with the road, properly constructed, where it is, and what would have been its present value if the road had not been built. *Lyon v. Green Bay and Minnesota R'y Co.*, 43 Wis., 538, 1877; 15 Amer. R'y Rep., 91.

975. Void proceedings; right of action of land owner. Where land has been injured by a railway company that has gone

upon it under void condemnation proceedings, the owner's right to recover damages is unaffected by his having sold it to a third person, for the depreciation would have been taken into account in fixing the price. *Dunlap v. Toledo, Ann Arbor and Grand Trunk R'y Co.*, 50 Mich., 470, 1883; 10 Amer. & Eng. R. R. Cases, 185.

976. — The general railway law permits a railway company to begin new proceedings where proceedings already taken have failed. *Held*, that where the land is meanwhile occupied by a tenant, the landlord's right of action against the company for injury done to the premises under the void proceedings goes with the land, and attaches only to his reversionary interest, and it is condemned and appropriated therewith, and disappears when subsequent valid proceedings are taken and compensation made. *Ib.*

EMPLOYES.

See CONSTITUTIONAL LAW; DAMAGES; INJURIES TO EMPLOYEES; INJURIES CAUSING DEATH; MASTER AND SERVANT.

1. Compensation; secretary of company. Under the Companies Clauses Consolidation Act, 8 and 9 Vict., c. 16, s. 91, a person who has been employed as secretary to a company may maintain an action for work and labor against the company, although the remuneration to be paid him as secretary has not been determined on at a general meeting of the company. *Bill v. Darent Valley R'y Co.*, 37 Eng. Law & Equity, 539. 1856.

2. Liability to company for their negligence. A railroad corporation may recover damages resulting from the negligence of an employe in the performance of his contract of service, when sued by the employe to recover his wages. When damage results to cars and other property of a corporation from the negligence of an employe in the performance of his duties, it may recover damages in an action against him. *Mobile and Montgomery R. R. Co. v. Clanton*, 59 Ala., 392. 1877.

Miscellaneous.

ENGINEER.

See ARBITRATION; CONSTRUCTION OF RAILWAYS; CONTRACT.

EQUITY.

See VISITORIAL POWERS.

1. Compensation for taking private property. A court of equity cannot determine the amount of compensation to be made for lands taken by a railway company by right of eminent domain, the matter being of purely legal cognizance; and, in such a case, the failure of a defendant company to answer that the plaintiff has an adequate remedy at law does not waive the objection. *Buckner v. Chicago, Milwaukee and Northwestern R'y Co.*, 56 Wis., 403. 1882.

2. Rules; stockholder's suits. Equity rule 94 applies only to bills brought by a stockholder against a corporation and others, "founded on rights which may be asserted by the corporation," and does not apply to a suit brought by a stockholder, not "founded on such rights," against a corporation to restrain corporate action, and against the president for discovery merely. *Leo v. Union Pacific R'y Co.*, 17 Federal Reporter, 273. 1883.

ESCROW.

See EMINENT DOMAIN; MORTGAGE.

ESTATES OF DECEDENTS.

See INJURIES CAUSING DEATH; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; INJURIES TO PERSONS CROSSING THE TRACK.

ESTOPPEL.

See CARRIAGE OF MERCHANDISE; CONVEYANCE; EMINENT DOMAIN.

1. Against member of corporation. If a member of a railway company, who is also an associate director, claims that the other directors, as agents of the company, have exceeded their functions in selling property in derogation of the rights of the company, that claim must be seasonably as-

serted in a manner that will bind the parties to the sale. Acquiescence will confirm the sale, and, allowing the consideration to be applied to the use of the company, will adopt and ratify it; and the purchaser must be a party to such a proceeding. *State ex rel. v. Smith*, 43 Vt., 266; 16 Amer. R'y Rep., 394. 1876.

2. Conduct; compromise. Conduct by one of the parties to a transaction will not amount to an estoppel if it was not accompanied by a design that the other party should act upon it, and there has been no change in the situation of that party. This rule applied to a compromise with an injured passenger, and held, that the failure to return the amount paid in compromise did not work an estoppel in this case. *Carroll v. Manchester and Lawrence R. R. Co.*, 111 Mass., 1. 1872.

3. Corporations. Railroad companies are subject to the same rules of estoppel as individuals. *Little Rock and Napoleon R. R. Co. v. Little Rock, Mississippi River and Texas R. R. Co.*, 36 Ark., 663, 1880; 4 Amer. & Eng. R. R. Cases, 392.

4. Dower. A widow is not estopped from claiming her dower by advising and consenting to a sale made by the heirs at law. *Toledo, Peoria and Warsaw R'y Co. v. Curtinius*, 65 Ill., 120. 1872.

5. Ejectment. Where a land owner permits a railway company to build its road upon his land he cannot maintain ejectment against the company. *Kanaga v. St. Louis, Lawrence and Western R. R. Co.*, 76 Mo., 207. 1882.

6. Erection of building on railway land. Where a deed referred to a railway as one boundary and contained in it a covenant to build a house on the lot sold, and the authorities of the railroad company must have known that the house extended beyond the boundary during the erection thereof, and interposed no objection thereto, and the defendant acted *bona fide*, the company will be estopped from not allowing the defendant to remove the house from off its land (in case of a recovery of it), at its expense; or it will be decreed to pay for its value on proper pleadings made therefor. *Ga. R. R. and Banking Co. v. Hamilton*, 59 Ga., 171. 1877.

Abbreviations — Books.

7. Patented articles; contract. Where one who has contracted with a corporation for the exclusive right to manufacture and sell a certain patented article has received the full benefit of the contract, he cannot, in an action against him thereon, deny the authority of the corporation to make the contract, especially if the stockholders are satisfied. *Hall Manuf'g Co. v. American R'y Supply Co.*, 48 Mich., 331. 1882.

8. Payment. Creditors who have received township aid bonds in payment cannot retain them and question their validity or value at the same time; if they wish for a payment in cash they must give up the bonds. *Michigan Air Line R'y Co. v. Mellen*, 44 Mich., 321, 1880; 5 Amer. & Eng. R. R. Cases, 245.

9. Pleading. If an estoppel be relied on as a defense to an action, in order to be availing it must be pleaded. *Burlington and Missouri River R. R. Co. v. Harris*, 8 Neb., 140. 1879.

10. Statute. There can arise no estoppel to deny the existence of a law. *State v. Little Rock, Miss. River and Tex. R'y Co.*, 31 Ark., 701. 1877.

11. Stockholders' acts. A corporation is not estopped by acts of individual stockholders, who, being admitted as parties to a suit wherein the corporation was a party, filed pleadings therein for themselves only, and not for the corporation. The corporation is not estopped by the action of the court on such pleadings, although they may have set up the same acts as grounds for relief that are afterward relied upon by the corporation in another suit. *Covington and Lexington R. R. Co. v. Bowler*, 9 Bush (Ky.), 468. 1872.

EVIDENCE.

See BAGGAGE; BY-LAWS; CARRIAGE OF LIVE STOCK; CARRIAGE OF MERCHANDISE; CONVEYANCE; EMBEZZLEMENT; EMINENT DOMAIN; FRAUD; HUSBAND AND WIFE; INDICTMENT; INJURIES TO DOMESTIC ANIMALS; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; INJURIES TO PERSONS CROSSING THE TRACK; PATENTS; STATUTES; STATUTE OF FRAUDS; SUBSCRIPTIONS BY CITIES AND TOWNS; SUBSCRIPTIONS BY COUNTIES; SUBSCRIPTIONS BY INDIVIDUALS; TAXATION.

[Matters of evidence will be found distributed through this Digest generally, under the various other titles.]

1. Abbreviations. Courts will not take judicial notice of the meaning of commercial abbreviations; such questions are for the jury. The court would not take notice of the letters "C. O. D." *McNichol v. Pacific Express Co.*, 12 Mo. App., 401. 1882.

2. Agreement of agents. Where a general agent of a common carrier, with power to settle and adjust losses, makes a promise to pay for a loss upon a certain contingency, evidence of such promise is proper for the consideration of the jury. *Merchants' Despatch Transportation Co. v. Leysor*, 89 Ill., 43. 1878.

3. Admissions of attorney. An oral admission of a fact by an attorney during the trial of a cause binds his client; and where it is uncertain what was the scope and intent of the admission, the matter must be left to the jury for its determination. *Central Branch Union Pacific R. R. Co. v. Shoup*, 28 Kans., 394. 1882.

4. — An attorney who has been employed by the depository to defend an action brought by the depositors for the destruction of the deposit, as provided in § 1838 of the Civil Code, has no authority by virtue of his employment to make *in pais* admissions or statements in respect to the circumstances under which the destruction occurred that are binding upon the depository. So held in an action for destruction by fire of certain wool stored in a warehouse. *Wilson v. Southern Pacific R. R. Co.*, 53 Cal., 735. 1879.

5. Answers to interrogatories by corporation. The answers made by a defendant corporation to interrogatories filed with the complaint are proper evidence for the plaintiff. *Louisville, New Albany and Chicago R'y Co. v. Henly*, 88 Ind., 535. 1883.

6. Admissions of injured person. The admissions of one injured by the alleged negligence of a railway company, made after the accident, are not conclusive respecting the manner in which the accident occurred and the absence of wilful intention to injure him, but may be considered in connection with other circumstances. *Cooper v. Central R. R. Co. of Ia.*, 44 Ia., 134. 1876.

7. Books; account books. Entries made in the usual course of business in the books of a partnership by a partner who has since gone to parts unknown are admissible in

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evidence in favor of the partnership without the testimony of such partner. *New Haven and Northampton Co. v. Goodwin*, 42 Conn., 230. 1875.

8. — corporation books. Where the books of a corporation, produced in evidence under a rule of court in a suit against the corporation for specific performance of a contract, failed to show that the contract had ever been recognized by resolution of the proprietors of the corporation, and the bill was thereupon dismissed for want of evidence, and the plaintiffs subsequently applied for leave to file a supplemental bill in the nature of a bill of review for the purpose of making such resolution a part of their case, they having discovered that such a resolution had been adopted, it was held that though plaintiffs might, with due diligence, have discovered the evidence soon enough to have availed themselves of it in the original suit, yet, as the defendants ought to have entered the resolution in their books, the motion should be granted. *Sheffield Canal Co. v. Sheffield and Rotheram R. R. Co.*, 1 Phillips (Eng. Ch.) 484. 1843.

9. — freight books. While the freight books of a railway company may be used by a witness to refresh his memory, they are not admissible in evidence. *Martin v. Union Pacific R. R. Co.*, 1 Wyoming, 143. 1873.

10. — The freight book of a railway company, kept by its agent, is competent evidence against it to show the receipt of goods. *Root v. Great Western R'y Co.*, 55 N. Y., 636. 1873.

11. — record of weights. Where a railroad company was sued for the non-delivery of grain to the consignee of the plaintiff, and the company defended on the ground that they delivered the same to a third party with whom the consignee had grain shipped to him, delivered, and that the same was burned in the great Chicago fire, the defendant offered in evidence an entry made in a book of such third party on October 7, 1871, shown to have been made in the usual course of business, by the foreman of the receiving and weighing department of such third party, as tending to show the receipt of the plaintiff's grain on that day. It was not pretended that the foreman was dead, but the offer was based upon showing the

entry to have been in his handwriting, and made in the course of his ordinary duties and as a part of the *res gestæ*. Held, that the entry was proper evidence and should have been admitted. *Chicago and Northwestern R'y Co. v. Ingersoll*, 65 Ill., 399. 1872.

12. — rule books. The rule books of a corporation having been produced upon notice do not thereby become admissible in evidence unless relevant. *Gow v. Charlotté, etc., R. R. Co.*, 68 Ga., 54. 1879.

13. — stock and stockholders; transfer book. The transfer book is admissible in evidence to show when a transfer is made. *Aylesbury R'y Co. v. Thompson*, 2 Eng. R. R. & Canal Cases, 668. 1841.

14. — subscription books. A subscription book to the stock of a railway company was made *prima facie* evidence by the special act of incorporation. A book was held admissible in evidence under this act, although the book contained the names of some persons not entitled to shares, and omitted the names of some others who were entitled. *London R'y Co. v. Freeman*, 2 Manning & Granger, 606; 40 E. C. L., 766, 1841; *London R'y Co. v. Graham*, 1 Adolphus & Ellis (N. S.), 271; 41 E. C. L., 535, 1841.

15. — time books. Time books kept with the men engaged in work upon a railroad are not admissible in evidence to show the cost or amount of such work until it is shown that they were properly and correctly kept. *Ford v. St. Louis, Kansas City and Northern R'y Co.*, 54 Ia., 723. 1880.

16. — production of corporate books. An order for the inspection of the books and papers of a foreign corporation should not require it to produce books, kept and in constant use in its office in a distant state, but should direct it to produce and deliver to the plaintiff sworn copies of so much of their contents as relates to the subject matter mentioned in the order, within a reasonable time, to be designated by the order. *Irvin v. Oregon R'y and Navigation Co.*, 22 Hun (N. Y.), 566. 1890.

17. — On a motion made in an action to discover books, papers and documents, where the moving papers establish the existence of the evidence, its materiality, the necessity of a discovery, and the good faith of the ap-

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plication, and these facts were uncontradicted, it was not necessary that the papers should also show, in addition to these facts, that the evidence sought to be discovered is "indispensably necessary," and that the party seeking the discovery has not the means of establishing the same facts by other available proof. So *held*, where freight books, bills of lading, etc., were called for in an action for damages to cotton by fire. *Whitworth v. Erie R. R. Co.*, 37 N. Y. Superior Ct., 437. 1874.

18. — A corporation may be compelled to produce its books and papers in evidence, which may be necessary and vital to the rights of litigants, and considerations of inconvenience must give way to the paramount rights of parties to the litigation. *Wertheim v. Continental R'y and Trust Co.*, 15 Federal Reporter, 716. 1883.

19. — In requiring the production of books or writings in evidence in actions at law, federal courts are not governed by the provisions of state statutes, but by the provisions of s. 724, Rev. St. U. S. *Gregory v. Chicago, Milwaukee and St. Paul R. R. Co.*, 10 Federal Reporter, 529; 3 McCrary (U. S. C. C.), 374. 1893.

20. Carriage of merchandise — lost contract. Where the terms of a lost contract were in controversy, evidence of the custom of the parties, of conversations respecting the subject matter of the contract, and of the general nature and scope of such contracts, was not irrelevant or immaterial. *Beiderbecke v. Merchants' Despatch Co.*, 39 La., 500. 1874.

21. — parol evidence. The general rule that a common carrier in forwarding goods beyond the end of his route is bound to follow with fidelity the precise instructions of the consignor, or to suffer the risk of a deviation therefrom, applies in case where, in the absence of express stipulations, the instructions become part of the contract. If the carrier stipulates in writing that he may forward the goods by any customary mode which is safe and prudent, it is a variation of the contract to permit a prior or contemporaneous oral direction to control it and to impose upon him a different duty. *Hinckley v. N. Y. Central and Hudson River R. R. Co.*, 56 N. Y., 429, 1874; *Same v. Same*, 3

Thompson & Cook (N. Y. Supreme Ct.), 281. 1874.

22. Competency; deceased party; railway officer as witness. In an action between a railway company and a partnership, a director of the company is incompetent to prove negotiations in reference to the subject matter of the suit between him and a member of the firm since deceased. *Southwestern R. R. Co. v. Papot*, 67 Ga., 675. 1881.

23. — Tennessee statute. That part of the Code, § 1169, which renders the engineers and agents of a railroad incompetent witnesses to prove that accidents were unavoidable, is repealed by the act of 1869-70, T. & S. Statutes, 3818, and the witnesses are competent. *Grable v. Louisville and Nashville R. R. Co.*, 2 Lea (Tenn.), 246. 1879.

24. Concealment and subornation. On the trial of an action on the case, brought against a city railway company to recover for a personal injury, the court allowed a witness for the plaintiff to testify that a clerk in the employ of the defendant offered him \$300, either to prevent him from appearing as a witness against the company, or to influence his evidence in favor of the company. This was objected to as no part of the *res gestæ*. *Held*, that the evidence was proper, though not a part of the *res gestæ*. *Chicago City R'y Co. v. McMahon*, 103 Ill., 485, 1883; 8 Amer. & Eng. R. R. Cases, 68.

25. — There is no presumption that a railroad corporation has authorized its local agent to hinder access by the counsel of an adverse suitor to a witness in the employment of the company; and, unless the delegation of such authority appears in evidence, the corporation will be unaffected by conduct of the agent tending to prevent such access. *Marsh v. South Carolina R. R. Co.*, 56 Ga., 274. 1876.

26. — On the trial of an action by the plaintiff and wife for injuries sustained by the wife owing to the defendant's negligence, the plaintiff's case was proved by the evidence of the wife and other witnesses; and, the defendant having introduced evidence to prove that the wife was in fault, tendered the following evidence, which was received, subject to objection. W. deposed that he, the plaintiff, and C., a clerk of the plaintiff's attorney, were together at the plaintiff's

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house; the plaintiff said that if W. would give testimony as to the accident he should share the compensation; the plaintiff knew that W. was not present at the accident, and W. said he was not, and C. said if W. would not come forward he, C., would get other witnesses. The other witnesses deposed to similar proposals made to them by C., but not in the plaintiff's presence, to give false evidence. The plaintiff was not present at the accident; and neither he nor C. had been called as witnesses. *Held*, that the evidence was rightly received, as amounting to evidence of an admission, by conduct, of the plaintiff that he had a bad case. C. having been shown to be acting in concert with the plaintiff to suborn false witnesses, what C. did in furtherance of that object in the absence of the plaintiff might be inferred to have been done with the plaintiff's privity. *Moriarty v. London, Chatham and Dover R'y Co.*, Law Reports, 5 Queen's Bench Cases, 314. 1870.

27. Condition of track. In a case involving the question of negligence of a railway company in suffering loose planks to lie on a culvert between the rails of the track, resulting in personal injury to the plaintiff, the evidence was conflicting as to the fact of the culvert being worked upon on the day before the injury, the section boss and one H., a servant under him, having testified that no work was done on the culvert on the day claimed. After this the plaintiff's father and mother both testified that the servant, on the day of the accident, said to them that he told the boss the evening before that it was a dangerous way to leave the planks, without being spiked down. The court refused to allow the defendant to prove in rebuttal by the boss that the servant never told him anything of the kind. *Held*, that the court erred in refusing it. *Pennsylvania Co. v. Boylan*, 104 Ill., 595, 1882; 10 Amer. & Eng. R. R. Cases, 784.

28. Connecting lines; way bill. What amounts to competent evidence. This matter stated in a recapitulation of the evidence given in this particular case. A way bill in which the heading spoke of the goods as goods to be transported by the first road, *from* the place of departure *to* the place at

the end of the whole line, and at which the owner wished to have them delivered, *held*, to be competent, whether looked upon as a contract or as a declaration or admission. *Railroad Co. v. Pratt*, 22 Wallace, 128, 1874; 11 Amer. R'y Rep., 431.

29. Construction of engine. Where incompetent evidence is admitted as to the construction of engines, and afterwards the same facts are shown by competent evidence on behalf of the opposite party, *held*, that the error was without prejudice. *Rowell v. Boston and Me. R. R. Co.*, 58 N. H., 514. 1879.

30. Contract for railway ties. In a suit against a railroad company to recover the price and value of ties furnished, the company offered in evidence a copy of a blank, shown the plaintiff by its engineer, for the purpose of proving that the contract was made on behalf of certain contractors named in the blank. The blank contract was not executed by the parties, and was exhibited to the plaintiff to inform him of the length and size of the ties. *Held*, that the blank was not admissible as evidence to prove the contract was made by the plaintiff with the contractors. *Toledo, Wabash and Western R'y Co. v. Chew*, 67 Ill., 878. 1873.

31. Correspondence. In a suit by an employee of a railway company to recover back money paid by him to the company, letters written by the plaintiff to the officers of the company are not admissible as evidence in his favor. *St. Louis, Alton and Terre Haute R. R. Co. v. Thomas*, 85 Ill., 464. 1877.

32. — letters of corporate officers. Letters from the president of a railway company, written after the destruction of goods by fire, admitting the liability of his company therefor, are not evidence against the corporation in action brought to recover for such loss. *Piedmont Manufacturing Co. v. Columbia and Greenville R. R. Co.*, 19 So. Car., 553. 1882.

33. — The secretary of a company cannot bind the corporation by admissions contained in correspondence. *Bell v. London and North Western R'y Co.*, 21 Eng. Law & Equity, 566; 15 Beavan, 548. 1853.

34. — Two letters of W. F. D., general superintendent of the defendant, were introduced and read in evidence, over general ob-

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jections of incompetency, irrelevancy and immateriality. The subject matter of these letters was within the general scope of the superintendent's authority, and the contents thereof were principally admissions of facts, and not merely offers to compromise. *Held*, that although a mere offer to compromise is not proper evidence, yet that an admission of a fact is, and that these letters were properly introduced in evidence. *Central Branch Union Pacific R. R. Co. v. Butman*, 22 Kans., 639. 1879.

35. — parol evidence. Parol evidence, explanatory of letters written to execute an oral contract, is not admissible. *McFarland v. Boston and Lowell R. R. Co.*, 115 Mass., 63. 1874.

36. — tracing letter. A tracing letter sent by an express agent in search of goods lost, together with the reply indorsed thereon by another agent, and the declaration of the agent as to the burning of goods, are admissible in evidence against the company. *Schutter v. Adams Express Co.*, 5 Mo. App., 316. 1878.

37. Corporate existence; appearance. Appearance to a summons directed to a corporation is an admission of its corporate existence. *Derrenbacher v. Lehigh Valley R. R. Co.*, 28 Hun (N. Y.), 612, 1880; *Witthouse v. Atlantic and Pacific R. R. Co.*, 64 Mo., 523, 1877.

38. — The general appearance and answer of a defendant corporation ought to be deemed an admission of its corporate existence; and it ought not afterwards, when no special issue is presented, insist that plaintiff must produce and prove its character; at all events, in such case it is enough to show user or corporate acts to make a *prima facie* case of the identity of such corporation. *Derrenbacher v. Lehigh Valley R. R. Co.*, 59 Howard's Practice (N. Y.), 283. 1880.

39. — criminal case. On the trial in a criminal case, the existence of a railway corporation may be proved by general reputation. A *de facto* existence of a corporation is all that is necessary to be shown. *State v. Thompson*, 23 Kans., 338. 1880.

40. — statute. Where a corporation has been recognized by the state in a general statute, the existence of such corporation will be judicially noticed. *Houston and Texas*

Central R. R. Co. v. Knapp, 51 Tex., 569. 1879.

41. Cross-examination. If a witness is sworn and gives some evidence, however informal and unimportant, he may be cross-examined in relation to all matters involved in the case. *St. Louis and Iron Mountain R. R. Co. v. Silver*, 56 Mo., 265. 1874.

42. — The latitude permissible in cross-examination of a witness in relation to a railway construction contract considered. *Ottawa, etc., R. R. Co. v. McMath*, 1 Bradwell (Ill.), 429. 1877.

43. Customs of hackmen. Testimony concerning the usages of runners and hackmen at remote periods, to establish a custom at the time of the accident, is objectionable. *Michigan Central R. R. Co. v. Coleman*, 28 Mich., 440, 1874; 12 Amer. R'y Rep., 59.

44. Damages to crops. On the trial of a question of damages for an injury to growing crops, neither science nor unusual skill being involved, the witnesses should be confined in their testimony to a statement of the facts showing the injury, and should not be permitted to express opinions as to the amount of the damage or loss occasioned thereby. *Burlington and Missouri River R. R. Co. v. Schluntz*, 14 Neb., 421. 1883.

45. Declarations; admissions. A statement by a railway agent that it was reported that there had been a delay in a freight train, and that, if the facts were as represented, the company ought to and would pay the damages, and requesting the party in interest to investigate the facts, is incompetent and irrelevant in a suit against the road for damages from such delay. *Tuggle v. St. Louis, Kansas City and Northern R'y Co.*, 62 Mo., 425. 1876.

46. — Where a canal boat had been sunk when in charge of defendant, and on inquiry of defendant's agent, having charge of tow boats, the agent stated that he regarded the boat as a total loss, *held*, that these admissions were competent evidence. *Dowdall v. Pennsylvania R. R. Co.*, 13 Blatchford (U. S. C.), 403. 1876.

47. — The declarations of an agent in charge of a station and warehouse belonging to the defendant, at the time the goods of plaintiff and his assignors were burned therein, as to what occasioned the fire, *held*,

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upon the facts stated in the opinion, inadmissible in evidence. *Meyer v. Virginia and Truckee R. R. Co.*, 16 Nev., 341, 1881; 9 Amer. & Eng. R. R. Cases, 178.

48. — cross-examination. The employes of the railway company who were employed on the train at the time plaintiff's intestate was killed, having been examined as witnesses for the company, they may be questioned on cross-examination as to their statements and declarations relative to the accident, made a day or two after it happened; such questions are certainly permissible, as laying a predicate for proof of contradictory statements, even if they exceed the large latitude which is allowed in the cross-examination of witnesses. *Tanner v. Louisville and Nashville R. R. Co.*, 60 Ala., 621. 1877.

49. Declarations after occurrence. The declarations of an agent after the occurrence are not admissible against the principal. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Wright*, 80 Ind., 182, 1881; 5 Amer. & Eng. R. R. Cases, 628; *Moore v. Chicago, St. Louis and New Orleans R. R. Co.*, 59 Miss., 243, 1881; 9 Amer. & Eng. R. R. Cases, 401; *Michigan Central R. R. Co. v. Coleman*, 28 Mich., 440, 1874; 12 Amer. R'y Rep., 59; *Treadway v. S. C. and St. P. R. R. Co.*, 40 Ia., 526, 1875; 8 Amer. R'y Rep., 415; *Furst v. Second Avenue R. R. Co.*, 72 N. Y., 542, 1878; *Hannibal and St. Joseph R. R. Co. v. Martin*, 11 Bradwell (Ill.), 386, 1882.

50. — Declarations of an agent made after an accident will not bind the master unless they are of such a character as to show that he had previous knowledge of the defect in the machinery. *Baker v. Allegheny Valley R. R. Co.*, 95 Pa. St., 211, 1880; 8 Amer. & Eng. R. R. Cases, 141.

51. — In an action against a street passenger railroad company for an injury to a boy, which occurred while he was getting on a car of the company, the plaintiff offered in evidence the declarations of the driver of the car as to the cause of the accident. The declarations were made about half an hour after the accident occurred, and were offered as evidence in chief, and not for the purpose of contradicting the driver, who had not been examined as a witness for the defendant. On objection, it was held that the evi-

dence was inadmissible. *Dietrich v. Baltimore and Hall's Springs R'y Co.*, 58 Md., 347, 1882; 11 Amer. & Eng. R. R. Cases, 115.

52. — What defendant's engineer said some time after the injury and at a different place, indicating the state of his feelings towards the person injured, is not admissible against the defendant. *Newsom v. Ga. R. R. Co.*, 66 Ga., 57. 1880.

53. — To make the declarations of an agent admissible as against his principal, they must have been made while he was engaged in the performance of the duties of his agency, and must have related to the subject matter thereof. *Verry v. B. C. R. and M. R. R. Co.*, 47 Ia., 549. 1877.

54. — An employe of a railroad company was injured while coupling two cars, one of which had been left in the yard for repairs; an employe in the repair department stated, some minutes after the injury, that he knew the car was out of repair, and that they proposed to repair it when it had been switched back to the proper place. *Held*, that, as the employe was not at the scene of the accident in the performance of any duty, but as a mere spectator, his declarations were not admissible. *Ib.*

55. — On the trial of a suit against a railroad company for damages to the plaintiff, an employe, caused by the negligence of his co-employees, it was error in the court to permit the plaintiff to testify before the jury that an assistant supervisor had told him, after the injury was done, that the company felt itself under obligations to support him and his family during his life. *East Tenn., Va. and Ga. R. R. Co. v. Duggan*, 51 Ga., 212. 1874.

56. — The declarations of an engineer made two or three hours after the accident, the engineer being dead at the time of the trial, are not competent testimony against the railway company. *Travis v. Louisville and Nashville R. R. Co.*, 9 Lea (Tenn.), 231. 1882.

57. — The declarations of the servants of the railroad company, while returning to town on the train with the dead body of the deceased, are not admissible evidence against the company as a part of the *res gestæ* connected with the killing. *Tanner v. Louis-*

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ville and Nashville R. R. Co., 60 Ala., 621. 1877.

58. — What an agent says or does within the scope of his agency, and while engaged in the very business, is evidence for or against his principal. His declarations made subsequently as to what he had done are not evidence, though he may continue still to act as agent generally or in other matters. *McComb v. North Carolina R. R. Co.*, 70 N. C., 178, 1874; *Stenhouse v. Charlotte, Columbia and Augusta R. R. Co.*, ib., 542, 1874.

59. — Declarations of defendants' agent within a reasonable time after the transaction were evidence against them in an action for wrongful delivery of goods. *Union R. R. and Transportation Co. v. Riegel*, 73 Pa. St., 72. 1873.

60. — In an action brought by a railway laborer against the company to recover damages for injuries alleged to have been sustained through the incompetency of a section foreman, by way of showing the company's knowledge that the foreman was incompetent, plaintiff offered to prove that some days after the occurrence of the injury the defendant's road-master had said he was incompetent. *Held*, that the evidence was inadmissible. *McDermott v. Hannibal and St. Joseph R. R. Co.*, 73 Mo., 516, 1881; 2 Amer. & Eng. R. R. Cases, 85.

61. — In an action brought by a widow against a railroad company for killing her husband, a witness was allowed to testify that after deceased was struck, and after the train was stopped, two of the train-men, whom he took to be the fireman and the engineer, came up, and one of them said to the other, "If you had stopped the train when I told you you would not have killed him," and that the other replied: "It cannot be helped now; it is too late." *Held*, that the admission of the evidence was error. *Adams v. Hannibal and St. Joseph R. R. Co.*, 74 Mo., 553, 1881; 7 Amer. & Eng. R. R. Cases, 414.

62. — The declarations of a conductor, being made at the time of the collision or a few moments afterwards, when there was no time to contrive or devise a falsehood, and during the search for the victims of the accident, are a part of the *res gestæ*, and competent as original evidence. *McLeod v.*

Ginther, 80 Ky., 399, 1882; 8 Amer. & Eng. R. R. Cases, 162.

63. — In a suit against a railroad company an assignment of error that the court refused to allow evidence of the declaration of the conductor immediately after the accident, without specifying what declaration, is too general. *Newsom v. Ga. R. R. Co.*, 62 Ga., 339, 1879.

64. — At the trial by a jury of an action against a railway company, as a common carrier, to recover for the loss of cotton alleged to have been delivered at a depot of defendants, and burned the same day, a declaration of the agent, made the next day, that "the railroad company was responsible for the cotton," was received as evidence against defendant. *Held*, error, but not sufficient ground for a new trial — the declaration being a mere expression of opinion and irrelevant to the issues. *Patterson v. Railroad Co.*, 4 So. Car., 153. 1872.

65. — In an action against a railway company for the loss of a parcel containing money, the defendant pleaded the Carriers Act, and plaintiff replied that the parcel was lost by the felonious act of one of the company's servants. It was proved that the parcel was sent on the 27th of July, by the defendant's railway, addressed to a clerk of plaintiff at U., where there was a station on defendant's railway. That the parcel was not delivered, and on the same day H., a porter in the defendant's service at U. station, disappeared. A superintendent of police at U. gave, after objection by defendant, the following evidence: "I know P., the station-master at defendant's railway station at U. In consequence of a communication I went to him on the 30th of July. He told me that H., a parcel porter, had absconded from the service; that a money parcel was missing, and he, P., suspected H. had taken it; would I (the witness) make inquiries after him?" A verdict having passed for plaintiffs, *held*, that the evidence was rightly admitted; for that it must be taken that the station-master, being the person in charge there, had authority from the defendant to set the police in motion, and that what he said was pertinent to the occasion, when acting within the scope of his authority, and was evidence against the de-

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fendant. *Kirkstall Brewery Co. v. Furness R'y Co.*, Law Reports, 9 Queen's Bench Cases, 468, 1874; 10 Eng. (Moak), 118.

66. — previous to transaction. It being charged in the complaint that plaintiff, while being carried on the defendant's train, was drenched with water, and that it was done wilfully, and evidence tending to show that it was done by the direct procurement of the brakeman, it was competent to prove a previous declaration by the brakeman of his purpose to do it. *Terre Haute and Indianapolis R. R. Co. v. Jackson*, 81 Ind., 19, 1881; 6 Amer. & Eng. R. R. Cases, 178.

67. — In an action for damages against a railway company for injuries to the person, declarations made by the conductor of a train to a passenger, a moment before the accident, of the bad condition of the road, and his train having run off the track five consecutive times next before the preceding trip, are not admissible in proof of negligence of an agent binding on the principal. *Mobile and Montgomery R. R. Co. v. Ashcroft*, 48 Ala., 15, 1872.

68. — In the construction of a culvert under a railroad, the engineer of the company declared to a bystander in no way connected with the company, that he thought the culvert would prove insufficient in a flood. Twenty-five years thereafter suit was brought against the lessee of the company for damages for an injury resulting from an overflow of the embankment, and the party to whom these declarations of the engineer were made was permitted to testify thereto. *Held*, that this was error; that such declarations were inadmissible to bind the defendant in any way whatever. *Baltimore and Ohio R. R. Co. v. Sulphur Spring School District*, 96 Pa. St., 65, 1880; 2 Amer. & Eng. R. R. Cases, 166.

69. — *res gestæ*. The declarations of an agent authorized to purchase property, made by him while acting as agent of the vendee in negotiation for a settlement with the vendor, are regarded as connected with and as forming a part of the business of his agency, and will bind his principal. *Lyman v. Boston and Maine R. R. Co.*, 58 N. H., 384, 1878; *Huntingdon and Broad Top Mountain R. R. Co. v. Decker*, 82 Pa. St., 119, 1876; 15 Amer. R'y Rep., 425.

70. — A party seeking to enforce an agreement made by his agent is bound by his declarations made at the time, although he has exceeded his authority. *Caley v. Philadelphia and Chester County R. R. Co.*, 80 Pa. St., 363, 1876.

71. — The statements of the local agents of an express company to the grantor, pending negotiations between said company and said grantor, for said company to release the grantor's son, who was under arrest for embezzlement, upon the execution of a deed conveying certain land to the company, are admissible upon the trial of an action of ejectment by the company for said land. *Southern Express Co. v. Duffey*, 48 Ga., 358, 1873.

72. — The admissions or declarations of an agent are admissible against his principal only when made within the scope of his authority. *Livingston v. Iowa Midland R'y Co.*, 35 Ia., 555, 1872; 5 Amer. R'y Rep., 166.

73. — In an action against a railway company for failure to construct a cattle-pass which, it was claimed by plaintiff, it had agreed to do, a letter, in relation thereto, written to plaintiff by the superintendent, whose duty was to operate and keep in repair the road, was held not admissible. The cattle-pass, being an independent construction, is not properly embraced in repairs. *Id.*

74. Declarations of officers. It is not competent to show by the parol declarations of the individual directors of a corporation for what specific purpose a fund reserved in a contract made by the corporation was to be used. Such fund can be appropriated by the board of directors only. *Grayville and Mattoon R. R. Co. v. Burns*, 92 Ill., 802, 1879.

75. — In an action against a corporation for acts done by one of its servants, an admission made by the president of the company after the happening of the act, that, before the occurrence, the officers of the corporation had knowledge of the character of the servant whose act was complained of, cannot be introduced in evidence against the corporation. *Utter v. Forty-Second Street, etc., R. R. Co.*, 6 Daly (N. Y.), 227, 1875.

76. — Language used by the superintendent of a street railway company, admitting

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and justifying an assault of one of its drivers, was held to bind the company. *Malecek v. Tower Grove and Lafayette R'y Co.*, 57 Mo., 17, 1874; 9 Amer. R'y Rep., 1.

77. — The secretary of a corporation is not an officer having authority to make admissions binding the company. *Bruff v. Great Northern R'y Co.*, 1 Foster & Finlason (Nisi Prius), 844. 1858.

78. **Declaration of injured person.** About midnight a train of the defendant's freight cars passed K. street, in the city of Rochester, going east. It was followed, at a distance of about fifty feet, by a single engine and a tender running backwards. The plaintiff's intestate was struck at the crossing by either the train or the engine and killed. It appeared that immediately after the engine passed the deceased was found lying on or near the track mangled and bleeding. He was at once picked up and carried to the sidewalk. Some twenty or twenty-five minutes thereafter his brother arrived and conversed with him. Both the deceased and his brother were deaf mutes and the conversation was carried on by motions of the hands. *Held*, that the declarations thus made rested in a measure in the discretion of the trial court, and that the court did not abuse its discretion in permitting the introduction of the testimony. *Waldele v. New York Central and Hudson River R. R. Co.*, 29 Hun (N. Y.), 35. 1883.

79. — In a suit against a railroad company for damages resulting from a fall from a buggy, caused by the frightening of the plaintiff's horse by the blowing of defendant's whistle, what the plaintiff said a short time after the injury was done, at a place some distance off, as to the malice of defendant's agent in blowing the whistle, was not admissible in his own behalf as part of the *res gestæ*. *Newsom v. Ga. R. R. Co.*, 66 Ga., 57. 1890.

80. — **complaints of pain.** Complaints of physical pain, made by one suffering from a recent injury, are admissible in evidence on behalf of the sufferer in an action to recover damages for the injury. *Brown v. Hannibal and St. Joseph R. R. Co.*, 66 Mo., 588. 1877.

81. — An action was brought to recover damages for a personal injury alleged to have been occasioned by the defendant's neg-

ligence. Upon the trial a witness who had slept with the plaintiff some three months after the injury was allowed to testify that the plaintiff would sit on the edge of the bed and complain of pain in her arm and shoulder. *Held*, that the plaintiff's declaration was properly admitted as tending to characterize and explain her act in so sitting upon the bed. *Nichols v. Brooklyn City R. R. Co.*, 30 Hun (N. Y.), 437. 1883.

82. — In an action to recover damages for personal injury caused by the negligence of the defendant, the court permitted the plaintiff to prove, by a physician, that some weeks after the injury, and after the commencement of the action, the plaintiff complained of pain in the back, and soreness in his side. *Held*, that this was not erroneous; but that the length of time that had elapsed between the accident and the declaration was a proper subject of consideration for the jury. *Murphy v. N. Y. Central R. R. Co.*, 66 Barbour (N. Y.), 125. 1867.

83. **Depositions.** The manner of taking depositions on a *dedimus* considered. *Jones v. Oregon Central R. R. Co.*, 3 Sawyer (U. S. C. C.), 523. 1875.

84. — Sec. 29, ch. 73, Statutes of Minnesota, concerning depositions, must, under § 721 of the Revised Statutes of the United States, be followed in the federal courts in actions at law as a rule of decision. *Gravelle v. Minneapolis and St. Louis R'y Co.*, 3 McCrary (U. S. C. C.), 385. 1881.

85. — Under the practice in Alabama a party may use a deposition taken by his adversary, if he cross-examined the witness, and the party by whom it was taken declines to use it; and if, not having cross-examined the witness, he offers the deposition in evidence without objection from the party by whom it was taken, it must be regarded as any other deposition legally taken. *Louisville and Nashville R. R. Co. v. Brown*, 56 Ala., 411. 1876.

86. — A deposition which has been read in evidence without objection upon one trial of an action cannot be objected to on a second trial on the ground of the incompetency of the witness. *McMillan v. Burlington and Missouri River R. R. Co.*, 56 Ia., 421. 1881.

87. — One of two defendants, having stip-

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ulated for the taking of a deposition, cannot object afterwards on the ground that it was ruled out as against his co-defendant, who had not agreed to the stipulation. *French v. Canada Southern R'y Co.*, 42 Mich., 64. 1879.

88. Dying declarations. Dying declarations of a person injured by a railway collision are not competent in favor of his administrator in an action against the railway company for the injury. *Waldele v. New York Central and Hudson River R. R. Co.*, 26 Hun (N. Y.), 69, 1879; *Chicago and Northwestern R'y Co. v. Howard*, 6 Bradwell (Ill.), 569. 1880.

89. — Statements made by one fatally injured, as to the cause of the injury, so far as they are treated as admissions, should be considered by the jury in connection with all the circumstances under which they were made, and given such weight as the jury believe them entitled to. *Perigo v. Chicago, Rock Island and Pacific R. R. Co.*, 55 Ia., 326. 1880.

90. — Dying declarations are competent evidence in criminal cases. But in an action for an injury causing death the declarations of the injured party are not competent so far as they go to narrate the circumstances of the injury. Such evidence is only competent as describing the condition of the person and not as a narration of events. *Waldele v. N. Y. Central and Hudson River R. R. Co.*, 61 Howard's Practice (N. Y.), 850. 1881.

91. Ejectment. In ejectment, it is error for the court to leave it to the jury to determine whether the plaintiff is the owner of the premises, without instructing them as to the legal effect of the deeds read in evidence. *Hunt v. Missouri Pacific R'y Co.*, 75 Mo., 252. 1881.

92. — Where a railway company, under its charter, is empowered to condemn land for right of way, and does so, and transfers its rights to another company which is authorized by law to make the purchase, it is error to exclude evidence of the proceedings to condemn, in an action of ejectment against the latter railway company, where no objections are shown to such proceedings. *St. Louis and Southeastern R'y Co. v. Needles*, 85 Ill., 462. 1877.

93. Employees. Railway employees are as worthy of belief as other agents. All agents

and employees are presumed to be friendly to their employer, and on that account are usually subjected to a rigid cross-examination; but when this is done their evidence must be weighed as other testimony, and its value estimated in connection with all the facts proven. *Tucker v. Duncan*, 6 Amer. & Eng. R. R. Cases (Miss.), 268. 1881.

94. — The natural bias of relations, or servants or employees, is matter for legitimate comment by counsel before the jury, whether such witnesses be introduced by one side or the other. *Central R. R. Co. v. Mitchell*, 63 Ga., 173, 1879; 1 Amer. & Eng. R. R. Cases, 145.

95. — negligent co-employee as witness. In an action by an employee of a railway company against his master for damages alleged to have resulted from the negligence of a co-employee, the latter is competent to prove that he was not at fault, under proper questions for that purpose. *Augusta and Summerville R. R. Co. v. Dorsey*, 68 Ga., 223. 1881.

96. Engineer's plans; order for inspection. Where the issue in a cause depended in a great measure upon the state of the originals of certain engineering plans and documents, and the defendant deposed that he was not possessed of any engineering knowledge, and that an inspection of the documents would be useless to him without the aid and assistance of an engineer, the order for production and inspection of documents was directed to extend to the defendant's surveyor. *Swansea Vale R'y Co. v. Budd*, Law Reports, 2 Equity Cases, 274. 1866.

97. Erroneous evidence. Where evidence is erroneously admitted upon the trial of an action, prejudice will be presumed; so held where erroneous evidence of the rule as to flying switches was admitted. *George v. Keokuk and Des Moines R. R. Co.*, 53 Ia., 503. 1880.

98. Examination of the person in cases of personal injury. The plaintiff brought an action to recover damages for injuries arising from the alleged negligence of the defendant in moving a train of cars on which she was a passenger. After issue joined, an order was made, upon the defendant's application, requiring the plaintiff to

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submit to an examination of her person by three physicians, named in the order and selected by the defendant, under the direction of a referee therein named. It provided that such other physicians as the plaintiff might desire might be present, and that at the examination she should answer such questions as should be put to her touching her then present sensations by the physicians selected by the defendant. *Held*, that the court had no power to make such an order. *Roberts v. Ogdensburgh and Lake Champlain R. R. Co.*, 29 Hun (N. Y.), 154. 1883.

99. — Courts may compel an injured plaintiff to submit to a surgical examination. *Schroeder v. Chicago, Rock Island and Pacific R. R. Co.*, 47 Ia., 375. 1877.

100. Personal injury; examination by experts. In an action for damages for personal injuries of a permanent as well as temporary character to the plaintiff's eyes, where the plaintiff testified concerning his injuries, and no physician was examined as a witness in the case, the plaintiff may be required by the court, in its discretion, upon a proper application being made therefor by the defendant, to submit his eyes to a reasonable and proper examination by some competent expert, for the purpose of ascertaining the nature, extent and permanency of his injuries. *Atchison, Topeka and Santa Fe R. R. Co. v. Thul*, 29 Kans., 466, 1883; 10 Amer. & Eng. R. R. Cases, 783.

101. Excavations in streets. A witness on the part of the defendant, who had testified that he hung a lamp, on the evening of the accident, near an excavation in the street, and about the hour in the morning when he removed it, was asked, "Is your recollection refreshed or your attention called to that (the time of removal) from any circumstance, any accident, that happened then?" This was objected to and excluded. *Held*, error. *O'Hagan v. Dillon*, 76 N. Y., 170. 1879.

102. Experts — ability to labor. An inquiry with respect to the ability of the plaintiff, after the injury, to perform certain services, involved no question of skill, science or trade, and was not competent to be addressed to a witness testifying as an expert. *Kline v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 50 Ia., 659. 1879.

103. — brakemen. Brakemen, baggage-masters and conductors are not competent to give their opinion as experts respecting the coupling of cars, and as to the danger a brakeman would incur by attempting to make a coupling under certain circumstances. *Muldowney v. Illinois Central R'y Co.*, 36 Ia., 462. 1873.

104. — conductors. A person who has acted continuously for more than seven years as a "railroad conductor" can be examined as an expert, relative to the means of stopping railroad trains. *Mobile and Montgomery R. R. Co. v. Blakely*, 59 Ala., 471. 1877.

105. — bridge builder. Where it was sought to charge a railway company with the death of a person resulting from a defective bridge, the court refused to permit the company's bridge builder to give his opinion, as an expert, whether the accident was caused by defects in the bridge or not. The condition of the bridge was shown by other witnesses, they testifying to facts. *Held*, that the court did not err in refusing the testimony, as the condition of the bridge at the time of the accident was not a scientific question. *Toledo, Wabash and Western R'y Co. v. Conroy*, 63 Ill., 560. 1873.

106. — duty of engine driver. The plaintiff being an expert engine driver, and one question being whether he had been negligent at the time of the accident which was the basis of the suit, it was competent to prove by him what were his duties. *Augusta and Summerville R. R. Co. v. Dorsey*, 68 Ga., 228. 1881.

107. — A conductor in authority over an engine driver may testify as to the duties of the latter. *Id.*

108. — handwriting. Upon a trial wherein the question of the genuineness of signatures to stock in a railway company was in issue, it was held that an expert who was only acquainted with the signatures as they appeared in the stock book was not competent to testify as to the signatures in question. *Tome v. Parkersburg Branch R. R. Co.*, 39 Md., 36. 1873.

109. — Photographic copies, some of them enlarged, of the signatures in question, taken in connection with the testimony of a photographer, as an expert, were also held inadmissible. *Id.*

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110. — newspaper reporter. A newspaper reporter, who, has frequently visited the scene of railway accidents to report the same, is not a competent witness to testify as an expert, from an examination of a broken rail, as to the cause of such defect. *Hoyt v. Long Island R. R. Co.*, 57 N. Y., 678. 1874.

111. — opinion of engineer. Upon an issue of negligence in the construction of a work, it is not competent for the engineer in charge to testify that in the opinion of other engineers his work was sufficient and suited to its purpose. *Cornish v. Chicago, Burlington and Quincy R. R. Co.*, 49 Ia., 378. 1878.

112. — It is competent for experts, such as engineers, to give their opinion in respect to matters which may form the proper ingredients of a verdict, but it is not competent to ask the opinion of witnesses in such a way as to cover the very question to be found by the jury. The admission of such testimony is nothing more nor less than permitting the witnesses to usurp the province of the jury. *Chicago and Alton R. R. Co. v. Springfield and Northwestern R. R. Co.*, 67 Ill., 142. 1873.

113. — physicians. Where five physicians had testified that they had made a personal examination, and from such examination expressed a uniform opinion as to the character and probable permanence of the injuries; and a sixth physician was called, who testified, without objection, that he had heard none of the testimony; that he had made a personal examination, and from such examination, as well as from statements of the party as to the past history of the case and statements made by her husband in her presence, he had formed a certain opinion, which opinion was in harmony with that expressed by the other physicians, and, upon cross-examination, reiterated the same testimony; and thereafter a motion was made to strike out *all of his testimony*, and no inquiry was made as to what the statements of the party or her husband to him were; and where the amount awarded by the jury is not grossly excessive, *held*, that judgment will not be reversed on the ground that the trial court erred in overruling the motion to strike out

the testimony. *Atchison, Topeka and Santa Fe R. R. Co. v. Frazier*, 27 Kans., 463, 1882; 8 Amer. & Eng. R. R. Cases, 72.

114. Express company; damage to goods. In a suit against a common carrier for the loss of a can of yeast, shipped to be used for distilling, by breaking or puncturing the can, through careless handling, so as to let the yeast escape, there is no error in allowing in evidence a can similar to that in which the yeast was shipped, for the examination of the jury. *American Express Co. v. Spellman*, 90 Ill., 455. 1878.

115. Expulsion of passenger. In an action for damages for violent ejection from the car by the conductor, it is the province of the jury to reconcile differences in the testimony, and to decide as to the credibility of the witnesses, taking into consideration the relation they sustain to the case, their probable motives, their demeanor, and their opportunities of knowing and seeing the facts about which they testify, and the reasonableness or unreasonableness of their testimony, in view of the knowledge of human nature, and the established and undoubted facts in the case. *Gallena v. Hot Springs R. R. Co.*, 13 Federal Reporter, 116, 1882; 4 McCrary, 371.

116. Former testimony of absent witness. A witness more than thirty miles from the place of trial, and outside of the county, but within the state, is not out of the jurisdiction of the court, so as to authorize the reading of his testimony given at a former trial of the cause. *Butcher v. Vaca Valley R. R. Co.*, 56 Cal., 598. 1880.

117. Forgery. A variance in a signature is not necessarily proof of its being a forgery. Dissimilitude may be occasioned by a variety of circumstances; by the state of health and spirits of the writer, by the materials, by his position, or by his hurry or care. *Risley v. Indianapolis, Bloomington and Western R. R. Co.*, 7 Bissell (U. S. C. C.), 408. 1877.

118. Husband and wife. Where the wife is a party to the suit and interested in the subject matter thereof, the husband is incompetent to testify. *Shenandoah Valley R. R. Co. v. Lewis*, 12 Amer. & Eng. R. R. Cases (Va.), 305. 1883.

119. Impeachment. A plaintiff who, in a suit for damages against a railroad company,

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calls witnesses who testify that they were not present when he was injured, cannot, in order to impeach their credibility, ask them whether they have stated otherwise to designated persons. *Moore v. Chicago, St. Louis and New Orleans R. R. Co.*, 59 Miss., 243, 1881; 9 Amer. & Eng. R. R. Cases, 401.

120. Inference of care on part of decedent. The proof of the fact that decedent, at the time of the accident, was in the exercise of ordinary care, need not always be direct and positive, but the fact may sometimes be fairly and reasonably inferred from the circumstances. *Murphy v. Chicago, Rock Island and Pacific R. R. Co.*, 45 Ia., 661, 1877.

121. Injury to passengers; order of proof. In an action against a street railway company for injuries caused by one of its conductors in wrongfully removing a passenger from a car, the plaintiff introduced evidence that his knee was injured while being so expelled; that in consequence he was confined to his house from four to six months, and was afterwards obliged to use crutches. The defendant introduced evidence in reply that the plaintiff was seen walking in his doorway and the streets with little apparent lameness and without crutches within two or three days after the alleged occurrence, and from time to time within the period named by the plaintiff. The plaintiff, at the close of the defendant's evidence, offered evidence that during that period the witnesses had seen him in his house with his foot upon a pillow and had helped him from his chair to his bed. It did not appear that this evidence related to the days and times testified to by the defendant's witnesses. *Held*, that this evidence was part of the plaintiff's case, and that it was within the discretion of the judge at the trial to exclude it when offered in rebuttal. *Wallace v. Taunton Street R'y Co.*, 119 Mass., 91. 1875.

122. Inspection of documents; agreement of settlement. To an action by executors to recover damages for the death of the testator, caused, as alleged, by the negligence of the defendant, a railway company, the defendant pleaded not guilty, and that the deceased had accepted 75¢ in discharge of all claims connected with the accident from which it was alleged the death

had afterwards resulted. The defendant had sent a clerk in its secretary's office and its medical officer to see the deceased, and ascertain his state, and to negotiate as to the pecuniary compensation to be made him. The court ordered the plaintiffs' inspection and copies of the reports made to the defendant by these officers of their interviews with the deceased. *Baker v. London and South Western R'y Co.*, Law Reports, 3 Queen's Bench Cases, 91. 1867.

123. Intoxication. The statement of the car driver, that the deceased "came staggering and seemed to me to be drunk," is sufficient evidence of intoxication to entitle the defendant to have the jury instructed as to the effect of such intoxication as bearing upon the case. *Bradley v. Second Avenue R. R. Co.*, 8 Daly (N. Y.), 289. 1879.

124. Judicial notice; car inspections. The courts will take notice, as part of the general knowledge of the business community, that the railway companies of the country conduct inspections of cars under a system which all employes are presumed to understand. *Smith v. Potter*, 46 Mich., 258, 1881; 2 Amer. & Eng. R. R. Cases, 140.

125. Judgment in another suit. In an action by a father to recover damages alleged to have been sustained by him from injuries to his infant son, arising from the negligence of the defendant, a former judgment in favor of the son, in an action by him, suing by his *guardian ad litem*, against the same defendant for damages for the same injuries, may properly be alleged in the complaint and given in evidence, to establish that such injuries were caused solely by the defendant's negligence; and will be sufficient proof of that fact, if the record shows that it was so determined in that action. *Anderson v. Third Avenue R. R. Co.*, 9 Daly (N. Y.), 437. 1881.

126. Length of train. The length of defendant's train on a certain day was not provable by the average length of its trains at that season of the year. *Newsom v. Ga. R. R. Co.*, 62 Ga., 389. 1879.

127. Letter-press copies of reports. Where M. had a contract with the St. Louis, Lawrence and Western Railway Co. to act as its agent at Wichita, to influence the shipment of cattle over its railroad from Car-

Lex fori — Name of Corporation.

bondale to Chicago and St. Louis, and was to receive as compensation for his services a certain stated sum for every car-load of cattle shipped by the way of Carbondale in cars over said road, and in an action against such railway company to recover his compensation under the contract, he proved the number of cars shipped from Wichita by the Atchison, Topeka and Santa Fe R. R., billed to Chicago and St. Louis via Carbondale and the said St. Louis, L. and W. Railway, by a book of record of the A., T. and Santa Fe R. R. Co., containing the letter-press copies of quarterly reports of the shipment of live stock from Wichita, made by an agent of the A., T. and Santa Fe R. R. Co., to the general freight agent of said last-named company, from dray-tickets, which were all on file, and said book not being a book of original entries, nor an account book, held, that such evidence was incompetent, being hearsay. *St. Louis, Lawrence and Western Ry Co. v. Maddox*, 18 Kans., 546. 1877.

128. Lex fori; law of sister state. There is no presumption that the statute law of a sister state is that of the forum, but such law must be shown. In the absence of proof of the statute law of a sister state, that which would be the common law of the forum governs. *Goldsmith v. Chicago and Alton R. R. Co.*, 12 Mo. App., 479. 1888.

129. Life tables. The life tables, it seems, are admissible upon the question of damages where the injury resulted in permanently disabling the party injured. *Simonson v. Chicago, Rock Island and Pacific R. R. Co.*, 49 Ia., 87. 1878.

130. — Carlisle tables. In an action for injuries not resulting in death, the Carlisle tables are immaterial and should be excluded. *Nelson v. Chicago, Rock Island and Pacific R. R. Co.*, 38 Ia., 584. 1874.

131. — The Carlisle life tables are admissible to show the expectancy of life. The computation, however, was properly made from the date of decedent's death, and not from the age of twenty-one years, although recovery dated from that time. *Walters v. Chicago, Rock Island and Pacific R. R. Co.*, 41 Ia., 71. 1875.

132. — For the purpose of showing the probable duration of the life of the deceased, the Carlisle, or other approved life tables,

may be used. *Kansas Pacific Ry Co. v. Lundin*, 3 Colo., 94, 1876; *Denver, South Park and Pacific Ry Co. v. Woodward*, 4 Colo., 1. 1877.

133. — Northampton tables. In an action to recover damages occasioned by the death of the plaintiff's intestate, the Northampton tables are properly received in evidence to show the probable duration of the life of the deceased. *Sauter v. New York Central and Hudson River R. R. Co.*, 6 Hun (N. Y.), 446, 1876; *Sauter v. New York Central and Hudson River R. R. Co.*, 66 N. Y., 50, 1876.

134. Market value. A witness testified to the price of wool on a certain day, but said he only derived his information from others who dealt in wool; did not know of or attend a sale of wool that day; and did not name any wool broker with whom he had conversed. Held, insufficient to establish the price. *Hill v. Syracuse, Binghamton and New York R. R. Co.*, 4 Thompson & Cook (N. Y. Supreme Ct.), 685. 1874.

135. — Where the value of property, which has no fixed market value, is in question, witnesses may state what they consider it worth according to their best judgment or belief. *Erd v. Chicago and Northwestern Ry Co.*, 41 Wis., 65. 1876.

136. — Where an article has never been bought or sold at a particular place, and has never been used there, it has no market value there. Its market value at the next nearest place where it has a market value may be considered for the purpose of fixing its value at said place, taking into consideration the hazard and risks of transportation and all other facts affecting the question. *Harris v. Panama R. R. Co.*, 36 N. Y. Superior Ct., 373. 1873.

137. Name of corporation. In an action against the St. Louis, Alton and Terre Haute R. R. Co., promissory notes, purporting to have been executed by the Terre Haute, Alton and St. Louis R. R. Co., are not admissible as evidence of indebtedness without proof that the two companies are the same, known by different names, or that the company sued is liable for the indebtedness of the company executing the notes. *Desmond v. St. Louis, Alton and Terre Haute R. R. Co.*, 77 Ill., 681. 1875.

Negligence — Ordinances.

138. Negligence. Negligence may be shown not only by direct and positive evidence, but by any circumstances which tend to prove it or from which it may be reasonably inferred. *Wilson v. Southern Pacific R. Co.*, 62 Cal., 164. 1882.

139. Newspaper account; published statement of witness. In an action brought by the plaintiff in error to recover damages from defendant in error for the killing of his intestate, the court allowed a statement of the facts connected with the accident, made by one of the defendant's witnesses soon after its occurrence, and printed in a newspaper, to be read to the jury, and commented on by counsel as a part of the witness' testimony, and as a contradiction of his testimony on trial of the cause going to his credit. In his charge to the jury the court withdrew from before the jury the statement, so far as it had been admitted as evidence of the witness and binding on the company, but said to the jury that they might look to the printed statement as evidence so far as the same may be admitted by the witness to be correct, as part of his testimony. *Held*, that the admission of the printed statement as a part of the witness' testimony, in any view, was error, for which the judgment should be reversed. *East Tenn. and Va. R. R. Co. v. Eanes*, 8 Baxter (Tenn.), 221. 1874.

140. Non-suit. If there is evidence tending to sustain plaintiff's action it is error to direct a non-suit. *Grand Trunk R'y Co. v. Russ*, 47 Mich., 500. 1882.

141. Objections. Objections to testimony should be specific. *King v. Chicago, Danville and Vincennes R. R. Co.*, 98 Ill., 376. 1881.

142. Offer to aid family of decedent. In an action against a railway company for damages for causing the death of plaintiff's intestate, evidence to the effect that the company offered to pay the latter's funeral expenses is not material. *Campbell v. Chicago, Rock Island and Pacific R. R. Co.*, 45 Ia., 76. 1876.

143. Opinions. It is improper to ask a witness his opinion, after seeing a railway accident, as to whether it could have been avoided. *Haggerty v. Brooklyn City and Newtown R. R. Co.*, 61 N. Y., 624. 1874.

144. — Where a witness' estimate of the depreciation of property is founded upon remote or conjectural sources of injury, the remedy is for the court to instruct the jury that these are not proper grounds upon which to base their assessment of damages. *Hutchinson v. Chicago and Northwestern R'y Co.*, 41 Wis., 541. 1877.

145. Ownership of train. In a suit against a railway company to recover for an injury inflicted by a train of cars, alleged to have belonged to the company, or operated by it, full and undoubted proof of the fact that the company owned the train, or was operating the same, is not required of the plaintiff. In the absence of positive proof on the subject by the company, it will be sufficient if the plaintiff's evidence is *prima facie* sufficient to show the fact. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Knutson*, 69 Ill., 103. 1873.

146. Ordinances; acceptance of benefit by railway company. The validity of an ordinance admitted to have been passed by the city council of the city of St. Joseph being denied on the ground that the mayor never approved it, and no copy with his signature attached being found among the city records, it was shown by the testimony of the mayor that he had desired the passage of the ordinance, and his impression was that he had signed it. It was also shown that it was recorded in a book kept by the city in which ordinances passed and approved were entered. The charter required this book to be kept, but did not require the mayor to sign the record. It was, however, the practice, but not the uniform practice, to sign. The present ordinance was not signed in this book. It was also shown that this ordinance was published in the official newspaper of the city as an ordinance passed by the council and approved by the mayor; that the proper officer of the city received, filed and kept a certified copy of a resolution of a railroad company accepting a grant of privileges conferred by the ordinance, and that the company had availed itself of the grant by laying down its track on one of the streets of the city, and using the same with the knowledge of the city officials and without objection from them. *Held*, that this was sufficient evidence of the approval

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of the ordinance. *Knight v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 70 Mo., 231. 1879.

147. Parent and child; declarations of father. The defendant offered to prove that in a conversation touching the accident, the father of the plaintiff, the latter being a small child, had stated that "he did not blame the driver at all, and that the child was injured through a pure accident." The father was not present when the accident occurred, saw nothing of it, and had no knowledge of the particulars further than the information he derived from others. On objection it was held that the evidence was inadmissible. *Baltimore R. R. Co. v. McDonnell*, 43 Md., 534. 1875.

148. Pedigree and relationship. Declarations of a decedent, contained in letters shown to have been written by him, are competent to show his marriage. Documents purporting to be transcripts from certain official registers, found in the baggage of a railway passenger who was killed in an accident, were held admissible upon the question of his marriage, without evidence of their authenticity. In the same case the decedent, whose family relationship was in issue, had, next before his death, been found traveling with a woman and certain young children, toward whom these adults were observed to perform the office of parents; the baggage inferentially shown to belong to deceased contained wearing apparel, apparently of all the party in common; these circumstances were held to afford an inference that the relation of husband and wife existed. *Kansas Pacific R'y Co. v. Miller*, 2 Colo., 442, 1874; 20 Amer. R'y Rep., 245.

149. Personal injuries. The following expressions, used by a witness testifying as to the personal injuries received by the plaintiff, "though awkwardly expressed sometimes, are, at most, conclusions of fact," and are not improperly allowed: "Plaintiff seemed to be suffering" the day after the injury; "she was not able to return home" on that day; "was not able to use her arm a large part of the time for several months;" "when she returned home," on the second day after the injury, "she looked bad, and her left wrist looked like the bone had

slipped off the joint;" she "was disabled by the fall," etc. *South and North Ala. R. R. Co. v. McLendon*, 63 Ala., 266. 1878.

150. — burden of proof; Georgia statute. Whenever a person, not an employe, is injured by the running of trains in Georgia, the presumption is that the company is at fault, and the *onus* is on it to rebut such presumption. *Southwestern R. R. Co. v. Singleton*, 67 Ga., 303. 1881.

151. — business of injured party. In a suit to recover for a personal injury, sufficient evidence of plaintiff's business is admissible to show how far he is affected in it. *Grand Rapids and Indiana R. R. Co. v. Martin*, 41 Mich., 607. 1879.

152. — damages. Evidence of the amount of plaintiff's earnings was admissible, not as a basis of computation, but as a circumstance tending to show his capacity and disposition to earn money. In like manner it was competent to show the condition of his health, his aptitude and qualifications for business, and his habits of industry, or anything else which affected his prospective earnings or savings. *Simonson v. Chicago, Rock Island and Pacific R. R. Co.*, 49 Ia., 87. 1878.

153. — The plaintiff, testifying as a witness to her personal injuries, may state, "In consequence of loss of time, and physical disability from the injuries, she had been prevented from earning money by her labor, and had been injured fifty dollars within the four months next after the fall, in consequence of the hurts caused by the fall." This, in substance, is an assertion that her labor during that time would have been worth fifty dollars. *South and North Ala. R. R. Co. v. McLendon*, 63 Ala., 266. 1878.

154. — surgical examination. In an action the injured person complained of pain and weakness in the hip joint, continuing from the time of the accident to that of the trial; and, at the request of the defendant, she submitted to an examination, during the trial, by a number of physicians and surgeons, one-half of them selected by herself and the others by the defense, who all testified that there was no appearance in the hip of physical conditions that would cause the pain complained of. One of those summoned by plaintiff was then permitted,

Photograph — Privilege.

against objection, to testify that he thought he could tell whether or not she suffered pain from the movement of the hip, judging from all the examination, including what she said; and that she gave every indication of suffering pain; that in his opinion she did so suffer; and that the pain, if it existed, indicated some trouble in the hip joint. *Held*, that the evidence was properly admitted. *Quaife v. Chicago and Northwestern R'y Co.*, 48 Wis., 513. 1879.

155. — pleading. In an action for injury to the person from the negligence of a railway company, the complaint shows that an engine on which plaintiff was fireman was derailed and upset, and that large quantities of steam and water escaped therefrom and fell upon him, and he was "severely burned, maimed and permanently injured, and has suffered and continues to suffer great pain in body and mind, and that by reason thereof he became and for a long time remained ill, and is still suffering from said injuries." There was no motion to make the complaint more definite and certain. *Held*, that there was no error in admitting evidence for plaintiff that the covering of his spinal cord was injured by the accident, and that urinal difficulties resulted from his injuries; nor in admitting evidence that an *inguinal hernia* made its appearance about nine months after the injury, and was the result thereof. *Delie v. Chicago and Northwestern R'y Co.*, 51 Wis., 400, 1881; 5 Amer. & Eng. R. R. Cases, 464.

156. Photograph. The defendant offered in evidence a photograph of another street railway car, and proposed to prove that it was an exact representation of the car upon which the accident happened. On objection, it was held that it might have been competent to have offered in evidence a photograph of the car upon which the accident happened, but not the photograph of another car, and then supplement the proof by showing that the two cars were alike. *People's R'y Co. of Baltimore v. Green*, 56 Md., 84, 1880; 6 Amer. & Eng. R. R. Cases, 168.

157. — In an action against a railway company on account of an injury caused by the destruction of a bridge, a photograph of the wreck, broken bridge and stream was

held to be competent evidence. *Locke v. Sioux City and Pacific R. R. Co.*, 46 Ia., 109, 1877; 16 Amer. R'y Rep., 138.

158. Privilege — inspector's report of accident. In an action against a railway company for a personal injury sustained by a passenger on its railway, the court allowed inspection of the following documents: 1. A report of one of the defendant's inspectors to the general manager as to the accident in respect of which the action was brought; 2. A report of the guard of the train to which the accident happened; 3. A report of the defendant's locomotive superintendent to the general manager, as to the accident,— upon the ground that they were reports or communications made by agents of the company in the ordinary course of their duty, for the purpose of conveying to the company information upon the subject, and were not opinions obtained confidentially with a view to litigation; and this without reference to whether they were made before or after the commencement of litigation. *Woolley v. North London R'y Co.*, Law Reports, 4 Common Pleas Cases, 602. 1869.

159. — medical report; privilege; medical officer. The report of a medical officer to a railway company is privileged. *Pacey v. London Tramways Co.*, Law Reports, 2 Exchequer Division, 440, 1877; *Friend v. London, Chatham and Dover R'y Co.*, 2 ib., 437, 1877.

160. — Where an accident occurs on a railway, and the officials of the company in the course of their ordinary duty make a report to the company, whether before or after action brought, the report is not privileged. But when a claim has been made, and the company seeks to inform itself by a medical examination as to the condition of the person making the claim, the report made to it is privileged. *Skinner v. Great Northern R'y Co.*, Law Reports, 9 Exchequer Cases, 298, 1874; 10 Eng. (Moak), 462.

161. — The defendant, in order to ascertain whether or not it ought to yield to a claim by the plaintiff for damages for personal injuries alleged to have been sustained by the plaintiff in an accident on the defendant's line, sent its medical officer, before litigation commenced or was formally threatened, to report to the company upon

Professional Confidence — Seal of Corporation.

the nature of the plaintiff's injuries. *Held*, that the reports of the medical officer, were privileged. *Cossey v. London, Brighton and South Coast R'y Co.*, Law Reports, 5 Common Pleas Cases, 146. 1870.

162. Professional confidence. The statute excluding a physician's testimony as to facts learned in the treatment of a patient only establishes a privilege, and has no force where the patient consents to a disclosure. *Grand Rapids and Indiana R. R. Co. v. Martin*, 41 Mich., 667. 1879.

163. Presumption as to employment. When upon a freight train in motion a man appears wearing a brakeman's cap and jacket, and assuming to act upon the train with authority, and is called by those who see him a brakeman, it may be presumed that he was in the employ of the railroad company as a brakeman. *Hughes v. New York and New Haven R. R. Co.*, 36 N. Y. Superior Ct., 223, 1873; *Hoffman v. N. Y. Central and Hudson River R. R. Co.*, 44 ib., 1, 1878.

164. Province of jury. Courts cannot assume that witnesses upon whom they place most credit will be followed by the jury, and, no matter how dissatisfied a court may be with the conclusions of the jury, it cannot usurp their functions. *Marcott v. Marquette, Houghton and Ontonagon R. R. Co.*, 47 Mich., 1, 1881; 4 Amer. & Eng. R. R. Cases, 548.

165. Purpose of evidence. It is error to admit evidence, competent for one purpose only, to be considered and acted on generally by the jury, without instructions restricting it to the special purpose for which it is admissible. *Burlon v. Wilmington and Weldon R. R. Co.*, 84 N. C., 192. 1881.

166. Rebates; parol contract. Evidence of a verbal contract to pay rebates to a stock shipper is not competent where it appears that a written contract was entered into for such shipments. *Hopkins v. St. Louis and San Francisco R'y Co.*, 29 Kans., 544. 1883.

167. Receipt. A certain receipt for labor and material put in evidence in this case and set out in the opinion of the court, *held* to be a mere acknowledgment of payment, and, therefore, open to parol explanation. *Morris v. St. Paul and Chicago R'y Co.*, 21 Minn., 91. 1874.

168. Report of company. A report made by the corporation to the state engineer is competent evidence against the company. *Leonard v. N. Y. Central and Hudson River R. R. Co.*, 44 N. Y. Superior Ct., 575; affirmed, 80 N. Y., 659. 1880.

169. Ringing of bell. The testimony of a person at a great distance that he did not hear the engine bell ring is inadmissible. *Chapman v. N. Y. Central and Hudson River R. R. Co.*, 14 Hun (N. Y.), 484. 1878.

170. — As against positive affirmative evidence of credible witnesses of the ringing of a bell or the sounding of a whistle there must be something more than the testimony of one or more that they did not hear it. It must appear that their attention was directed to the fact at the time. *Culhane v. N. Y. Central and Hudson River R. R. Co.*, 60 N. Y., 133, 1875; 10 Amer. R'y Rep., 142.

171. — A refusal to instruct the jury that the positive testimony of two witnesses that a warning of the approach of a car was given by the brakeman "will outweigh the negative testimony of four that they did not hear it, provided the witnesses are all equally credible," *held* not to be error, because it ignores the consideration of what opportunity each witness had of hearing the alleged warning, and because two witnesses did not testify positively that the brakeman gave such warning, nor was the negative testimony confined to four witnesses. *Berg v. Chicago, Milwaukee and St. Paul R'y Co.*, 50 Wis., 419, 1880; 2 Amer. & Eng. R. R. Cases, 70.

172. Rules. Certain "train rules" made by defendant and another company, regarding a track used by them jointly, but two hundred miles distant from the place where the injury occurred, *held* irrelevant and inadmissible. *Moody v. Pacific R. R. Co.*, 68 Mo., 470. 1878.

173. — Whether, under a certain published rule of a railroad company, there would be any objection to doing a thing a certain way, is not a proper matter to submit to a witness. *Pennsylvania Co. v. Stoelke*, 104 Ill., 201, 1839; 8 Amer. & Eng. R. R. Cases, 523.

174. Seal of corporation. Under the 8 and 9 Vict., c. 16, s. 28, the register of shareholders, having thereon the seal of the company, is admissible in evidence without proof that

Adjournment of Sale — Equitable Proceedings.

the seal was duly affixed to the document at an ordinary meeting of the company, in pursuance of the provisions of s. 9 of the act. *London and Northwestern Railway Co. v. McMichael*, 5 Welsby, Hurlstone & Gordon (Exchequer), 855. 1850.

175. **Signals.** Where witnesses who, at the time of an accident at a railroad crossing, were within thirty yards of it, testify that they were in a situation to have heard a bell ring or whistle sound, if there had been any rung or sounded, and that they did not hear any, such testimony cannot be regarded as negative testimony. *Rockford, Rock Island and St. Louis R. R. Co. v. Hillmer*, 72 Ill., 235. 1874.

176. **Statute of frauds.** The requirement of the statute of frauds that a contract for the sale of land shall be in writing, etc., applies only to "the party to be charged therewith." *Green v. North Carolina R. R. Co.*, 77 N. C., 95. 1877.

177. **Telegrams.** In a suit against a railroad company, whose superintendent was C. B. Hinckley, the court allowed parol evidence of the contents of a telegram signed C. B. H., without producing the original, or the foundation being laid for the proof of its contents, or proof that the telegram came from C. B. Hinckley, the superintendent. *Held*, that the court erred in admitting the evidence. *Chicago and Iowa R. R. Co. v. Russell*, 91 Ill., 293. 1878.

178. **Time-table.** The time-table of a railway company, which on its face announces that it is for the government and information of employes only, and in terms reserves to the company the right to vary therefrom at pleasure, is not admissible in evidence in a suit for damages against the company for not stopping the train at a place mentioned in the time-table, but at which no station was ever really established. *Beauchamp v. International and Great Northern R'y Co.*, 56 Tex., 239, 1882; 9 Amer. & Eng. R. R. Cases, 307.

179. **Wealth of parties.** The wealth and resources of a party may be considered by the jury to enable them to judge whether or not he has been able to produce all the evidence in his favor. *Daub v. Northern Pacific R'y Co.*, 18 Federal Reporter, 625. 1883.

180. — In actions to recover damages for

injuries received by the negligence of another, it is error to receive evidence of the poverty or pecuniary condition of the plaintiff. *Illinois Central R. R. Co. v. Zang*; 10 Bradwell (Ill.), 594. 1893.

181. **Wilful acts.** On the trial of an action against a railway company for causing the death of a person, it is not error to refuse to instruct the jury as to what evidence would or would not show a willingness on the part of the defendant to inflict the injury complained of. *Evansville and Crawfordsville R. R. Co. v. Wolf*, 59 Ind., 89. 1877.

EXCURSION TRAINS.

See BAGGAGE.

EXECUTIONS.

See EMINENT DOMAIN; MORTGAGE.

1. **Adjournment of sale.** A sheriff adjourned a sale under execution because of an injunction. He continued from week to week to adjourn the sale for about three years, when the injunction was dissolved. Without further notice he sold the property. *Held*, that the sale should be set aside. *Trustees of School v. N. J. West Line R. R. Co.*, 30 N. J. Eq., 494. 1879.

2. **Appraisers.** Persons residing and having taxable estate in a town, which, in its corporate capacity, is a stockholder in a railway company, are not incompetent from interest to act as appraisers in the levy of an execution against such company. *Fletcher v. Somerset R. R. Co.*, 74 Me., 434. 1883.

3. **Bonds.** Bonds made in vacation discharging a levy upon the property of a railway company, *held* invalid, unless approved by the court. Civil Code, §§ 242, 243. *Louisville City R'y Co. v. Masonic Savings Bank*, 12 Bush (Ky.), 416. 1877.

4. **Equitable proceedings.** A court of equity is not bound to shut its eyes to the evident character of a transaction where its aid is sought to carry into effect an unconscionable bargain, but will leave the party to his remedy at law. So *held* where an execution sale of railroad stock at a very small valuation was sought to be enforced in

Exemption — Sale of Railway.

equity. *Mississippi and Missouri R. R. Co. v. Cromwell*, 91 U. S., 643. 1875.

5. **Exemption.** A debt due a mechanic for wages is the subject of attachment under § 252 of the Code of South Carolina. *McKelvey v. South Carolina R. R. Co.*, 6 So. Car., 446. 1875.

6. — The statutory action for use and occupation is of the nature of *assumpsit* at common law on an implied promise, and not an action *ex delicto*; and is subject to the exemption of the constitution as a debt by contract. *St. Louis, Iron Mountain and Southern Ry Co. v. Hart*, 38 Ark., 112. 1881.

7. **Franchise.** The law is well settled, that the franchises and corporate rights of a company and the means vested in it for the purpose of its existence cannot be granted away and transferred by any act of its own, or by any adverse proceeding, unless with the consent of the original grantor, formally expressed. In the absence of any provision to that effect, either in the general law or in the charter of such company, the franchise cannot be levied upon for debt. The franchise, so termed, in this case, is nothing more than a right of way or license conferred by the municipal ordinance, and cannot be treated as a corporate right, which is derived only from sovereign dispensation. It is, in this instance, only an incident of the corporate existence of the company, as created by law, and determines with the extinction of such corporate life. *New Orleans, Spanish Fort and Lake R. R. Co. v. Delamore*, 34 La. An., 1225. 1882.

8. **Goods in transit.** The seizure of the goods of A. in attachment against B., which attachment is afterwards released, is no defense to an action by A. against the carrier upon the contract of shipment. *Faust v. South Carolina R. R. Co.*, 8 So. Car., 118. 1877.

9. **Lease.** An execution having been issued against the railway company and levied upon property in Bibb county, the principal office of the company being in that county, the superior court thereof has jurisdiction to enjoin collection of the *fi. fas.* The cause is not altered by the lease to another company. *Southwestern R. R. Co. v. Wright*, 68 Ga., 311. 1882.

10. **Levy.** The act of 1870 is amendatory of s. 72 of the act of 1836, and provides that in addition to the provisions of that section, and in lieu of the proceeding by sequestration, the plaintiff may have execution by *fi. fa.*, commanding the officer to levy the sum due of any personal, real or mixed property, franchises and rights of the corporation, and proceed to sell the same. *Fox v. Hempfield R. R. Co.*, 3 Pittsburgh (U. S. C. C.), 289. 1871.

11. **Nunc pro tunc order.** The plaintiff recovered judgment in the supreme court against the defendant. A judgment was also recovered in the circuit court by another party against the defendant, and also against S., garnishee, but the clerk in issuing the execution attached the seal of the district court instead of the circuit court. Upon motion properly made, in which the plaintiff in the judgment obtained in the supreme court intervened, the judge of the circuit court directed the execution to be corrected by a *nunc pro tunc* order. *Held*, that the circuit court acquired jurisdiction of the subject matter and of the intervenor, and that the order of the circuit court could only be changed or modified on direct appeal. *Rose v. Des Moines Valley R. R. Co.*, 47 Ia., 420. 1877.

12. **Return.** A sheriff's return to a writ of *fi. fa.*—"And I have, therefore, by virtue of the same written writ, levied upon all the right, title, interest and claim of the S. and M. R. R. Co., of, in and to the S. and M. R. R., in Somerset county, and state of Pennsylvania, and upon all the property, real, personal and mixed, including locomotive, cars . . . now in the regular use of the said S. and M. R. R. Co., in the conducting of its business as a carrier,"—imports a seizure of the locomotive and cars, and, in an action of trespass against the sheriff, is conclusive evidence against him of such seizure. *Hardesty v. Pyle*, 15 Federal Reporter, 778. 1883.

13. **Sale of railway.** The road-bed, rails and right of way of a railroad are not personality; and, when sold by the sheriff, the requisites for an execution sale of realty must be observed. *Hart v. Benton-Bellefontaine Ry Co.*, 7 Mo. App., 446. 1879.

14. — **Canada.** Railways, subsidized by the province under the Quebec Railway Act

Miscellaneous.

of 1869, are liable to seizure and sale on execution. *Wason Mfg. Co. v. Levis and Kennebec R'y Co.*, 7 Quebec Law Reports, 330. 1880.

15. — **Georgia.** A chartered railroad, with all rights and privileges that properly appertain to it as an instrument of transportation (excluding, of course, the franchise of the corporation to be a body politic), is property, subject to be applied to the payment of its just debts; and the whole may be sold for that purpose, in Georgia, under a judgment at law. *City of Atlanta v. Grant*, 57 Ga., 340. 1876.

16. — But the judgment, and the execution founded thereon, must be specially moulded, in substantial compliance with §§ 3082, 3562, 3639 of the Code; if not in all cases, certainly in a case where the railroad, in pursuance of the charter, has been located and partially constructed in three counties. A sale under execution not thus moulded, about to be made by the sheriff, may be arrested by an affidavit of illegality, interposed by the corporation, through its proper officers. *Ib.*

17. — **New Jersey.** Under § 1 of the act concerning the sale of railroads, canals, etc., a purchaser of railroad property and franchises at a judicial sale is empowered to take and hold the purchase in a corporate capacity; and when so held it is liable to be seized and sold for corporation debts only. *Boylan v. Kelly*, 36 N. J. Eq., 331. 1882.

18. — **Texas.** The railroad track, franchise and chartered powers are an entirety, and must be levied on as such, whether situated in one county or not. Paschal's Dig., arts. 4912-4914. *Central and Montgomery R. R. Co. v. Henning*, 52 Tex., 466, 1880; *Stephenson v. Texas and Pacific R'y Co.*, 12 Amer. & Eng. R. R. Cases (U. S. S. C.), 393, 1882.

19. — The statutes of Texas in relation to railways sold upon execution construed. *Witherspoon v. Texas Pacific R. R. Co.*, 48 Tex., 309. 1877.

20. — When the franchises, track, etc., of a railroad company are sold under execution, as allowed by art. 4914, Paschal's Digest, the directors become trustees by virtue of the subsequent art. 4913; and all unsold property of the company passes to such

trustees, for the benefit of any creditors of the company. Stockholders of the company can have no priority over the creditors. *Good v. Sherman*, 37 Tex., 660. 1872-3.

21. **Statute of Pennsylvania.** The act of 1870 does not repeal the act of 1836, s. 72, and a *fl. fa.* issued against a corporation must be executed in the manner therein prescribed before the levy under the act of 1870 can be made. *Fox v. Hempfield R. R. Co.*, 8 Philadelphia (U. S. C. C.), 639. 1871.

22. **Rolling stock; statute.** The fourth section of the Railway Companies Act, 1867, takes away from the judgment creditor of a railway company the right of taking in execution the rolling stock and plant of that company, but gives him new rights, which are independent of the fact whether such company has or has not rolling stock or plant to be taken in execution. *Manchester v. Milford R'y Co., Ex Parte*, Law Reports, 14 Chancery Division, 645. 1880.

23. — Wherever the judgment creditor of a railway company is unpaid, the appointment of a receiver or manager is a matter of right. *Ib.*

24. **Supplemental proceedings.** In proceedings supplementary to execution, instituted under § 522 of the Code, against the execution defendant, a railway company, and either its debtor or the custodian of its property, the answers of the defendants under oath, in denial either of the possession of such property or of the existence of the alleged indebtedness, are not conclusive upon any question of fact involved therein; but, as to any such question, issues may be joined by or between the plaintiff and the defendants, or either of them, or by and between the defendants, and such issues may be heard and determined in the same manner as other issues of law or fact. *Toledo, Wabash and Western R'y Co. v. Howes*, 63 Ind., 458. 1879.

EXEMPLARY DAMAGES.

See DAMAGES; INJURIES TO DOMESTIC ANIMALS; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; INJURIES TO PERSONS ON THE TRACK; TRESPASS.

EXEMPTION LAWS.

See GARNISHMENT.

Ferry Boat — Act of God — C. O. D.

EXPERTS.

See EVIDENCE; EMINENT DOMAIN; INJURIES TO DOMESTIC ANIMALS.

EXPLOSIONS.

See INJURIES TO EMPLOYEES.

1. Ferry boat; lease. If a steamer, while being run under a lease, is lost by explosion, it is a question of fact for the jury whether the lessee used all reasonable skill, and whether the explosion was one which human skill could have prevented. *Stewart v. Western Union R. R. Co.*, 4 Bissell (U. S. C. C.), 362. 1869.

EXPRESS COMPANIES.

1. Act of God. Admitting that an express company is responsible for the fault of a railroad company over whose line it carries, the fact that a bridge was carried away by a freshet of unusual violence is not such default or negligence in the railroad company as will make the express company responsible for the loss of perishable property occasioned by a delay thus made inevitable. *American Express Co. v. Smith*, 33 Ohio St., 511. 1878.

2. — In an action against an express company for the loss of a trunk, the case was submitted to the superior court on an agreed statement of facts, from which it appeared that a flood carried away a railway bridge; that the cars went through the opening in the bridge, and were with the trunk destroyed by fire, through no fault of the carrier; that the carrier, to avoid litigation in settling losses connected with the disaster, adopted a rule to pay \$50 to all claimants, where no value was declared at the time of shipment; that no value was declared in this case, and the company's agent wrote a letter to the plaintiff declining to pay more than \$50, on the ground that the value was not declared at the time of shipment, and offering to pay this amount. It was also agreed that if the plaintiff was entitled to recover, judgment for \$175 was to be entered for him. The superior court entered judgment for the plaintiff. *Held*, on appeal, that the judgment below proceeded upon the inference of fact

that the letter of the agent admitted a liability to some extent, and that the judgment should be affirmed. *Fox v. Adams Express Co.*, 116 Mass., 292. 1874.

3. Agent's bond. An express company employed a messenger and required him to give bond. The bond provided that he should "well and truly perform all the duties required of him in any position or place to which he may be assigned in said employment, and well and truly account for all money and property of every description which may come into his possession or control, or for which he may have given his receipt by reason of said employment, and make good all loss or damage which may happen to such money or property while under his control, for which he may be legally responsible, and indemnify and save harmless the said company from all liability on account of his fault or neglect." *Held*, that as between the company and the messenger his liability was not that of a common carrier, but that of an agent, and depended on his diligence or negligence. *Southern Express Co. v. Frink*, 67 Ga., 201. 1881.

4. Birds. Whether live pigeons would be regarded in any case as common law freight for an express company conducting as common carriers, query? In a suit for freight for carrying live pigeons, where neither the pleadings nor the evidence indicated in what character the plaintiffs conducted the carrying, the refusal of requests to charge which seek to avert liability for injury to the pigeons carried, upon an assumption that common carriers are not liable for such injury to live animals in the course of transportation, is not error. *American Merchants' Union Express Co. v. Phillips*, 29 Mich., 515. 1874.

5. — The refusal to charge that the plaintiff was not required to feed and water the birds in the absence of an agreement to do so, and the submission of the fact of not feeding and watering to the jury to be considered as one, among others, going to show actionable neglect, *held* not error. *Ib.*

6. C. O. D. The letters "C. O. D.," used in a complaint against an express company, have acquired, in the commerce of the country, such a fixed and determinate mean-

Collections — Connecting Lines.

ing, that courts and juries, from their general information, may readily understand what they mean. If such a complaint were defective for want of an allegation of their meaning, the defect is one to be reached by a motion to make more specific; a motion in arrest of judgment would not reach such defect. *United States Express Co. v. Keefer*, 59 Ind., 263. 1877.

7. — The courts will not take judicial notice of the meaning of commercial abbreviations, such as C. O. D. *McNichol v. Pacific Express Co.*, 12 Mo. App., 401. 1882.

8. — The general rule is, that actions against carriers for the loss of goods must be brought in the name of the consignee; but where the goods are shipped, marked "C. O. D.," the contract of the common carrier is to "collect on delivery," and return to the consignor the charges on the goods; and the consignor may sue on such contract, where neither the goods nor the charges thereon are returned to him. *United States Express Co. v. Keefer*, 59 Ind., 263. 1877.

9. — The act of an express company, in receiving a payment conditionally made, held to be ratified under the facts of a particular case. *Brooks v. American Express Co.*, 14 Hun (N. Y.), 364. 1878.

10. — Where goods, sent "C. O. D.," are fraudulently obtained by the consignee from the express company, without payment, the company may maintain replevin for the goods. *American Merchants' Union Express Co. v. Willsie*, 79 Ill., 92. 1875.

11. — Where goods transported by an express company are by it tendered to the consignee, and he fails to receive and pay for them, it is the duty of the company to notify the consignor of the goods, and when this is done the company is relieved of the responsibility as a common carrier, and holds the goods subject to the order of the consignor, but not before. *American Merchants' Union Express Co. v. Wolf*, 79 Ill., 430. 1875.

12. — The fact that goods are shipped, marked "C. O. D.," for the carrier to collect the price from the consignee, does not change the liability of the carrier in case of loss by fire after the goods arrive at their destination. *Gibson v. American Merchants' Union Express Co.*, 1 Hun (N. Y.), 387. 1874.

13. — Evidence held insufficient to sustain

a judgment against an express company for failure to deliver goods and collect on delivery. *Adams Express Co. v. McConnell*, 9 Amer. & Eng. R. R. Cases, 240; 27 Kans., 238. 1882.

14. Collections. Where an express company receives a note for collection beyond its terminus, and by negligence fails to make the collection, it is liable for the damages resulting from such neglect. *Knapp v. U. S. and Canada Express Co.*, 55 N. H., 348. 1875.

15. — Where an express company took a check to carry for collection and the bank failed, there being no unreasonable delay on the part of the defendant, it was held not to be liable for the loss. *Eiswald v. Southern Express Co.*, 60 Ga., 496. 1878.

16. Common carriers. An express company that receives and transports goods from one place to another for a compensation, in the ordinary means of conveyance, is a common carrier, although not the owner and having no interest in the conveyance by which the goods are transported. *United States Express Co. v. Backman*, 28 Ohio St., 144, 1875; 14 Amer. R'y Rep., 82.

17. Connecting lines. In case for money delivered to the agent of an express company to be sent to a place beyond the route of the company, it appeared that plaintiff paid charges through, and received a receipt for the money to be sent containing a memorandum of such payment. Held, that on the facts, there was not a special contract to carry to destination. *Hadd v. U. S. and Canada Express Co.*, 52 Vt., 335, 1880; 6 Amer. & Eng. R. R. Cases, 443.

18. — In the absence of special contract, a common carrier receiving a parcel marked to a point beyond its route, but having no special business relationship with the carrier on the connecting line, is responsible, as such carrier, only for safe and seasonable delivery at the end of its own route to the carrier next in the line of transportation. *Ib.*

19. — The reception by an express company of a package for transportation to a point beyond its route, and the receipt of the entire compensation for the transportation to that point, is sufficient to make out a *prima facie* case of contract to carry and

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deliver the package to that point. *St. John v. Express Co.*, 1 Woods (U. S. C. C.), 612. 1871.

20. — A consignor delivered to the Adams Express Co. a package, said to contain \$352.35, which was received by the company for transportation, and a receipt given therefor, containing this clause: "Upon the special acceptance and agreement that this company is to forward the same to its agent nearest, or most convenient, to destination only, and then deliver the same to other parties to complete the transportation; such delivery to terminate all liability of this company for such package." The Adams Express Co. transported the package a part of the distance, and then transferred it to the U. S. Express Co., which delivered it to the consignee, where the amount inclosed was found to be \$100.50 short. Upon suit by the consignor against the Adams Express Co. for the amount of such deficit, *held*, that the evidence was admissible on behalf of the defendant to show that it had delivered the package to its agent nearest to the point of destination, and that its agent had there delivered the package to other parties to complete the transportation, and to show further that the package, when received from the consignor, was securely sealed, and that it was delivered just as it was received, in good order, without being broken or mutilated. *Snider v. Adams Express Co.*, 63 Mo., 376, 1876; 20 Amer. R'y Rep., 435.

21. — Plaintiff's clerk delivered to defendant a box of goods for transportation to a point beyond defendant's lines, and upon the lines of another express company. The box was directed to "S. F. D.," and the company was directed to collect on delivery, of the consignee, \$45. At the time the box was delivered to defendant, a receipt filled out by plaintiff's clerk was given by defendant, in which it was stated that defendant only undertook to carry the box to the point on its own lines nearest the point of destination, to there deliver it to the other company; that defendant should be liable only as forwarder and not for loss by fire, and that it should not be liable for loss at a point not on its own lines. The box was delivered by defendant to the other company at a point on defendant's lines nearest the desti-

nation of the box, and was by that company tendered to the consignee, who refused to pay the charges. It was then taken to the storehouse of that company, in the same place, and while there destroyed by fire. *Held*, that plaintiff had legal knowledge of the contents of the receipt; that under its provisions defendant was not liable for loss after delivering the box to the next carrier in the usual course of business, and the direction to collect on delivery did not change the character of the shipment so as to make defendant liable. *Gibson v. American Merchants' Union Express Co.*, 3 Thompson & Cook (N. Y. Supreme Ct.), 501. 1874.

22. — Where goods are delivered to a common carrier to be carried to a designated place, and the charges for transportation to that place paid in full, and the goods are received by the carrier without any contract limiting its liability, such carrier is responsible for the delivery of the goods at the place designated, notwithstanding its line ends before reaching such place, and the goods are delivered to another carrier in good order at the termination of its line. *Adams Express Co. v. Wilson*, 81 Ill., 339. 1876.

23. — When a common carrier receives express goods, the question whether the carrier contracts to transport said goods to their destination, or only to deliver them safely to the next carrier at the point nearest or most convenient to the destination, is one of fact for the jury, dependent upon the circumstances. *Philadelphia and Reading R. R. Co. v. Ramsey*, 89 Pa. St., 474. 1879.

24. — Where goods are delivered to an express company under a written contract, which limits its liability as a common carrier, and provides that the goods may be delivered to a connecting line to be carried, and that such other line shall be entitled to all the stipulations and conditions of the contract, another company to whom the goods are delivered becomes entitled to the benefit of the limitations of the contract. *Levy v. Southern Express Co.*, 4 So. Car., 234. 1872.

25. Contract limiting liability. A party engaged as a common carrier cannot, by declaring or stipulating that he shall not be so considered, divest himself of the liability

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attached to the fixed legal character of that occupation. *Bank of Kentucky v. Adams Express Co.*, 93 U. S., 174. 1876.

26. — A common carrier may limit his liability by special contract, provided such contract does not exempt from losses by negligence or misconduct. *Southern Express Co. v. Hunnicutt*, 54 Miss., 566, 1877; *Boscowitz v. Adams Express Co.*, 93 Ill., 523. 1879.

27. — An exception in its bill of lading, "that the express company is not to be liable in any manner or to any extent for any loss or damage or detention of such package, or its contents, or of any portion thereof, occasioned by fire," does not excuse the company from liability for the loss of such package by fire, if caused by the negligence of a railroad company to which the former had confided a part of the duty it had assumed. *Bank of Kentucky v. Adams Express Co.*, 93 U. S., 174. 1876.

28. — A stipulation in a receipt exempting an express company from liability "for any loss or damage by fire" does not relieve such company where such loss occurred through the negligence of a railroad company employed by the express company to transport the goods in controversy. *Muser v. American Express Co.*, 1 Federal Reporter, 382. 1880.

29. — Where a person sends goods by an express company and they fail to arrive at their destination, that raises against the company the presumption of the want of ordinary care. The company has it within its power to trace the goods and discover where they were lost, whilst it is not so with the shipper, and hence the burden is upon the carrier to show that he has used reasonable care, notwithstanding he may have stipulated that he was only to be held liable for gross negligence. *Adams Express Co. v. Stettaners*, 61 Ill., 184. 1871.

30. — A contract limiting liability of an express company will not release it from liability for negligence, unless such exemption is expressly agreed to. *Magnin v. Dinsmore*, 56 N. Y., 168. 1874.

31. — An express company, upon receiving goods for transportation, gave a receipt in which it was provided the company should not be liable, in case of loss, for over \$50, unless the value was therein stated, and not

liable for any loss unless the claim therefor was made in writing within thirty days, etc. *Held*, that these conditions did not limit the liability of the company for damages caused by its own negligent delay to deliver the goods sent. *Vroman v. American Merchants' Union Express Co.*, 5 Thompson & Cook (N. Y. Supreme Ct.), 22. 1874.

32. — An express company cannot exonerate itself from liability for the negligence of its agents and employes by stipulations contained in its receipts. *Muser v. Holland*, 17 Blatchford (U. S. C. C.), 412. 1880.

33. — A statute of the state of Illinois, which prohibits a common carrier from limiting its liability, does not apply where the shipper refused to inform the carrier of the value of the goods at the time they were shipped. *Mather v. American Express Co.*, 2 Federal Reporter, 49; 9 Bissell (U. S. C. C.), 293. 1880.

34. — Where a trunk containing money and jewelry to the amount of \$350 was delivered to an express company with notice of the contents or value, and the receipt contained stipulations that the company would be liable for loss or damage to goods only when specially insured by the terms of the receipt, and in no case for more than \$50, unless a greater value be specified, *held*, that it was proper to refuse to charge the jury, as matter of law, that the company had the right to assume that the trunk did not contain articles of special value, and for such articles it was not then liable, nor for any injury to the trunk beyond \$50. *Levy v. Southern Express Co.*, 4 So. Car., 234. 1872.

35. — Where no receipt is given at the time a package is delivered to an express company for transportation, the company cannot limit its liability by a receipt afterwards given, when the proof negatives all presumption of any knowledge on the part of the shipper that the receipt contained a clause limiting the carrier's liability, or that the carrier claimed any such limitation. *American Express Co. v. Spellman*, 90 Ill., 455. 1878.

36. — Where a party forwarding a money package to Austin, in Nevada, took a receipt from an express company in Illinois, which stated that the company undertook to for-

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ward the package "to the nearest point of destination reached by this company," and the company carried the same safely to Atchison, the nearest point to Austin reached by its line, and from there forwarded the same by the Overland Stage Co., through whose delay it did not reach its destination until after the consignee had left, and heavy charges were made for its return, *held*, that if the consignor assented to the limitation of the company's liability as stated in the receipt, it became his contract as fully as if he had signed it, and he was bound by its terms, and could not hold the express company liable for the acts of the stage company. *United States Express Co. v. Haines*, 67 Ill., 137. 1873.

37. Defective packing of goods. A carrier may refuse to receive for carriage an article which is improperly packed, but if he accepts it he is bound to exercise due care for its safe carriage; and if, while in his charge, the property is injured, the burden is upon him to show that the injury is attributable to the defective packing, and not to any fault or neglect on his part. *Union Express Co. v. Graham*, 26 Ohio St., 595. 1875.

38. Delay — failure to deliver life insurance premium; damages. The plaintiff's intestate delivered to the defendant's agent at Castine \$24.90, to be forwarded to Belfast and there delivered to the agent of the Continental Life Ins. Co. The money was sent for the purpose of paying the intestate's semi-annual premium on his life policy, which would by its terms lapse if the premium was not paid on or before eight days thereafter; of all which the defendant's agent had notice, but failed to deliver the money. *Held*, that primarily the defendant would be liable in damages for the net value of the policy on the day of its lapse, both parties having presumably contemplated such damages from knowledge of the circumstances. Also, *held*, that it was incumbent upon the plaintiff's intestate to use ordinary care and take all reasonable measures within his knowledge and power to reinstate himself with the insurance company, or to reinsure, and that he cannot recover damages for such loss as he might have thus prevented. *Grindle v. Eastern Express Co.*, 67 Me., 317. 1877.

39. — handbills for concert. A concert singer contracted with certain persons to give a concert at a certain place, and the latter expressly stipulated that she should furnish them the posters announcing it not later than the 21st inst. The posters were printed in another town, and were delivered to the express company on the evening of the 20th to be forwarded. The person in charge of the office was informed that the forwarders wanted the package to go on "No. 5," in order to make connection, as they did not want it to be delayed. Nothing was said about its contents or purpose or any necessity for its delivery next day, nor was any departure from the usual course of business asked for. The package was sent by train No. 5, but owing to the running arrangements, it did not reach its destination until the evening of the 21st, and could not be delivered until the next day. The parties who had contracted for the concert accordingly canceled the arrangement, and the concert singer sued the express company for negligence in not making seasonable carriage and delivery of the package. *Held*, that the action could not lie. *United States Express Co. v. Root*, 47 Mich., 231. 1881.

40. Delivery. An express company is not only required, as a common carrier, to transport the goods to the place of destination, but the further duty is enjoined upon it to deliver the goods to the consignee at his residence or place of business. *American Merchants' Union Express Co. v. Wolfe*, 79 Ill., 430. 1875.

41. — goods addressed to two persons; delivery to either. C., having an order for goods, borrowed money of W. to enable him to fill the order, and, upon shipping the goods, both C. and W. requested the purchaser to send the purchase money to W., but he sent it by express in a package addressed to C. & W., jointly. *Held*, that although there was no such firm as C. & W., notice or delivery to either one of them was notice or delivery to both. *Wells v. American Express Co.*, 44 Wis., 342. 1878.

42. — The mere fact, known to the express company's agent at the office of delivery, that W. had shipped goods to the sender of the package, and had sent to the proper agent of such company a bill of the goods

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for collection from him, which had been returned unpaid, would not render the express company liable to W. for the value of the package, or of W.'s interest therein, after its delivery to C. *Ib.*

43. Delivery of package; authority to receive it. It is a question of fact, whether one who, while in the employ of another as a book-keeper, occasionally received packages of goods sent by express to his principal, and was in the habit of receiving his mail, had authority to receive and receipt for a money package of his principal, after his employment ceased. *American Merchants' Union Express Co. v. Milk*, 73 Ill., 224. 1874.

44. Delivery to wrong person. An express company, well knowing that certain goods, received by it for transportation to a place mentioned in its receipt, were the property of the shipper, delivered them without his knowledge to a third person, at the place of shipment, on the order of the consignee. *Held*, that the company was liable to the shipper for the value of the goods. *Southern Express Co. v. Dickson*, 94 U. S., 549. 1876.

45. — A high degree of care is required at the hands of an express company. The delivery of a money package by such company to an unauthorized person was held to render the company liable. *Southern Express Co. v. Van Meter*, 17 Fla., 783. 1880.

46. — It is the duty of an express company, upon receiving a package of money to be forwarded, to safely carry and deliver it to the consignee. It is not discharged by delivering the same to another on a forged order of the owner. *American Merchants' Union Express Co. v. Milk*, 73 Ill., 224. 1874.

47. — In a suit against an express company to recover for money intrusted to it by the plaintiff for delivery to another, and alleged to have been lost, the jury, with their general verdict for the plaintiff, found specially, in answer to interrogatories, that the money had been received from the plaintiff, by the agent of the company, for delivery to the consignee, and that the package containing it had been delivered by another agent, with the seals unbroken, to one not the consignee. *Held*, the evidence not being in the

record, that the answers are not inconsistent with the general verdict. *Monroe v. Adams Express Co.*, 65 Ind., 60. 1878.

48. Fire; negligence. Goods were placed in a wooden car about five years old, well finished and in good order, having sliding doors in the middle of the sides, with a crevice between the doors and the side of the car through which a spark might pass; the car was placed next to the engine, which was wood-burning, and the express messenger was in the first passenger car, with another car between him and the first car, so that he could not see it, and the engine was emitting a stream of sparks from the time the train started. The court below referred to these facts in the charge, and told the jury, if they found, "in view of all the facts and evidence, that the defendant omitted to do what a man of reasonable care and caution would have done under the circumstances to protect the car from fire, then it was negligence." *Held*, to be error. *Adams Express Co. v. Sharpless*, 77 Pa. St., 516. 1875.

49. — Placing the car next to the engine, or permitting the messenger to ride in the front passenger car, was not evidence of want of reasonable and ordinary care. *Ib.*

50. — Goods were sent by A. directed to B. at M. They were delivered to an express company's agent on Thursday, and should have reached their destination the same day. They were sent by a circuitous route and did not arrive at M. until Saturday evening about six o'clock. About two o'clock on Saturday afternoon B. called at the office for the goods and was informed there were none there. B. lived about one hundred rods from the express office in M., and had lived there for a year, and was well known. No effort was made to deliver the goods to him, nor any notice given of their arrival. They remained in the express office until Tuesday night, when they were destroyed by fire. *Held*, that the company was liable for their loss. *Union Express Co. v. Ohleman*, 92 Pa. St., 323. 1879.

51. Goods shipped in care of express company. Where goods are not delivered to an express company, but are sent by railway to their destination consigned to the purchaser *in the care* of the express company's agent at that place, and never come into his

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possession, but are delivered by the railway company directly to the purchaser, without fault of the express company or its agent, and a bill of such goods, sent also to such agent for collection, not being paid by the purchaser, is promptly returned by the agent, no liability of the express company to the consignor is created by these facts. *Wells v. American Express Co.*, 44 Wis., 842. 1878.

52. Injury to employees; pleading. In a suit against an express company for injuries received while in its employment, an allegation in the complaint that such injuries were caused by the negligence of one who was the "agent and manager of the said company's office" in the city where the plaintiff was employed, does not, in the absence of further allegations showing what the duties and powers of such agent were, create the presumption that he was a vice-principal for whose negligent acts, resulting in injury to its employees, the express company would be liable. *Dwyer v. American Express Co.*, 55 Wis., 453, 1882; 8 Amer. & Eng. R. R. Cases, 159.

53. — And especially does not such presumption arise where the complaint further shows that the acts from which the injury resulted were done by such agent while engaged as driver of the team drawing goods between the company's office and the depots, and while defendant was riding to and fro, assisting in loading and unloading such goods. *Ib.*

54. Limitation as to time of presenting claim. A stipulation in print at the foot of the receipt of an express company for a package "that the express company shall not be liable for any loss, unless claim therefor shall be made in writing at this shipping office within thirty days from this date, in a statement to which this receipt shall be attached," is a condition with which the owner or shipper must comply, or lose his claim. *Southern Express Co. v. Hunnicutt*, 54 Miss., 566. 1877.

55. — A stipulation requiring notice of loss to be given to a carrier within thirty days is reasonable. *United States Express Co. v. Harris*, 51 Ind., 127. 1875.

56. — A clause in the contract of an express company that "it is not to be held lia-

ble for any loss or damage whatever, unless claim be made therefor within ninety days from the delivery to it," held, not to limit the liability of the company in an action upon the contract to recover for the non-delivery of goods. *Porter v. Southern Express Co.*, 4 So. Car., 135. 1872.

57. — A receipt given by an express company contained a clause to the effect that the company would not be liable for loss or damage unless the claim therefor was made "in writing within thirty days from the accruing of the cause of action." In an action to recover for a loss, held, that the clause was not in the nature of a condition precedent to plaintiff's right to recover, as it assumes the existence of a cause of action which has accrued, but was in the nature of a limitation, and could not be availed of upon trial unless set up in the answer. *Westcott v. Fargo*, 61 N. Y., 542. 1875.

58. Loss of goods; action by stockholder. A member of a joint stock express company may maintain an action against it in the manner prescribed by said statute (*i. e.*, against its president or treasurer) to recover for goods lost which were delivered to it for transportation, the same as if he was not connected with the company. *Ib.*

59. Loss of goods; evidence. Evidence that A. delivered a box containing his property to an express company to be carried to another town; that the box was directed to B. at the place of consignment; that A. had made efforts to find the box, but had not been able to do so; that he had made inquiries at both towns at the offices of the carrier; that he had not seen the box since he sent it; that he had inquired of B. about the box, — is not sufficient evidence to sustain an action by A. against the carrier for the value of the box and its contents, although the defendant introduced no evidence. *Morley v. Eastern Express Co.*, 116 Mass., 97. 1874.

60. Messenger; action against; evidence; receipt. Where an express messenger is sued by the company for the value of a package alleged to have been received by him, and his receipt to a connecting messenger given in the usual form, is introduced in evidence, it is proper to permit the defendant to testify and deny the receipt of the package, not-

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withstanding the receipt. *Swann v. Southern Express Co.*, 53 Miss., 286. 1876.

61. Money; carriage of. In an action against an express company for the loss of money delivered to it to be carried to, and delivered at, a certain place, it is only necessary to prove the delivery of the money to the company, and its failure to redeliver the same. *United States v. Pacific Express Co.*, 15 Federal Reporter, 867. 1833.

62. — Express companies are insurers for the safe delivery of a money package intrusted to them for delivery to another person, and nothing can excuse them from their obligation safely to carry and deliver but the act of God or the public enemy. *United States Express Co. v. Hutchins*, 67 Ill., 348. 1873.

63. — If an express company has a settled and uniform rule that money packages must be sealed and indorsed in a certain way, and such rule is brought home to the knowledge of the consignor, who neglects or intentionally omits to comply with it, and the company, in ignorance of the special value of the package, takes ordinary care of it only, the company will not be liable for the loss. If, however, the money is stolen by an agent of the company, and the company recovers the money from the thief, it will be liable for the amount so recovered upon a count for money had and received, notwithstanding the violation of its rules by the consignor. *St. John v. Express Co.*, 1 Woods (U. S. C. C.), 612. 1871.

64. — A package of money belonging to W. alone was sent by express directed to W. & C., and, upon W.'s demanding it as sole owner, without any assignment by C. of his apparent interest to W., or written order by C. to deliver to W., or offer of any receipt or acquittance from both, the express company refused to deliver it to W., claiming that the money had been subjected to process of garnishment in its hands. *Held*, that apart from the question of garnishment, W. may recover the full amount of such moneys. *Wells v. American Express Co.*, 55 Wis., 23. 1882.

65. — The S. E. Co., on December 22, 1861, undertook, at the request of C., to carry \$100 from Holly Springs, Miss., to Bowling Green, Ky., and deliver to D., for

which C. paid \$7.50; and on January 4, 1862, undertook in like manner to carry \$65, as above stated, for which C. paid \$1.50. The money was not delivered. C. afterwards paid D. the amount, and sued the S. E. Co. for \$165. *Held*, that C. was the proper party to recover the loss. *Southern Express Co. v. Craft*, 49 Miss., 480. 1873.

66. — The shipper is a party in interest to the contract, and it does not lie with the carrier who made the contract with him, to say, upon a breach of it, that he is not entitled to recover damages, unless it be shown that the consignee objects, for without that it will be presumed that the suit was commenced and so prosecuted with the knowledge and consent of the consignee, and for his benefit. *Id.*

67. Postal laws. It is not a violation of the postoffice laws for an express company to carry with a money letter or package an unstamped letter of advice concerning said money. It was the intention of congress, in the act of March 3, 1845, to permit an unstamped letter of advice relating merely to the article shipped to be transmitted with such article. *United States v. U. S. Express Co.*, 5 Bissell (U. S. C. C.), 91. 1869.

68. Railway facilities. A railway company is required to furnish the usual and necessary facilities for the transaction of the business of express companies. *Wells, Fargo & Co. v. Oregon R'y and Navigation Co.*, 8 Sawyer (U. S. C. C.), 600, 1883; *Dinsmore v. R. R. Companies*, 3 Amer. & Eng. R. R. Cases (U. S. C. C.), 594; *Wells, Fargo & Co. v. Oregon R'y and Navigation Co.*, 18 Federal Reporter, 517, 1883; *Wells v. Oregon and C. R'y Co.*, 18 Federal Reporter, 667, 1883.

69. — Railroad companies, as common carriers, are not authorized to carry on express business. As such carriers they are bound to provide for those doing an express business over their roads reasonable and necessary facilities for such business, and to all upon equal terms. They cannot insist upon the exclusive right to do such business over their lines of road, nor grant such right to one express company to the exclusion of others, but are bound to carry for every one offering to do the same sort of business upon the same terms. Where an express company had, under special contract, been for

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many years engaged in that business over the system of roads controlled by defendant, and had built up a large and valuable business, and established valuable connections, all of which would be much depreciated if defendant should be allowed to refuse to further allow it to carry on such business over its line of road, *held*, that for that reason an injunction restraining such action might be granted. *Dinsmore v. Louisville, Cincinnati, etc., R'y Co.*, 2 Federal Reporter, 465; 2 Flippin (U. S. C. C.), 672. 1880.

70. — The rights of express companies and of railway companies discussed at length, but decision reserved until final hearing. Preliminary injunction denied. *Camblong v. Philadelphia and Reading R. R. Co.*, 9 Philadelphia (U. S. C. C.), 411. 1873.

71. — Railroad companies are bound, as common carriers, to allow express companies to do business on their roads, and to provide such conveyances, by special cars or otherwise, attached to their trains, as are required for the safe and proper transportation of express matter, and they are bound to extend the use of such facilities on equal terms to all who are engaged in the express business. *Southern Express Co. v. St. Louis, Iron Mountain and Southern R'y Co.*, 10 Federal Reporter, 210; 3 McCrary (U. S. C. C.), 147, 154, 1882; *Same v. Memphis, etc., R. R. Co.*, 2 McCrary (U. S. C. C.), 570, 1881.

72. — A contract to furnish daily such an excessive and unnecessary amount of space, in the cars of a railroad company, for the transportation of the express matter of any one person or corporation, as will disable such railroad from serving others equally entitled to be served in the same manner, is illegal and void. Such contract is extortionate upon the express company. *Texas Express Co. v. Texas and Pacific R'y Co.*, 6 Federal Reporter, 426. 1881.

73. — A temporary injunction granted to enjoin a railroad company from charging a certain express company higher rates than were charged to other specified companies by the same railroad. *Southern Express Co. v. Memphis, etc., R. R. Co.*, 8 Federal Reporter, 799; 2 McCrary (U. S. C. C.), 570, 1881.

74. — Where an injunction is granted re-

quiring a railway company to furnish facilities to an express company to continue its business, the court will presume that past rates paid for such service are reasonable. *Wells, Fargo & Co. v. Oregon R'y and Navigation Co.*, 8 Sawyer (U. S. C. C.), 600. 1883.

75. — A railway company cannot lawfully fix upon an absolute rate of compensation and insist upon being paid by express companies in advance or at the end of each trip. *Southern Express Co. v. St. Louis, Iron Mountain and Southern R'y Co.*, 10 Federal Reporter, 210; 3 McCrary (U. S. C. C.), 147, 154. 1882. See, also, *Same v. Memphis, etc., R. R. Co.*, 2 McCrary (U. S. C. C.), 570, 1881.

76. — A railway company has no right to open and inspect packages conveyed over its road which are in charge of an express company. *Southern Express Co. v. St. Louis, Iron Mountain and Southern R'y Co.*, 10 Federal Reporter, 210; 3 McCrary (U. S. C. C.), 147. 1882.

77. — The refusal of a railroad company to carry an express company's safes and chests, unless it was allowed to open the same and inspect their contents, or was furnished with an inventory of such contents, with the further understanding that the railroad company might, whenever it saw fit, open and inspect the safes and chests of the express company, and also collect the freight on each separate article or parcel contained therein, as if each had been shipped by itself, violates both the express company's rights as a shipper, and the terms of an interlocutory judgment temporarily restraining an interference with the express company's business. *Dinsmore v. Louisville, New Albany and Chicago R. R. Co.*, 3 Federal Reporter, 593. 1880.

78. — To refuse permission to express messengers or agents to accompany property on the steamboats or railroads on which it is to be carried, and to deny to them the right to the custody of the property while so carried, would be destructive of the express business, and of the rights which the public have to the use of such steamboats and railroads for the transportation of such property so under the control of such messengers or agents. *Southern Express Co. v. St. Louis, Iron Mountain and Southern R'y Co.*, 10 Federal

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Reporter, 869; 3 McCrary (U. S. C. C.), 147, 154. 1882.

79. — Section 36 of the incorporation act (Or. Laws, 532), which declares a railway corporation formed thereunder to be a common carrier, and empowers it "to collect and receive such tolls or freights for transportation of persons or property thereon as it may prescribe," authorizes such corporation to take reasonable toll, not inconsistent with its character and obligation as a common carrier, and no more, and, so far, it constitutes a contract between the corporation and the state, the obligation of which the latter cannot impair nor any court disregard. *Wells v. Oregon R'y and Navigation Co.*, 15 Federal Reporter, 561. 1883.

80. — What is reasonable compensation under said § 36, when the parties cannot agree thereabout, is a question to be determined by the court; but in allowing a provisional injunction requiring a railway corporation to furnish an express company with the facilities theretofore enjoyed by it, over and upon its road, the court will assume that the compensation paid for such past facilities is reasonable, and require them to be furnished under the injunction at the same rate. *Ib.*

81. — An express company is entitled to some notice from a competing railroad of an intended change in rates and privileges in the conduct of the express business. *Southern Express Co. v. Louisville and Nashville R. R. Co.*, 4 Federal Reporter, 481. 1880.

82. — A railway company cannot exercise a supervision over a rival company in the conduct of the express business. *Ib.*

83. — Nor can it discriminate in its own favor in the conduct of the express business. *Ib.*

84. — Railroad companies are not authorized to carry on an express business. *Southern Express Co. v. Memphis, etc., R. R. Co.*, 8 Federal Reporter, 799; 2 McCrary (U. S. C. C.), 570. 1881.

85. — A railway company is not bound to furnish an expressman who seeks to carry on his business over its road with facilities and accommodations different in kind from those furnished to the general public; and the fact that it has furnished him with such facilities for many years, and that he has

thereby acquired a valuable business, is immaterial. *Sargent v. Boston and Lowell R. R. Co.*, 115 Mass., 416. 1874.

86. — The statute of 1867, ch. 339, obliging each railway company within the commonwealth to give to all persons or companies reasonable and equal terms, facilities and accommodations for the transportation of merchandise, does not render it unlawful for such a company to carry on the express business itself, and to refuse to allow similar privileges to another person. *Ib.*

87. — When a railway company may lawfully refuse to furnish a person desiring to carry on an express business over its road with greater facilities than are furnished to the public generally, the fact that the corporation carries on such business itself, and that this is *ultra vires*, is immaterial. *Ib.*

88. Receipt. A receipt of an express agent of goods for conveyance, containing a memorandum of agreement, is of itself evidence to bind the company. *Porter v. Southern Express Co.*, 4 So. Car., 135. 1872.

89. — An express receipt contained a clause limiting the liability of the company to the risks of carriage to the end of its route. The consignor could not read, and the agent read the principal part of the receipt to him, but did not read that clause. *Held*, that as that clause was expressive only of the company's liability under the law, the omission to read it was no fraud on the consignor. Such a receipt, like any simple receipt, may be explained by parol evidence. *Hadd v. U. S. and Canada Express Co.*, 52 Vt., 335, 1880; 6 Amer. & Eng. R. R. Cases, 443.

90. — use of wrong blank. Where, in filling up a receipt for goods by the Adams Express Co., a blank was used belonging to the United States Express Co., and the name in ink in the blank part was filled with the Adams Express Co., but the printed part was not changed, *held*, that in the absence of proof *dehors* the receipt, the court would not determine whether the limitation of liability contained in the printed blank in favor of the United States Express Co. applied to the Adams Express Co., but that the intent of the parties should be gathered from all the circumstances proved on the

Stolen Property — Value.

trial. *Adams Express Co. v. Boskowitz*, 107 Ill., 660. 1883.

91. Stolen property. Where property in possession of one as collateral security for a debt due him from the owner is stolen from his possession and delivered to an express company, the possession by such company is unlawful, and when a demand is made upon it for the property by the lawfully authorized agent of the one from whose possession it was stolen, it should surrender it up, and, failing to do so, it becomes liable for the value of the property. *United States Express Co. v. Meints*, 72 Ill., 293. 1874.

92. Sunday laws. Although an express company would not be justified in transacting its ordinary business or receiving and delivering merchandise on Sunday, yet it may, despite the provisions of the Sunday clause of the Penal Code, carry express matter through the city of New York on Sunday, from the Jersey City ferry to the Grand Central depot, and if the police threaten to interfere the court will grant an injunction to restrain them from such interference. *Adams Express Co. v. Board of Police*, 65 Howard's Practice (N. Y.), 72. 1883.

93. Taxation. A city which is authorized by its charter to license, tax and regulate merchants, agents, express companies, insurance companies, etc., has power to impose an *ad valorem* tax upon the gross annual receipts of an express company from its business done in the city, and such tax does not violate the constitutional requirement of uniformity and equality because different from that imposed upon merchants. That requirement is complied with if all persons engaged in the same business are taxed alike. *American Union Express Co. v. City of St. Joseph*, 66 Mo., 675. 1877.

94. — A tax levied by state authority upon the gross receipts of an express company, whose business consists in receiving goods to be delivered at points outside of the state, to which the company's line does not extend, is not a violation of that provision of the constitution of the United States which confides to congress alone the power to regulate commerce with foreign nations and among the several states. *Ib.*

95. Trover against carrier. Goods were delivered to an express company, marked "C. O. D.," to be carried to the consignee. The consignee paid the express charges but refused to receive the goods, and directed the company to return them to the consignor. The consignor brought suit against the consignee, and recovered a judgment for the value of the goods, but in the meantime, after a verdict was rendered in favor of the consignor, and before judgment was rendered thereon, the express company, by direction of the consignor's attorney, returned the goods to the consignor. The consignee never countermanded his direction to the company to reship to the consignor. When final judgment was rendered, the consignee brought an action of trover against the company to recover the value of the goods, without offering to pay the \$250 charges. *Held*, that the consignee had no right of action against the company. *American Express Co. v. Greenhalgh*, 80 Ill., 68. 1875.

96. Value — Contract. An express company is liable for the value of the goods lost through its negligence, notwithstanding the bill of lading provides that it shall not be liable beyond an amount named therein, when it is understood by the parties that the sum named is less than the value of the goods. Such an agreement can at most cover a loss arising from some cause other than the negligence or default of the carrier or its servants, and the rule of damages is the same, although less is charged and paid for the transportation than when the exempting clause is omitted. *United States Express Co. v. Backman*, 28 Ohio St., 144, 1875; 14 Amer. R'y Rep., 82.

97. — A clause in a contract between an express company and a shipper stated that goods shipped are of the value of \$50, unless their value should be inserted in the contract, and that the company, in case of loss, would not be liable for more than \$50, unless the value was so inserted, and the value of the goods was not inserted. *Held*, that this did not relieve the company from liability for the full value of the goods if lost through its fault, and that a presumption of negligence arose from the mere fact of loss. The limitation only reduces the

Act of Agent.

amount of damages where the carrier is held as an insurer without fault. *Kirby v. Adams Express Co.*, 2 Mo. App., 370. 1876.

98. — **failure to disclose.** A statement in the receipt for a trunk and contents, that its value is fixed at \$50, "unless its value was otherwise stated," is a valid condition; and where the property was of greater value, and no statement thereof was contained in the receipt, it was held that the liability of the company was limited to \$50. *Muser v. Holland*, 17 Blatchford (U. S. C. C.), 412. 1880.

99. — **fraudulent concealment.** Where a carrier by contract limits his liability to a specified amount, if the value of the property is not stated by the shipper, and the goods are of greater value than the amount specified, silence alone, on the part of the shipper, as to the real value, although there be no inquiry by the carrier and no artifice to deceive, is fraud in law which discharges the carrier from liability for ordinary negligence. *Magnin v. Dinsmore*, 62 N. Y., 35. 1875.

100. — **Common carriers have a right to demand good faith and fair dealing from those whom they serve.** So, where, by notice brought home to a shipper, an express company made known that it would not be liable to a greater amount than \$50 for the loss of unvalued packages, and the shipper, to avoid paying the regular charges of the company, failed to disclose the value of the package delivered for carriage, and led the company to treat it as of small value, whereby it was lost, it was held that the shipper could only recover \$50, although the package was of much greater value, and although the company, had the value of the package been made known to it, might have been guilty of negligence. *Earnest v. Express Co.*, 1 Woods (U. S. C. C.), 573. 1873.

101. — **Where a party forwarded jewelry worth \$3,800 in a box, by express, taking a receipt which disclosed on its face that the company should not be held liable for any loss or damage to any box, package or thing for over \$50 unless the just and true value thereof was therein stated, and failed to state the value, and, in consequence thereof, was charged a less premium than otherwise would have been required, it was held that,**

independent of the qualifying words in the receipt, the court would be inclined to exempt the company from liability on the ground of want of good faith in not disclosing the value of the goods. *Oppenheimer v. United States Express Co.*, 69 Ill., 62. 1873.

102. — **limitation of liability; notice.** An express company has the right to demand from a consignor such information as will enable it to decide on the proper compensation to charge for the risk, and the degree of care to bestow in discharging its trust; and a limitation of its liability not to exceed \$50, unless the value of the goods forwarded is truly stated, if brought to the knowledge of the consignor, is reasonable and consistent with public policy. *Id.*

103. **Written contract.** In a suit against an express company, upon a written contract to carry goods, the plaintiff relies upon the terms of the contract, and not upon the implied common law obligation of carriers. *Porter v. Southern Express Co.*, 4 So. Car., 135. 1872.

EXPRESS MESSENGER.

See EXPRESS COMPANIES; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS.

EXPULSION OF PASSENGERS.

See DAMAGES; INJURIES TO PASSENGERS; PASSENGERS; TICKETS.

FALSE IMPRISONMENT.

1. **Act of agent.** A common carrier having no right to imprison a passenger for non-payment of fare, held, that the action of a pursuer in so doing was not within the scope of his employment, and the carrier was not liable therefor. *Emerson v. Niagara Navigation Co.*, 2 Ontario Rep., 523. 1883.

FARM CROSSING.

See INJURIES TO DOMESTIC ANIMALS; PRIVATE CROSSINGS.

Attachment—Charter—Contract.

FEDERAL COURTS.

See BRIDGES; CONSTITUTIONAL LAW; HABEAS CORPUS; INJUNCTION; JURISDICTION; MORTGAGE; REMOVAL OF CAUSES; TAXATION.

1. Attachment. An attachment cannot be sued out of the United States circuit court against the property of the defendant in an action where the court has not acquired jurisdiction of the person. *Ex Parte R'y Co.*, 103 U. S., 794. 1880.

2. Certiorari. The United States circuit court has no jurisdiction of a writ of *certiorari* to a state court for the removal of proceedings by the state against a railroad company under the Illinois act of May 2, 1873. *State v. Chicago and Alton R. R. Co.*, 6 Bissell (U. S. C. C.), 107. 1874.

3. Injunction against railway commissioners. The United States circuit court has jurisdiction of a bill by non-resident creditors to restrain the railroad commissioners from actions injurious to their rights. It is not necessary to wait until the commissioners have taken positive action. *Piek v. Chicago and Northwestern R. R. Co.*, 6 Bissell (U. S. C. C.), 177. 1874.

4. Removal of causes. A corporation is a citizen of the state where it is created, and it can be a "citizen of another state," within the meaning of the words as used in the removal acts. *Quigley v. Central Pacific R. R. Co.*, 11 Nev., 350. 1876.

5. — Foreign citizens, where they do not constitute the entire plaintiff or defendant, cannot remove a suit, as the suits contemplated by the act of March 3, 1875, are those between citizens of one of the states of the Union on one side, and foreign states citizens or subjects on the other. *Hervey v. Illinois Midland R. R. Co.*, 7 Bissell (U. S. C. C.), 103. 1876.

6. Removal of proceedings for condemnation of real estate. A proceeding under the right of eminent domain to condemn land for a railroad is not a case in which the state is a party; and the federal courts may have jurisdiction. Nor is it a special proceeding, nor can the right of removal be limited by state laws. It is in effect a suit of a civil nature, and, if the parties are competent, comes under the United States statutes for removal of causes. *Warren v. Wis-*

consin Valley R. R. Co., 6 Bissell (U. S. C. C.), 425. 1875.

FENCES.

See EMINENT DOMAIN; INJURIES TO DOMESTIC ANIMALS; RIGHT OF WAY.

1. Charter. The charter of a railway company, which required only such construction of its road with reference to the safety of travel upon a turnpike as should be approved by a certain committee, was open to amendment by the general assembly. *Held*, that a general statute requiring all railway companies to maintain fences along their roads where running within the limits of any highway was an amendment of the charter. *Durand v. New Haven and Northampton Co.*, 42 Conn., 211. 1875.

2. Constitutional law. The statute requiring railway corporations to fence their roads is a police regulation, designed to secure the safety of the public travel and transportation, and is obligatory, as such, upon all such corporations, whether chartered before or after its passage. *Wilder v. Maine Central R. R. Co.*, 65 Me., 332, 1876; 9 Amer. R'y Rep., 289.

3. Contract. A parol agreement between a railway company and an adjoining owner, for the removal and discontinuance of a fence on the line of the railway, does not run with the land, and cannot therefore bind his grantee. *Id.*

4. — Where a railway company, in part consideration for the right of way over land, promised the land owner to fence its railway through said land, and to make cattle-guards and farm-crossings, the company was liable, upon its failure to perform such promise, for the cost of constructing such fences, etc.; and it was not necessary, in order to recover such damages, that the fences, etc., should have been erected by the plaintiff before bringing suit. *Logansport, etc., R'y Co. v. Wray*, 52 Ind., 578. 1876.

5. — Under the act of April 18, 1874 (71 O. L., 85), an action will not lie in favor of a land owner against a railway company to recover the cost of constructing a fence along the line of a railroad, where a former owner of the land, for a sufficient consideration, released the right of way over the

Liability of Railway Company to Fence—Statute.

lands, and agreed to build and maintain fences on both sides of the railway. *Warner v. Baltimore and Ohio R. R. Co.*, 31 Ohio St., 265. 1877.

6. Liability of railway company to fence; damage to crops. The ordinary fence laws of Tennessee do not apply to railroad companies, and there is neither a common law nor statutory obligation on them to construct or maintain cattle-guards for the protection of crops growing on the cultivated lands through which their roads pass. Neither was the act of 1875, ch. 64, intended to apply to railroad companies, although the land on which the track is built is within "one general inclosure," made by joining the fences of the farmer to the cattle-guards of the railroad. These laws were intended for adjoining land owners engaged in agriculture, who are mutually benefited as well as bound by them. *Ward v. Paducah and Memphis R. R. Co.*, 4 Federal Reporter, 862. 1880.

7. — The statute requiring railroad companies to fence their tracks is not for the purpose of protecting adjoining land owners from damage that might be done by stock getting on the right of way and thence to the adjacent crops. The object of the statute was to prevent stock from coming on the railroad and being injured, and to prevent accidents which would likely occur if stock were not fenced away from the track, thereby promoting the safety of passengers and employees on the trains. The requirement to build cattle-guards at road crossings is not different from that to build fences along the track, and a failure to build such cattle-guards imposes no greater or other liability than the failure to fence, and does not impose a liability for damage to crops. *Peoria, Decatur and Evansville R'y Co. v. Schiller*, 12 Bradwell (Ill.), 443. 1883.

8. — The statute does not make railroad companies liable for damages done by cattle trespassing upon their lands and passing thence, by reason of a failure to build fences, to the lands of adjoining owners. The liability in such case is upon the owner of the cattle. *Gowan v. St. Paul, Stillwater and Taylor's Falls R. R. Co.*, 25 Minn., 328. 1878.

9. — The statute does not require that the

fields should be protected by the owner with a lawful fence on other sides, in order to hold the railway company for failure to fence the side adjacent to the road-bed. But the incursion of stock and injuries to crops must result from the failure of the company to erect such fence. Where caused by insufficiency of the fence put up by the owner, the company will not be responsible. *Biggerstaff v. St. Louis, Kansas City and Northern R. R. Co.*, 60 Mo., 567. 1875.

10. Location of railway. A railway company, desiring to take lands outside the limits of its line, filed its location over a lot of land whose owner afterwards conveyed a part of the lot to the corporation. The county commissioners, subsequently, on the petition of the corporation, ordered that it have leave to take the land included within the location. *Held*, under the Gen. Sts., ch. 63, § 19, providing that such corporations shall not take lands without the limits of their railroads without the consent of the owner, unless the county commissioners first prescribe the limits within which the same may be taken, that the corporation acquired no right in the land under its location, and that the corporation was bound, under the Gen. Sts., ch. 63, § 43, to erect suitable fences between the land conveyed to it and the rest of the lot. *Derby v. Framingham and Lowell R. R. Co.*, 119 Mass., 516. 1876.

11. Order under statute; repeal of statute. The statute of 1873 required railway companies to make fences along their lines when ordered by the railway commissioners. The commissioners under it made an order that the defendant should make a fence. The act was repealed in 1874, and was re-enacted in 1875. *Held*, that the duty of the defendant to make the fence under the order of the commissioners terminated with the repeal of the act in 1874, and was not revived with the re-enactment of the act in 1875. *Kane v. New York and New England R. R. Co.*, 49 Conn., 139, 1881; 11 Amer. & Eng. R. R. Cases, 467.

12. Statute — Illinois. Where a land owner gave notice to a railway company, under provisions of the statute of 1869, to construct a fence, and, upon the failure of the company to do so, erected one-half of

Contract,

the fence and brought suit therefor, *held*, that the failure of the plaintiff to erect the whole of the fence would not defeat his right to recover for what he did build. *Toledo, Peoria and Warsaw Ry Co. v. Sieberns*, 63 Ill., 217. 1872.

13. — **Massachusetts.** The duty of maintaining a fence at a place where one is required to be built by the statute of 1879, ch. 205, § 1, is not imposed by law upon the owner of land adjoining a railway constructed prior to the statute of 1841, ch. 125. *Boston and Albany R. R. Co. v. Briggs*, 132 Mass., 24, 1882; 7 Amer. & Eng. R. R. Cases, 541.

14. — **Minnesota.** Under Laws 1872, c. 25, § 1, it is the duty of railroad companies to build the fences and cattle-guards therein mentioned, although no rules therefor are prescribed by the county commissioners. *Gowan v. St. Paul, Stillwater and Taylor's Falls R. R. Co.*, 25 Minn., 328. 1878.

15. — **Missouri.** If a railroad company, whose road runs through an inclosed field, fails to fence the sides of its road as required by the statute, the owner of the field may erect a fence along either side of the road, and will then be entitled, under the statute, to recover from the company the value of the fence so erected, without fencing the other side also. *Fletcher v. St. Louis, Kansas City and Northern Ry Co.*, 73 Mo., 142, 1880; 7 Amer. & Eng. R. R. Cases, 558.

16. — **New York.** The remedy of a land owner for a failure on the part of the corporation to comply with the provision of the Railroad Act of 1854 (§ 8, ch. 282, Laws of 1854) requiring railway corporations to erect and maintain fences on the sides of their roads and farm-crossings, is not confined to an action for damages given by said act; but he may enforce the performance of this duty. *Jones v. Seligman*, 81 N. Y. 190, 1880; 3 Amer. & Eng. R. R. Cases, 236.

FERRIES.

See BRIDGES; CHARTER.

1. **Contract.** A railroad company has power to contract with another corporation to complete the transportation of goods whose destination is beyond the terminus

of its own line. *Wiggins Ferry Co. v. Chicago and Alton R. R. Co.*, 73 Mo., 389, 1881; 5 Amer. & Eng. R. R. Cases, 1.

2. — A railway company and a ferry company entered into a contract for the ferrying of persons and property, by which the ferry company bound itself to "furnish and maintain wharf and steam ferry-boats sufficient to do with promptness and dispatch all the ferrying of passengers and freight requiring it." At the time this contract was made all goods intended for transportation over this ferry were unloaded from the cars and placed on wagons. Subsequently a system of transferring loaded cars came into vogue. *Held*, that under this contract the railroad company had a right to demand of the ferry company that it adopt the new system. It was bound to adopt any new improvements whereby transportation would be made cheaper, safer and more expeditious. *Id.*

3. — But the ferry company being ready at all times to comply with its contract, the railway company was liable for the profits upon the business lost by the ferry company. *Id.*

4. — In the same case in the St. Louis court of appeals, *held*: Where a railway company, by a contract of unlimited duration, agreed with a ferry company to employ the latter to transport across the Mississippi river "all persons and property which may be taken across the river either way, to or from the Illinois shore," and the ferry company sued the railroad company for damages because the latter had, under directions of shippers and otherwise, sent through another ferry company certain car-freights for which the latter had exclusive facilities for transportation over the river in bulk, *held*, that it could not be conceded that it was in contemplation of the parties to the contract that the railroad company should use efforts to force trade out of its natural channels, and that the proper interpretation of the words quoted was, such freights as should come and go in the regular course of business by that route, unimpeded by any adverse efforts of the railway company. *Wiggins Ferry Co. v. Chicago and Alton R. R. Co.*, 5 Mo. App., 347. 1878.

5. — A common carrier corporation cannot so use its franchise as to compel shippers

Miscellaneous.

to trade under unnecessary impediments. It was the duty of the ferry company, when the public interests demanded it, to furnish car transfers; and, as it was not able to do the business of car transfer, the railroad company cannot be made liable in damages for using a ferry that could and would do it. *Ib.*

6. — A contract between a railway company and a ferry company bound the railway company to employ the ferry company to transport for it across the Mississippi river at St. Louis, all persons and property which should be taken across the river either way by the railway company, to or from Bloody Island, either for the purpose of being transported on the road eastward, or which had been brought to the river over the road, destined to St. Louis or points beyond. *Held*, that the operation of the contract was confined to the territorial limits of Bloody Island, and that the railway company was not prohibited from extending its track to another point on the river, and then employing another ferry to transport passengers and freight across the river, from such point to St. Louis and from St. Louis to such point. *Wiggins Ferry Co. v. Ohio and Mississippi Ry Co.*, 72 Ill., 360. 1874.

7. **Exclusive right.** The same reasoning which holds that a railway bridge is not an interference with an exclusive ferry right applies with almost equal force to a ferry constructed for carriage of railway cars only. *Mayor, etc., of New York v. New England Transfer Co.*, 14 Blatchford (U. S. C. C.), 159. 1877.

8. — Where a company was forbidden by statute to build and establish a certain line, such restriction being for the protection of a certain ferry, it was held that for a violation of this act the owner of the ferry might bring an action without alleging special damage. *Chamberlaine v. Chester Ry Co.*, 1 Welsby, Hurlstone & Gordon (Exchequer), 870. 1848.

FORGERY.

1. **Railway scrip certificates.** A railway scrip certificate, in the usual form, is not an accountable receipt, nor an acquittance or receipt within the 11 Geo. 4, and 1 Will. 4, c.

66, s. 10, and the forgery of it does not amount to felony, but to a misdemeanor, at common law only. *Clark v. Newsam*, 5 Eng. R. R. & Canal Cases, 69; 1 Welsby, Hurlstone & Gordon (Exchequer), 131. 1847.

2. **Release.** In an action for damages for injuries claimed to have resulted from defendant's negligence, a release was set up as a defense; this the plaintiff claimed was a forgery. A commission was issued, on behalf of defendant, to take the testimony of the person who plaintiff alleged forged the release as to the alleged settlement. Plaintiff, after a cross-interrogatory calling for the salary paid to the witness, proposed others, asking the amount of the witness' expenses per annum, whether he left the place by day or night, by whom he was accompanied and where he stopped; also, as to the amount of the debts he left unpaid; whether before he left he bought an India shawl, and at what price, and whether he borrowed money of certain persons specified. These cross-interrogatories were disallowed: *held*, error. Interrogatories should be allowed, if it is at all probable that they will be competent upon the trial. *Uline v. New York Central and Hudson River R. R. Co.*, 79 N. Y., 175. 1879.

FINDINGS OF FACT.

1. **Right to demand finding of fact.** In a suit for damages in carriage of vegetables, the railway company, before the evidence was introduced, demanded a finding of the facts separately. *Held*, error to refuse such finding. *Atchison, Topeka and Santa Fe R. Co. v. Ferry*, 28 Kans., 686. 1882.

FIREMAN.

See INJURIES TO EMPLOYEES.

FIRES.

See BAGGAGE; CARRIAGE OF MERCHANDISE; CONTRACTORS; CONSTRUCTION OF RAILWAYS; EMINENT DOMAIN; FENCES; INSURANCE; SUNDAY LAWS.

I. COMPANIES NOT LIABLE EXCEPT FOR NEGLIGENCE.

Companies not Liable except for Negligence.

II. NEGLIGENCE.

1. *Presumptions.*
2. *Dry grass and weeds.*
3. *Management of engines.*
4. *Negligence of property owner.*

III. STATUTORY LIABILITY.

IV. EVIDENCE.

V. DAMAGES.

VI. LESSEES AND CONTRACTORS.

VII. PLEADING.

VIII. REMOTE FIRES.

IX. GENERAL MATTERS.

I. COMPANIES NOT LIABLE EXCEPT FOR NEGLIGENCE.

1. **Accidental fire.** A railway company, in the usual and ordinary performance of its business, is not liable for a purely accidental fire, caused by fire escaping from one of its engines. *Leavenworth, Lawrence and Galveston R. R. Co. v. Cook*, 18 Kans., 261, 1877; 15 Amer. R'y Rep., 350.

2. **Cotton; storage near railway.** The erection by a town council of a platform near to a railway siding for the storage of cotton imposed upon the company no other responsibility than such as existed as to its use of the main track. *Brown v. Atlanta and Charlotte R. R. Co.*, 19 So. Car., 39, 1882.

3. — And the use of such platform in part by the railroad company for holding cotton in their custody did not so impose upon them the duty of providing a watchman for the platform as to render them liable for cotton not receipted for, and there burned without their negligence. *Ib.*

4. — As to cotton placed near the line of a railroad, the company is not liable for consequences resulting from its lawful use of engines on its track, if proper care and diligence is used. *Ib.*

5. **Degree of care required.** Railway companies are liable for ordinary care only, in relation to the escape of fire. *Hill v. Ontario, etc., R. R. Co.*, 13 Upper Canada, Queen's Bench, 503, 1856.

6. — A railway company is obliged to employ the best known appliances to prevent injury to others from fire, and the failure to do so is want of ordinary care and prudence. *Longabaugh v. Virginia City and Truckee*

R. R. Co., 9 Nev., 271, 1874; *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Nelson*, 51 Ind., 150, 1875. See *Indianapolis, Bloomington and Western R'y Co. v. Clem*, *ib.*, 591, 1875.

7. — Where the evidence shows that the engines causing the fire for which damages are claimed were equipped with the best and most approved appliances for preventing the escape of fire or sparks, were properly and prudently managed, and no negligence on the part of the railroad company is shown, there can be no recovery for damages caused by sparks therefrom setting fire to an adjacent building. *Chicago and Alton R. R. Co. v. Smith*, 11 Bradwell (Ill.), 848, 1882; *Collins v. New York Central and Hudson River R. R. Co.*, 5 Hun (N. Y.), 503, 1875.

8. — A railway company authorized by the legislature to use locomotives is not responsible for damage from fire occasioned by sparks emitted from an engine traveling on its railway, provided it has taken every precaution in its power and adopted every means which science can suggest to prevent injury from fire, and is not guilty of negligence in the management of the engine. So held in the exchequer chamber (reversing the judgment of the court of exchequer). *Vaughan v. Taff Vale R'y Co.*, 5 Hurlstone & Norman (Exchequer), 679, 1860.

9. — If reasonable precautions are taken in providing engines with those appliances which are deemed best for the prevention of damage by fire, the company using them cannot be made liable, "though they fire every rod of the country through which they run." *Philadelphia and Reading R. R. Co. v. Schultz*, 93 Pa. St., 341, 1880; 2 Amer. & Eng. R. R. Cases, 271.

10. — The court, at the instance of the plaintiff, charged the jury that "It is the duty of the defendant to operate its engines and locomotives and run the same so as to guard against any accident by fire, and to employ such machinery and other agencies for safety to property as might be necessary to avoid accidental destruction, whether such machinery was then in common use or not on railroads." Held, that the instruction was erroneous, as the principle it announces would make the defendant an insurer against accidents by fire. *Toledo, Wabash*

Companies not Liable except for Negligence.

and *Western Ry Co. v. Larmon*, 67 Ill., 68. 1873.

11. — Railway companies must use reasonable precautions to prevent fire from being carried from their engines by such winds as are usual and ordinary at the season and the place, and are only relieved from making provision against extraordinary and unusual winds. *Palmer v. Missouri Pacific Ry Co.*, 76 Mo., 217. 1882.

12. — In action against a railway company for the negligent burning of cotton near its track the court did not err in refusing to charge "that if the jury find from the evidence that the defendant was provided with the most approved machinery for protection against fire, and said machinery was worked by careful and competent employes, they will find for the defendant." *Wilson v. Atlanta and Charlotte Ry Co.*, 16 So. Car., 587. 1881.

13. — An engine may be properly equipped with spark-arresters, and yet have other defects by which it may set fire to adjoining premises; or its operation may be so negligent as to render the company liable for setting out fire. *Toledo, Wabash and Western Ry Co. v. Wand*, 48 Ind., 476. 1874.

14. — The determination of an issue, as to whether the destruction of property by fire communicated by a locomotive was the result of negligence on the part of a railway company, depends upon the facts shown as to whether or not it used such caution and diligence as the circumstances of the case demanded or prudent men ordinarily exercise, and not upon the usual conduct of other companies in the vicinity. *Grand Trunk R. R. Co. v. Richardson*, 91 U. S., 454. 1875.

15. Evidence. In the absence of evidence to show that a locomotive from which fences, hay and grass caught fire was improperly constructed, and had not an approved spark-arrester, it was proper to instruct the jury to find a verdict for the defendant in an action to recover damages for the loss thereby occasioned. *Jennings v. Pennsylvania R. R. Co.*, 93 Pa. St., 337, 1880; *Philadelphia and Reading R. R. Co. v. Schultz*, ib., 341.

16. Excessive use of steam. It is error to instruct the jury that the use of an excess-

ive amount of steam, or other facts connected with the operation of a train, constitute negligence *per se*. They are competent evidence in an action for damages for fires alleged to have been set by a locomotive, to determine whether or not the company has failed to exercise due diligence in the operation of its train. *McCormick v. Chicago, Rock Island and Pacific R. R. Co.*, 41 Ia., 193. 1875.

17. Failure to extinguish fire. The employes of a railway company do not, by reason merely of their employment, owe any duty to the proprietors of lands adjoining the company's right of way to extinguish a fire found on the right of way. If they omit to do so, and the fire extends to adjoining property and does injury, the company is not liable unless the fire originated through its negligence. *Kenney v. Hannibal and St. Joseph R. R. Co.*, 70 Mo., 252. 1879.

18. — In the rule which limits a recovery for a tort to those damages which are its natural and proximate effects, the natural effects are those which might reasonably be foreseen, those which occur in an ordinary state of things; and the proximate effects are those between which and the tort there intervenes no culpable and efficient agency. A mere failure by third parties to extinguish a fire, started through the negligence of the defendant, is not such an agency. *Wiley v. West Jersey R. R. Co.*, 44 N. J. Law, 247. 1882.

19. Fuel. A railway company has a right to use fuel in ordinary use for the purposes to which it puts it, and it is not guilty of negligence in so doing, unless such fuel is of a dangerous or hazardous quality. *Collins v. New York Central and Hudson River R. R. Co.*, 5 Hun (N. Y.), 499. 1875.

20. Negligence in controlling fire; burning train. A railway company has the right to detach burning cars from the train and run them off on a spur of the track so as to save the train and main track, unless damages to the property of others are apparent and the probable result; but if in doing so it stops them near the property of another and it is consumed, it is liable for the injury, if by proper care, under all the circumstances, it could have been avoided.

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St. Louis, Iron Mountain and Southern R'y Co. v. Hecht, 38 Ark., 357, 1882; 9 Amer. & Eng. R. R. Cases, 222.

21. Risk assumed by owner. The owner of property near a railway must take all risks of a proper and careful use of the road. *Philadelphia and Reading R. R. Co. v. Hendrickson*, 80 Pa. St., 182. 1875.

II. NEGLIGENCE.

1. *Presumption.*

22. Burden of proof. If premises are shown to have been set on fire by sparks from a locomotive, a presumption of negligence arises, which it devolves upon the company to remove by proving that all necessary precautions were taken to avoid such mischief, a character of evidence peculiarly within its possession. *Burke v. Louisville and Nashville R. R. Co.*, 7 Heiskell (Tenn.), 451, 1872; 12 Amer. R'y Rep., 497; *Simpson v. East Tenn., Va. and Ga. R. R. Co.*, 5 Lea (Tenn.), 456, 1880; *Brown v. Atlanta and Charlotte R. R. Co.*, 19 So. Car., 39, 1882; *Pennsylvania Co. v. Watson*, 81½ Pa. St., 293, 1875; *Spaulding v. Chicago and Northwestern R'y Co.*, 33 Wis., 582, 1873; *Coale v. Hannibal and St. Joseph R. R. Co.*, 60 Mo., 227, 1875; 9 Amer. R'y Rep., 210.

23. — If one or more of the engines of a railway company drop coals or emit sparks just prior to or soon after property on the line of its track has been destroyed by fire, without any other known cause or circumstance of suspicion, it becomes incumbent upon the company, in an action for damages caused by such fire, to show that its engines were not the cause of it. *Longabaugh v. Virginia City and Truckee R. R. Co.*, 9 Nev., 271. 1874.

24. — The frequent setting out of fires will justify the inference of negligence. *Missouri Pacific R'y Co. v. Kincaid*, 11 Amer. & Eng. R. R. Cases (Kans.), 83. 1883.

25. — The burden of proof to show that a fire was set out negligently is on the plaintiff. *Babcock v. Chicago and Northwestern R. R. Co.*, 11 Amer. & Eng. R. R. Cases, 63, 1882; *Gulf, Colorado and Santa Fe R'y Co. v. Holt*, 11 Amer. & Eng. R. R. Cases (Tex.), 72, 1883; *Palmer v. Missouri*

Pacific R'y Co., 76 Mo., 217, 1882; *Philadelphia and Reading R. R. Co. v. Yerger*, 73 Pa. St., 121, 1873.

26. — Negligence will not be presumed in case of fire being set to grass and communicating to the fences adjoining. *Toledo, Peoria and Warsaw R'y Co. v. Parker*, 73 Ill., 526. 1874.

27. — Where a railway company is authorized to propel its trains by steam, no inference of negligence arises from the mere fact that an injury to adjacent property was caused by sparks emitted from its locomotives. *Ruffner v. Cincinnati, Hamilton and Dayton R. R. Co.*, 34 Ohio St., 96, 1877; 21 Amer. R'y Rep. 1.

28. — The mere fact that a fire is occasioned by sparks emitted from the smokestacks of engines does not, of itself, establish negligence, nor would it be sufficient to authorize a jury to infer negligence, unless the emission of the sparks was unusual in degree or character, or the sparks were of an extraordinary size and such as would not be emitted from perfectly constructed locomotives. *McCaig v. Erie R'y Co.*, 8 Hun (N. Y.), 599. 1876.

2. *Dry grass and weeds.*

29. Duty of railway company. It is not negligence, *per se*, for a railway company to permit dry grass and herbage to remain on its right of way. The fact, however, is one for the jury, who may find negligence from it. *Burlington and Missouri River R. R. Co. v. Westover*, 4 Neb., 268, 1876; *Louisville, New Albany and Chicago R'y Co. v. Stevens*, 87 Ind., 198, 1882; *Perry v. Southern Pacific R. R. Co.*, 50 Cal., 578, 1875; 12 Amer. R'y Rep., 187.

30. — Where a railway company suffered a heavy growth of dry grass to remain on its right of way through plaintiff's premises, and fire was communicated from the locomotive of a freight train, while laboring to ascend a heavy grade, to the grass and weeds in the right of way, and from thence communicated to the fences and grass of plaintiff, which were destroyed, *held*, that the company was guilty of negligence, and that the plaintiff was entitled to recover. *Rockford, Rock Island and St. Louis R. R. Co. v.*

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Rogers, 62 Ill., 346, 1872. See, also, *Salmon v. Delaware, Lackawanna and Western R. R. Co.*, 88 N. J. Law, 5, 1875; *Delaware, Lackawanna and Western v. R. R. Co. v. Salmon*, 39 ib., 299, 1877; *Longabaugh v. Virginia City and Truckee R. R. Co.*, 9 Nev., 271, 1874.

31. — It is negligence in a railway company to place near its track, and suffer to remain there, a pile of old, dry, combustible sills, which, being set on fire by one of the company's locomotives, communicated the fire to the fence of the plaintiff which was thus burned. *Troxler v. Richmond and Danville R. R. Co.*, 74 N. C., 377, 1876; 13 Amer. R'y Rep., 389.

32. — Although there was an intervening fence between the pile of sills and the plaintiff's fence to which it was joined, which intervening fence caught fire and was burned, and from which the plaintiff's fence was directly fired, still, if the burning of the sills was the cause of the intervening fence catching fire, and the same was directly set on fire by the engine itself, the plaintiff is entitled to recover. *Id.*

33. — The true rule is that it is for the jury to say, in the light of all the evidence and circumstances, including the surroundings and dryness of the time, whether or not the railway company has permitted such an accumulation of combustible matter within its right of way, exposed to fire, as would be permitted by a careful, prudent man upon his own premises, exposed to the same hazards. *Snyder v. P. C. and St. L. R'y Co.*, 11 W. Va., 14, 1877; 18 Amer. R'y Rep., 154.

34. — A complaint against a railway company, alleging that the plaintiff contracted with the defendant to deliver wood on the defendant's track, and did deliver one hundred and twenty-five cords, of the value, etc., that the defendant cut down grass and weeds on its track and grounds, which, with other inflammable material, it negligently permitted to accumulate at the place, until very dry, when they were set on fire by the passing engines, negligently operated on the road by the defendant, by reason of which the wood was consumed, does not sufficiently show that the injury was the result of the defendant's negligence, and is bad on

demurrer. *Pennsylvania Co. v. Gallentine*, 77 Ind., 322, 1881; 7 Amer. & Eng. R. R. Cases, 517.

35. — The proof showed that, although defendant had the proper mechanical appliances to prevent the escape of fire, yet there was a heavy growth of grass and weeds upon its land where the fire started; that it had not been burned off that season; that the plaintiff was not negligent in this respect on his part, and the fire occurred in the latter part of September, when the weeds and grass were very dry and combustible. *Held*, that the jury were warranted in finding the company guilty of negligence. *Illinois Central R. R. Co. v. Frazier*, 64 Ill., 28, 1872.

36. — From the fact that a railroad runs through a prairie country, with wild grass growing upon its right of way and adjacent thereto, it cannot be said, as a matter of law, that it is not incumbent upon the company to cut or destroy the wild grass upon its right of way and outside its road-bed. *Sidilrud v. Minneapolis and St. Louis R'y Co.*, 29 Minn., 58, 1882; 7 Amer. & Eng. R. R. Cases, 499.

37. — Negligence of a railway company may be inferred where, cord-wood of another being within its right of way, it permits such an accumulation of dry grass, weeds and other combustible matter within its right of way, exposed to fire from its engines, communicable to such wood, as would not be permitted by a prudent and cautious man upon his own premises exposed to the same hazard. *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Nelson*, 51 Ind., 150, 1875.

38. — If a railway company permits dry grass to remain standing between the railway track and the fence, in such quantities as to show negligence, evidence of the fact, in an action to recover damages for the destruction of a crop by fire in an adjoining field, alleged to have been caused by sparks from a locomotive, is admissible. *Henry v. Southern Pacific R. R. Co.*, 50 Cal., 176, 1875; 12 Amer. R'y Rep., 168.

3. Management of engines.

39. Construction of engine. In an action for damages alleged to have been caused

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by the escape of sparks from an engine, it is error to instruct the jury that the defendant must show, not only that the engine was supplied with the best and most approved appliances to prevent the escape of sparks at the time of the fire in question, but also that the engine was originally so constructed. If at the time of the fire it was properly constructed and in good order, that is sufficient. *Chicago and Northwestern R'y Co. v. Boller*, 7 Bradwell (Ill.), 625. 1880.

40. — In an action against a railroad for setting fire by its locomotive to plaintiff's wood-yard, the court charged the jury that if they believed that a locomotive, if properly constructed and skilfully managed, would not set fire to wood piled on the side of the track; and if they further believed that the plaintiff's wood was destroyed by fire or sparks from defendant's engine, without plaintiff's fault, they should find for plaintiff; *held*, no error. *Longabaugh v. Virginia City and Truckee R. R. Co.*, 9 Nev., 271. 1874.

41. — Where damage is caused by the escape of fire from a railway engine, the burden is upon the company to show that their engine was properly constructed, equipped and operated. And the question of the sufficiency of such construction and equipment is one of fact for the jury. *Burlington and Missouri River R. R. Co. v. Westover*, 4 Neb., 268. 1876.

42. — condition of engine. In an action for damages occasioned by fire escaping from an engine, an instruction which fails to include the question whether the engine was supplied with proper appliances for arresting sparks is erroneous, where there is testimony tending to prove that fact. *Chicago and Alton R. R. Co. v. Smith*, 10 Bradwell (Ill.), 359. 1882.

43. Defective engine. In an action for injury by fire alleged to have been caused by a locomotive, it was proved on the part of the plaintiff that the fire broke out shortly after the passing of the defendant's engine, and that that engine had none of the appliances which had been long in use to prevent sparks or hot cinders issuing from the chimney or the fire-box, and that there was no other way of accounting for the fire than assuming it to have been caused by a spark

or cinder from the engine. For the defendant the evidence of several scientific witnesses was to the effect that the engine in question was so constructed that it was unnecessary to provide any of the safeguards suggested by the plaintiff's witnesses, and that it was impossible that sparks or cinders could have been thrown out by it so as to cause the damage complained of. In his summing up, the court, after a careful recapitulation of the evidence on both sides, left it to the jury to say whether or not there had been negligence on the part of the company either in using an improperly constructed engine or in improperly using an engine of the description mentioned by the defendant's witnesses; *held*, no misdirection. *Freemantle v. London and North Western R'y Co.*, 10 Common Bench (N. S.), 89; 100 E. C. L., 88. 1861.

44. Negligence in setting out fire. In a suit for injuries to plaintiff's woodland, by fires communicated from engines on defendant's line, there was testimony to show that one of the fires was caused by the fireman or engineer throwing from the engine a burning stick, which fell into dry grass and leaves near the track, and that it was not unusual for defendant's firemen to throw off sticks of wood which had been tried and found too large to enter the furnace door, and to which fire might adhere. *Held*, that the act was one within the scope of the servant's employment, and if it was a negligent one, defendant was liable for the consequences. *Spaulding v. Chicago and Northwestern R'y Co.*, 33 Wis., 582. 1873.

45. — If the employees could readily have prevented the fire from escaping from the roadway upon the plaintiff's meadow, they were guilty of gross negligence, for which the company would be responsible, notwithstanding that the locomotive was provided with the most approved safeguards against the escape of fire, and that the engineer in charge of the locomotive was competent and careful. *Kenney v. Hannibal and St. Joseph R. R. Co.*, 63 Mo., 99, 1876; 20 Amer. R'y Rep., 275.

46. Sparks. The building of plaintiff was about ninety feet from a railway, and was used for the storage of coal and straw. Some straw scattered about the building

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caught fire from sparks from a passing engine, and the fire thus ignited was carried by a high wind to the storehouse which was destroyed. *Held*, that it was properly left to the jury to determine whether the negligence of the company, in allowing the escape of large sparks from the engine, was the remote or proximate cause of the injury. *Pennsylvania and New York Canal and R. R. Co. v. Lacey*, 89 Pa. St., 458. 1879.

47. — A railway company authorized to use locomotives is not responsible for damages occasioned by sparks emitted from an engine traveling on its road, provided it is not guilty of negligence and has taken due precaution to prevent injury from fire. *Morris and Essex R. R. Co. v. The State*, 36 N. J. Law, 553. 1873.

48. *Special finding.* In an action for the burning of a barn caused by sparks from defendant's engine, the jury were instructed that the engine was properly constructed and supplied with all known and usual means for preventing the escape of sparks, and that defendant was not liable unless the fire was caused by the negligent and unskilful management of the engine by defendant's agents, and they were required to find specially whether defendant was guilty of negligence which caused the loss, and, if so, in what such negligence consisted. The jury, answering the first question affirmatively, found that the negligence consisted in "not using proper precaution in handling the engine to prevent the extraordinary escape of sparks in passing the barn." *Held*, that the finding is sufficiently specific. *Caswell v. Chicago and Northwestern R'y Co.*, 42 Wis., 193, 1877; 15 Amer. R'y Rep., 163.

49. *Speed of train.* It appeared that the train was running within a village at an unlawful rate of speed, viz., at a greater rate than six miles per hour (R. S., §§ 1809, 4393); and that the train consisted of only two cars and was running on a straight line; and the grade was not shown. There was no other evidence that the undue speed increased the danger of fire. *Held*, that it was error as against defendant to submit that question to the jury. *Brusberg v. Milwaukee, Lake Shore and Western R'y Co.*, 50 Wis., 231, 1880; 2 Amer. & Eng. R. R. Cases, 264.

4. *Negligence of property owner.*

50. *Contributory negligence.* The owner of lands adjacent to a railway is not obliged to keep his lands contiguous to the track free from leaves or other combustible matter coming or being thereon. *Delaware, Lackawanna and Western R. R. Co. v. Salmon*, 39 N. J. Law, 299, 1877; 14 Amer. R'y Rep., 226; *Salmon v. Delaware, Lackawanna and Western R. R. Co.*, 38 N. J. Law, 5, 1875; *Philadelphia and Reading R. R. Co. v. Schultz*, 93 Pa. St., 341, 1880; 2 Amer. & Eng. R. R. Cases, 271; *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Jones*, 86 Ind., 496, 1882; 11 Amer. & Eng. R. R. Cases, 76.

51. — Where the contributory negligence charged consisted in permitting an accumulation of hay and shavings between two buildings destroyed, and under one of them, which was set upon blocks two and one-half feet high, and with the side next the track left open below the sills, *held*, that the question of contributory negligence should be submitted to the jury. *Murphy v. Chicago and Northwestern R'y Co.*, 45 Wis., 222, 1878; 18 Amer. R'y Rep., 17.

52. — The plaintiff was accustomed to stable his horse in a barn situated within about two feet of the fence beside the defendant's road; the bedding and manure of the horses were thrown out of a window in the barn near the track, and allowed to accumulate during a hot, dry season, from the spring until in July, when it was set on fire by a spark from one of defendant's engines. *Held*, that the evidence of contributory negligence on the part of the plaintiff was sufficient to require the question to be submitted to the jury. *Collins v. New York Central and Hudson River R. R. Co.*, 5 Hun (N. Y.), 499, 1875; affirmed, 71 N. Y., 609, 1877.

53. — A lumber dealer is not bound to provide appliances to prevent fires arising from the negligence of a railway company. *McLaren v. Canada Central R'y Co.*, 32 Upper Canada, Common Pleas, 324. 1882.

54. — Damage caused by fire through the negligence of one party, but increased through the negligence of the party suffering the loss, may be recovered up to the time when the contributory negligence be-

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gan to affect the result; hence there was error in the charge to the jury when it would be understood by them that, if the plaintiff neglected to do what a prudent man would have done when he learned of the fire, it defeated his right of recovery for the previous as well as subsequent damages. *Stebbins v. Central Vt. R. R. Co.*, 54 Vt., 464, 1882; 11 Amer. & Eng. R. R. Cases, 79.

55. — No obligation rests upon the owners of property along a railway to keep it in a condition to be always safe from the fires thrown from passing engines. They are not bound to remove combustible material on their own land in order to obviate the consequences of possible, or even probable, negligence of the company. And in such cases there is not contributory negligence on the part of the owner of the property destroyed. *Richmond and Danville R. R. Co. v. Medley*, 75 Va., 499, 1881; 7 Amer. & Eng. R. R. Cases, 493.

56. — Where a barn quite near a railway track was negligently burned by sparks from an engine, *held*, not evidence of contributory negligence that the owner suffered the roof to be in such condition as that it was more liable to take fire than if it had a secure and safe roof. *Philadelphia and Reading R. R. Co. v. Henderson*, 80 Pa. St., 182. 1875.

57. — If a person place cord-wood upon the right of way of a railroad, under contract, express or implied, with the company so to do, he does not thereby contribute to an injury caused by the destruction of the wood by fire communicated from a passing engine. *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Nelson*, 51 Ind., 150. 1875.

58. Contributory negligence; failure to plow around stacks. The fact that plaintiff had not plowed around stacks, so as to prevent fire from reaching them, is not negligence *per se*. Whether it amounted to negligence was a question of fact to be determined by the circumstances of the case. *Karsen v. Milwaukee and St. Paul R'y Co.*, 29 Minn., 12, 1881; 7 Amer. & Eng. R. R. Cases, 501; *Burlington and Mo. River R. R. Co. v. Westover*, 4 Neb., 268, 1876; *Lindsay v. Winona and St. Peter R. R. Co.*, 29 Minn., 411, 1882; *Kansas City, Fort Scott and Gulf R. R. Co. v. Owen*, 25 Kans., 419,

1881; *Kansas Pacific R'y Co. v. Brady*, 17 Kans., 380, 1877.

59. — Persons who live near railroads are bound to take notice of the increased danger to their property from fire, and to exercise a proportionate amount of care to protect it. *Kansas City, Fort Scott and Gulf R. R. Co. v. Owen*, 25 Kans., 419. 1881.

60. — Persons occupying farms along a line of railway are entitled to cultivate them in the usual manner, and may recover damages for fires caused by the negligence of the railway company, although they have not plowed up the dry grass or taken other unusual means to guard against negligence. *Snyder v. P., C. and St. L. R'y Co.*, 11 W. Va., 14, 1877; 18 Amer. R'y Rep., 154.

61. — In an action against a railway company to recover the value of certain stacks of oats, destroyed by fire set out by its engine, evidence of the custom of the neighborhood, not to plow around the stacks, is not competent for the purpose of showing a want of contributory negligence. Whether it is necessary for the plaintiff in such cases to show that he did not, by a failure to exercise ordinary care, contribute to the injury, *query?* *Ormond v. Central Iowa R'y Co.*, 53 Ia., 742. 1882.

62. — A party cannot be chargeable with negligence for not doing that which, if done, would afford him no protection; and evidence tending to show that plaintiff's failure to plow around his hay-stacks did not contribute to the loss was properly admitted. *Lewis v. Chicago, Milwaukee and St. Paul R. Co.*, 57 Ia., 127. 1881.

63. — The presence of combustible material on plaintiff's land adjoining the track did not constitute negligence on his part. *Erd v. Chicago and Northwestern R'y Co.*, 41 Wis., 65. 1876.

64. — The fact that a farmer permits dry grass and other combustible matter to remain on his land does not constitute contributory negligence on his part so as to prevent him from recovering against a railway company for the destruction of property there situate, caused by fire escaping from a passing train and driven by a high wind through similar combustible matter on the company's right of way and on an intervening farm. *Palmer v. Missouri Pacific R'y Co.*, 76 Mo., 217, 1882;

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Pittsburgh, Cincinnati and St. Louis R'y Co. v. Hixon, 79 Ind., 111, 1881; 8 Amer. & Eng. R. R. Cases, 717.

65. Contributory negligence; failure to put out fire. Though a burning railway car which is run off on a switch to save the train and main track is negligently stopped so near another's property as to ignite and consume it, the company is not liable for the injury, if the owner of the property, or his agents or employes, having charge of it, are present and can save it, but refuse to do so; or if they arrive after the property is on fire they must save what they can, or that omitted to be saved will go in mitigation of the damages; but agents or employes of the owner in other business not connected with the property are under no legal obligation to protect it, and their omission to do so is not contributory negligence on the part of the owner. *St. Louis, Iron Mountain and Southern R'y Co. v. Hecht*, 38 Ark., 357, 1882; 9 Amer. & Eng. R. R. Cases, 222.

66. — The fire having originated thirty or forty rods from plaintiff's land, and the only evidence bearing on his negligence being that he saw smoke rising from defendant's track on two or three days — the last time being eight days before his property was burned, — and took no measures to have the fire extinguished, *held*, that this would not have sustained a finding of contributory negligence. *McNarra v. Chicago and Northwestern R'y Co.*, 41 Wis., 69. 1876.

67. — Where fire is communicated to a building situate near a railway, through the negligence of a railway company, the owner cannot recover for the loss of such property as he could easily and without danger have saved from destruction. *Chicago and Alton R. R. Co. v. Pennell*, 94 Ill., 448. 1880.

68. — The plaintiff was held not bound to use extraordinary means to extinguish or prevent the spread of the fire set out by neglect of defendant. *Bevier v. Delaware and Hudson Canal Co.*, 13 Hun (N. Y.), 254. 1878.

69. Contributory negligence; open window. In an action against a railway company, by the owner of land lying contiguous to the defendant's track, to recover damages for the burning of a house situated on such

land and of personal property contained therein, belonging to him, alleged to have been caused by sparks escaping from the locomotive used by the defendant, which was not provided with a sufficient spark-arrester, the jury, with their general verdict for the plaintiff, found specially that the plaintiff's house was set on fire by sparks emitted from the smoke-stack of an engine which was provided with an improper, defective and unsafe spark-arrester; that if the engine had had a proper spark-arrester the burning could not have occurred; that the sparks entered an unoccupied upper room of the house, through a window fronting on the track, left open by the plaintiff; and that, though the opening of the window contributed to the burning, yet, as the plaintiff did not know of the use or presence of the defective engine, he was not guilty of negligence in having the window open. *Held*, that the defendant was not entitled to judgment on the special verdict. *Louisville, New Albany and Chicago R'y Co. v. Richardson*, 66 Ind., 43. 1879.

70. Contributory negligence; presumption of law. In an action founded upon the alleged negligence of the defendant, *held*, that in the absence of evidence tending to show either that the plaintiff was or was not negligent, the court should direct, and the jury should find, that the plaintiff was not negligent. *Central Branch Union Pacific R. R. Co. v. Hotham*, 22 Kans., 41. 1879.

71. Erection of building. Where a party erects his building at a reasonably safe distance from the railroad track, he cannot be held guilty of negligence because his building is so situated as to be liable to be set on fire by another, subsequently erected in a dangerous proximity to the track. *Toledo, Wabash and Western R'y Co. v. Maxfield*, 72 Ill., 95. 1874.

72. — Where a railway is constructed at such a distance from a building that the latter is not likely to be set on fire by sparks from engines properly constructed, and used upon the road, it is not negligence in the owner not to remove the building. *Caswell v. Chicago and Northwestern R'y Co.*, 42 Wis., 193, 1877; 16 Amer. R'y Rep., 162.

73. — on right of way. The erection of

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buildings by the permission of a railroad company within the line of its roadway by other parties, for convenience in delivering and receiving freight, is not inconsistent with the purposes for which the charter was granted; and a license by the company to such other parties is admissible to show its consent to the occupation of its premises. *Grand Trunk R. R. Co. v. Richardson*, 91 U. S., 454. 1875.

74. — Where the statute of a state provides that "when an injury is done to a building or other property by fires communicated by a locomotive-engine of any railroad corporation, the said corporation shall be responsible in damages for such injury," and have an insurable interest in such property "along its route," *held*, that the phrase "along its route" means in proximity to the rails upon which the locomotive-engines run; and that the corporation is liable for such an injury to buildings or other property along its route, whether they are outside of the lines of its roadway or lawfully within those lines. *Id.*

75. **Inflammable material on adjoining land.** A wood adjoining the defendant's railway was burnt by sparks from the locomotives. On several previous occasions it had been set on fire and the company had paid for the damage. Evidence was given that the defendant had done everything that was practicable to the locomotives to make them safe, but it was admitted that with these precautions the locomotives had been the means of occasionally setting fire to the wood. The banks of the railway were covered with inflammable grass. The jury found the company guilty of negligence. *Held*, assuming the fire to have been caused by lighted coals from the locomotives falling in the plaintiff's wood, the defendant was liable. That it was no defense that the plaintiff had allowed his wood to become peculiarly liable to take fire by neglecting to clear away the dry grass and dead sticks. *Vaughan v. Taff Vale Ry Co.*, 3 Hurlstone & Norman (Exchequer), 742, 1858.

76. **Orchard; contributory negligence.** The question of contributory negligence by mulching orchard trees with manure, and wrapping them with dry straw, is for the jury. *Missouri Pacific Ry Co. v. Cornell*,

11 Amer. & Eng. R. R. Cases (Kans.), 56, 1888.

77. **Risk assumed by owner.** A party who erects a building on or near a railway track knows the dangers incident to the use of steam as a motive power, and must be held to assume some of the hazards connected with its use on such thoroughfares. While the party has the right to erect a building near the track, and in an exposed position, yet if he does so, he is bound to a higher degree of care in providing proper means to protect his property from fire than a person in a less exposed position, and is also required to use all reasonable means to save his property in case a fire should occur. *Chicago and Alton R. R. Co. v. Pennell*, 94 Ill., 448. 1880.

78. **Special findings required.** Where the action is founded upon the alleged negligence of the defendant, and some of the evidence introduced on the trial tends to show that the plaintiff was guilty of contributory negligence, and the defendant, in accordance with s. 286 of the Code (Laws of 1874, pp. 140, 141), requests the court to direct the jury to find upon the particular question of fact whether or not the plaintiff was guilty of contributory negligence, and the court refuses, *held*, error. *Central Branch Union Pacific R. R. Co. v. Holtham*, 22 Kans., 41, 1879; *Same v. Same*, *ib.*, 54, 1879.

79. **Warehouse.** Warehousemen who have authorized the use of a locomotive on their premises, and have known of its use and acquiesced in it, have no right of action for damage done to their property by fire set by sparks from such engine. *Spear v. Marquette, Houghton and Ontonagon R. R. Co.*, 49 Mich., 248, 1882; 8 Amer. & Eng. R. R. Cases, 722; *Marquette, Houghton and Ontonagon R. R. Co. v. Spear*, 7 Amer. & Eng. R. R. Cases (Mich.), 486, 1880.

80. — The owners of a warehouse owned a railway track running on their own premises near it, and employed a railway company to send an engine to draw cars over it for their accommodation. The engine threw off sparks badly, and this they observed and complained of, but nevertheless continued to make use of it for a long time. At last the warehouse was burned by sparks emitted

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by the engine. *Held*, that the owner had no redress against the company for the burning. *Marquette, Houghton and Ontonagon R. R. Co. v. Spear*, 44 Mich., 169, 1880; 21 Amer. R'y Rep., 242.

81. — It is immaterial that the company, on repeated applications made that it should repair the engine, had promised to do so "sometime," as the use continued thereafter with the knowledge of the plaintiffs, and on their own application. *Id.*

III. STATUTORY LIABILITY.

82. **Contributory negligence.** A statute made the proprietors of every railway liable "for all damages which shall accrue to any person or property by fire or steam from any locomotive or other engine on such road," and gave them an insurable interest in property exposed along the line. In an action against a railway company under this statute, *held*, that the liability thereby imposed is that of insurers, and that the doctrine of contributory negligence by the plaintiff does not apply. *Rowell v. Railroad Co.*, 57 N. H., 132. 1876.

83. **Illinois.** Where fire is communicated from an engine of a railway company and thereby destroys the property of another, the presumption of negligence on the part of those having the care and management of the engine, created by statute, will not be sufficiently rebutted by proof that the engine was, at the time of the injury, provided with the best mechanical contrivances to prevent the escape of sparks, and that such contrivances were in good order. It should be further shown that the engine was properly managed under the circumstances surrounding the case. *Chicago and Alton R. R. Co. v. Clampit*, 63 Ill., 95, 1872; 7 Amer. R'y Rep., 133.

84. — The communication of fire by any locomotive while passing over any railroad affords full *prima facie* evidence to charge the corporation or persons in the use of such road with negligence under the statute. Proof of the communication of fire makes a case entitling the plaintiff to recover against any company using or occupying the road. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Campbell*, 86 Ill., 443. 1877.

85. — The statute having made the fact of the communication of fire by an engine *prima facie* evidence of negligence, it is not sufficient to overcome this presumption to show that the engine was equipped with the proper appliances to prevent the escape of fire, and that the same was in good order, but it is also necessary to show that the engine was properly handled by a skilful engine-driver. *St. Louis, Vandalia and Terre Haute R. R. Co. v. Funk*, 85 Ill., 460. 1877.

86. — **leased line.** Under the statute a railway company in the use of a railroad as lessee, or otherwise, is guilty of negligence if it fails to keep its right of way clear from all dead grass, weeds, etc., and for such neglect is made liable for injuries to others from the escape and transmission of fire from the engines. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Campbell*, 86 Ill., 443. 1877.

87. **Iowa.** Section 1289 of the Code, providing that railway companies "shall be liable for all damages by fire that is set out or caused by the operation" of their roads, does not create an absolute liability, but makes the fact of an injury so occurring only *prima facie* evidence of negligence, which may be rebutted by proof of freedom from negligence. *Small v. Chicago, Rock Island and Pacific R. R. Co.*, 50 Ia., 338, 1879; *Libby v. Same*, 52 ib., 92, 1879; *Slosson v. Burlington, Cedar Rapids and Northern R'y Co.*, 51 Ia., 294, 1879.

88. — **constitutional law.** Section 1289 of the Code, rendering railway companies liable for all damages by fire, occasioned by the operation of their roads, is not unconstitutional. *Rodemacher v. Milwaukee and St. Paul R'y Co.*, 41 Ia., 297. 1875.

89. **Kansas.** Section 2 of chapter 118, Gen. Stat., 1122, does not authorize a recovery against a railroad corporation for a prairie fire caused by a locomotive running on the track of the company, where there is no want of care and skill in the construction of the locomotive, or in operating it. *Mo., Kans. and Tex. R'y Co. v. Davidson*, 14 Kans., 349. 1875.

90. **Maryland.** Under art. 77 of the Code, in an action against a railroad company for injury done to property of the plaintiff by fire occasioned by the engines of the defendant, it is not incumbent on the plaintiff to

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prove that the fire was caused by the defendant's negligence, but the *onus* is cast on the defendant to show affirmatively that it had used reasonable care to prevent the causing of injury by fire from its engines. *Annapolis and Elk Ridge R. R. Co. v. Gantt*, 39 Md., 115, 1873; 11 Amer. R'y Rep., 210.

91. Minnesota. It being shown, in an action for the recovery of damages upon the ground of negligence, that fire was communicated from an engine of the defendant to combustible matter upon its right of way, and thence to plaintiff's property adjacent thereto, the statute raises a presumption of negligence on the part of the defendant, and the burden was upon it of proving the absence of negligence in respect to the condition and management of the engine. *Sibblrud v. Minneapolis and St. Louis R'y Co.*, 29 Minn., 58, 1882; 7 Amer. & Eng. R. R. Cases, 499.

92. Missouri. The proof of the setting out of the fire makes a *prima facie* case against a railway company. *Campbell v. St. Louis, Iron Mountain and Southern R. R. Co.*, 58 Mo., 498. 1874.

93. — In a suit for damages against a railroad company for the burning of a building of plaintiff, caused by the escape of sparks from defendant's locomotive, it appeared that the house was uncompleted and of frame, situated about one hundred feet from the track; that the carpenter had suffered shavings to accumulate about the house, and that the sparks were blown by a high wind from the locomotive into the dead grass adjoining the track, and from thence fire was communicated to the shavings and the building. *Held*, that the escape of the fire from the engine was the proximate cause of the damage, and proof of its escape established a *prima facie* case of negligence which would render the company liable. *Coates v. Missouri, Kansas and Texas R'y Co.*, 61 Mo., 38, 1875; 8 Amer. R'y Rep., 60.

94. New Jersey. Proof that a fire originated in a spark from an engine is *prima facie* evidence of negligence in those controlling the engine, by force of the statute of New Jersey. *Wiley v. West Jersey R. R. Co.*, 44 N. J. Law, 247. 1882.

95. Utah. The statute, C. L., § 503, provides that "any company operating a railway, etc., shall be liable for all damages which may be sustained through destruction of property caused by fire communicated from its engines." Under this statute, proof of such destruction makes out a *prima facie* case, and shifts the burden upon the defendant to show that the fire was not caused by its negligence. *Anderson v. Wasatch and Jordan Valley R. R. Co.*, 2 Utah, 518. 1877-1880.

IV. EVIDENCE.

96. Burden of proof. In an action against a railway company for burning a house by its engine, the burden is on the plaintiff to prove negligence, which is the absence of such care as is sufficient under the circumstances to avoid the danger and secure safety. *Pennsylvania Co. v. Watson*, 81½ Pa. St., 293, 1875; *Albert v. Northern Central R'y Co.*, 98 Pa. St., 316, 1881.

97. — In case against a railway company for so negligently managing and conducting an engine that certain premises of the plaintiff adjoining the line were destroyed by fire emitted from the engine, evidence is admissible for the purpose of showing that other engines belonging to the company, upon other occasions, in passing along the line, threw sparks or ignited matter to a sufficient distance to reach the building in question — without showing the precise circumstances under which this occurred. The fact of premises being fired by sparks emitted from a passing engine is *prima facie* evidence of negligence on the part of the company, rendering it incumbent on it to show that some precautions had been adopted by it reasonably calculated to prevent such accidents. *Piggot v. Eastern Counties R'y Co.*, 3 Manning, Granger & Scott, 229; 54 E. C. L., 229. 1848.

98. Circumstances. In an action against a railway company for injuries resulting from fire, the mere fact that the same was occasioned by sparks emitted from one of its engines does not establish a *prima facie* case of negligence against the company; but as, in the nature of the case, the plaintiff must labor under difficulties in making

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proof of negligence, it may be established by circumstances, bearing more or less directly on the case, which might not be satisfactory in other cases free from such difficulty and open to clearer proofs. *Garrett v. Chicago and Northwestern R'y Co.*, 36 Ia., 121. 1872.

99. — Negligence on the part of a railway company in permitting fire to escape from its engines may be shown wholly by circumstantial evidence, and it is not necessary in such a case that any direct proof of any particular act of negligence should be introduced. *Atchison, Topeka and Santa Fe R. R. Co. v. Bales*, 16 Kans., 252, 1876; *Philadelphia and Reading R. R. Co. v. Hendrickson*, 80 Pa. St., 182, 1876.

100. Compensation by right of way proceedings. The railway company, in an action for burning a building, cannot show by parol evidence that, when it acquired by condemnation its right of way over the land of the owner of a building, he claimed that it would be necessary to remove the building by reason of the road being located so near it, and the cost of such removal was included in the appraisal of his damages. *Caswell v. Chicago and Northwestern R'y Co.*, 43 Wis., 193, 1877; 16 Amer. R'y Rep., 162.

101. Condition of engine. While evidence of a single fire may not be sufficient to warrant a finding of negligence against a railway company, yet when it appears that at or about the same time several fires are caused by the same engine, and that only at or about that time were any fires caused by such engine, although used continuously for months, and also that an engine in good order and properly managed does not ordinarily cause fires, held, that a jury is justified in finding negligence, and this notwithstanding it is unable to point out specifically wherein the negligence consists. *Missouri Pacific R'y Co. v. Kincaid*, 29 Kans., 654, 1883; 11 Amer. & Eng. R. R. Cases, 83.

102. — It is competent to show the manner in which the defendant's engines emitted fire shortly after the fire in question. *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Noel*, 77 Ind., 110, 1881; 7 Amer. & Eng. R. R. Cases, 524.

103. — It is not necessary that the proof

should show from which engine the fire escaped. *Ib.*

104. — The evidence on the part of the plaintiff failed to identify with certainty the particular engine which emitted the sparks. Evidence was offered on the part of the company to show that all its engines were, on the day of the fire, provided with the most approved apparatus to prevent the escape of fire, and that the apparatus was in good condition, but the evidence was rejected on the ground that it ought to be limited to the particular engine which did the damage. Held, error. *Haley v. St. Louis, Kansas City and Northern R'y Co.*, 69 Mo., 614. 1879.

105. — Proof that a locomotive did, on October 12, 1871, cause two or more fires by the emission of sparks therefrom, and that other engines of the same company passed over the same road at the same place all that fall, prior to said day, under like conditions of wind, weather, etc., without causing any fires at or near that place, is some proof of negligence on the part of the company with regard to the particular engine which caused the fires,—either that it was not in good condition, or that it was not properly managed. *Atchison, Topeka and Santa Fe R. R. Co. v. Stanford*, 12 Kans., 354, 1874; 8 Amer. R'y Rep., 230.

106. — The charge of the court to the jury, that if the defendant changed the smoke-stack of the engine that caused the fire, after the fire occurred, because the smoke-stack was worn out or defective, or for greater safety, the jury might consider the fact in determining whether the engine was in proper condition or not, was not erroneous as a legal proposition, where there was sufficient evidence upon this subject to authorize such an instruction. *St. Joseph and Denver R. R. Co. v. Chase*, 11 Kans., 47. 1873.

107. — Where the evidence for the defendant, as to the construction and condition of its engines, was wholly uncontroverted, and was clear and decided to the point that they were properly constructed and equipped, and provided with all the most modern and approved appliances for preventing the escape of fire, it was error for the court to submit to the jury the question of the defective condition of such engines. *Spaulding v.*

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Chicago and Northwestern R'y Co., 33 Wis., 582. 1873.

108. Declarations of employees. A railway company directed its servants to set fire to the dry grass and weeds which had accumulated on its right of way. In the carrying out of such orders the fire spread to the premises of an adjacent owner and destroyed his property, and it was held, in a suit to recover for the damage occasioned, that any statements made by the company's servants while engaged in the performance of the act, concerning the same, were admissible in evidence against the company, as a part of the *res gestæ*. *Ohio and Mississippi R'y Co. v. Porter*, 92 Ill., 437. 1879.

109. Employee. A complaint alleged that the defendant, by its servants, etc., negligently set fire to and destroyed the plaintiff's raspberry patch. It was proved that the fire was started by means of a burning brand, thrown from a passing locomotive upon the defendant's own land, where it set fire to the grass, and the fire spread to the raspberry patch, which it adjoined. It was not shown that the person who threw off the brand was in the employ of the defendant; but it was proved that he was upon the engine, and apparently engaged at work there, with his coat off. *Held*, that this fairly raised a presumption that such person was in the employ of the defendant, and was rightfully engaged at work upon the engine, in absence of all explanation. *McCoun v. N. Y. Central and Hudson River R. Co.*, 66 Barbour (N. Y.), 338. 1873.

110. Error without prejudice. A witness for the plaintiff was improperly allowed to testify that the defendant had paid him for certain property belonging to him, which was stored in and destroyed with plaintiff's building; but on his cross-examination he said that the company did not pay him for his property, but made him a present; that it denied all liability, claiming that it had not set the fire, but gave him the money as a present because he was a poor man. *Held*, that the company could not be prejudiced by the evidence, and the admission thereof is no ground of reversal on its appeal. *Caswell v. Chicago and Northwestern R'y Co.*, 42 Wis., 193, 1877; 16 Amer. R'y Rep., 162.

111. Examination of witness. An agent having testified positively and of his own knowledge that certain cotton (for the negligent burning of which the action was brought) belonged to the plaintiffs jointly, said upon his cross-examination, "my books show how the cotton was owned." *Held*, that objection to the statement of witness, in the absence of his books, as to the ownership of the cotton, was properly overruled. *Wilson v. Atlanta and Charlotte R'y Co.*, 16 So. Car., 587. 1881.

112. Inference. The fact that after the passage of a train dry grass and other combustible materials were discovered on fire along the line of a railway is not, of itself, evidence of negligence on the part of the railway company. *Reading and Columbia R. R. Co. v. Latshaw*, 93 Pa. St., 449, 1890; 2 Amer. & Eng. R. R. Cases, 267; *Karsen v. Milwaukee and St. Paul R'y Co.*, 29 Minn., 12, 1891; 7 Amer. & Eng. R. R. Cases, 501.

113. — Evidence showing that a fire might have been caused by a spark from an engine, and tending to disprove the presence of any other cause, will warrant a conclusion that a spark did escape. *Wiley v. West Jersey R. R. Co.*, 44 N. J. Law, 247. 1892.

114. — In such an action the jury are not at liberty to infer negligence on the part of the defendant, from the absence, at the time of the fire, of the hands employed for the purpose of repairs on the section of the road where the fire occurred, and the failure by the company to assist in extinguishing the fire. *Baltimore and Ohio R. R. Co. v. Shipley*, 39 Md., 251, 1873; 11 Amer. R'y Rep., 269.

115. — A fire broke out on the defendant's line about fifteen feet from the end of the ties, and to the leeward of the track, soon after the passing of a train, and spread to the adjacent premises of plaintiff. There was no direct evidence as to the cause of the fire, or the condition or management of the engine; but the plaintiff's witnesses testified that a high wind was blowing at the time of the fire; that coals were found at the spot where it originated, although no wood, but only grass, was growing there; and that other fires broke out along the line of the railroad immediately after the passing of the same train. *Held*, that there was evi-

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dence to go to the jury that the fire was kindled by coals from the engine, and that the engine was of defective construction, in imperfect condition, or negligently operated. *Woodson v. Milwaukee and St. Paul R'y Co.*, 21 Minn., 60, 1874; 19 Amer. R'y Rep., 293.

116. Neglect in use of stoves. Plaintiff's evidence tended to show that defendant erected a small house for a switchman nearly opposite the center of the plaintiff's ice-house, which latter was a long, wooden building near to defendant's road; a wood stove was placed in the switch-house, the pipe from which went straight up through the roof, and was about fifteen feet distant from the ice-house; sparks of considerable size were emitted from the pipe before and after the fire. On the day of the fire a strong wind was blowing from the direction of the switch-house towards the ice-house; the latter took fire just opposite the switch-house; and while the fire was in progress, sparks were seen flying from the stove-pipe to the burning building at the spot where the fire first caught; this was the first windy day after the erection of the switch-house. On the part of defendant evidence was given to the effect that engines burning wood were constantly passing on its track about eighteen feet distant from the ice-house, but they had so passed for five years without doing injury. *Held*, that the evidence was sufficient to authorize a finding that the fire took from sparks from the switch-house, and that defendant was negligent in the use of the stove. *Briggs v. New York Central and Hudson River R. R. Co.*, 72 N. Y., 26, 1878.

117. Negligence; question for jury. The plaintiff's rick of beans was erected about eleven yards from the rails of the defendant's road; the engines were such as are usually employed on railways, and when they set fire to the rick were used in the ordinary manner and for the purposes authorized by statute. *Held*, that it was for the jury to say on these facts whether defendant was guilty of negligence. A non-suit should not be granted. *Aldridge v. Great Western R'y Co.*, 2 Eng. R. R. & Canal Cases, 852, 1841; *Same v. Same*, 3 Manning & Granger, 514; 42 E. C. L., 272, 1841.

118. Management of engine. To disprove the *prima facie* case of negligence made by the plaintiff, it was not enough for the defendant to show that the engine was of approved construction and in good condition, and was operated by a skilful engineer and fireman in the customary manner, without showing that the "customary" manner was also a careful manner. *Woodson v. Milwaukee and St. Paul R'y Co.*, 21 Minn., 60, 1874; 19 Amer. R'y Rep., 293.

119. — Evidence to show the employment of more men by the defendant after the fire than before — the necessity of having some men walk the track being conceded — is properly allowed to go to the jury upon the question whether too few or incompetent men had not been previously employed. In such a case proof of dropping coals and scattering sparks is not confined to the occasion when the injury was done, nor to defects in a single engine of the company. *Westfall v. Erie R'y Co.*, 5 Hun (N. Y.), 75, 1875.

120. — Where the question, in what part of a building a fire commenced, is material, it is error to permit a witness, who had not seen its commencement, to state "in what part of the building, judging from its appearance when he first saw it, and from all the circumstances, the fire originated." *Wood v. Chicago, Milwaukee and St. Paul R'y Co.*, 40 Wis., 582, 1876.

121. — Evidence of the emission of sparks from the engine, at other times than the time of the injury in question, is competent. *Crist v. Erie R'y Co.*, 58 N. Y., 638, 1874; *Home Ins. Co. v. Pennsylvania R. R. Co.*, 11 Hun (N. Y.), 182, 1877; *Nashville and Chattanooga R. R. Co. v. Tyne*, 7 Amer. & Eng. R. R. Cases (Tenn.), 515, 1882; *Philadelphia and Reading R. R. Co. v. Schultz*, 93 Pa. St., 341, 1880; 2 Amer. & Eng. R. R. Cases, 271; *Henry v. Southern Pacific R. R. Co.*, 50 Cal., 176, 1875; 12 Amer. R'y Rep., 168.

122. — Where a person sues a railroad company for negligently permitting sparks to escape from its engines and thereby setting fire to the plaintiff's property, and where it is claimed in the action that the defendant's engines are not in proper condition to prevent the escape of sparks, it is not error for the court to permit the plaintiff to introduce evidence on the trial tending to show that

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other fires were caused by sparks escaping from the defendant's engines immediately before or immediately after the time that this particular fire occurred. Such evidence would clearly tend to prove that defendant's engines were not in proper condition for arresting sparks,—either that they were not properly constructed or that they were out of repair. *St. Joseph and Denver R. R. Co., v. Chase*, 11 Kans., 47, 1873; *Annapolis and Elk Ridge R. R. Co. v. Gantt*, 39 Md., 115, 1873; 11 Amer. R'y Rep., 210; *Longabaugh v. Virginia City and Truckee R. R. Co.*, 9 Nev., 271, 1874.

123. — In an action for loss by fire, evidence was offered by the plaintiff to show that, at various times during the same summer before the fire in question occurred, the defendant's locomotives scattered fire when going past the buildings, without showing that either of those which he claimed communicated the fire in question was among the number, or was similar to them in its make, state of repair, or management. *Held*, that the evidence was admissible, as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and to show a negligent habit of the officers and agents of the corporation. *Grand Trunk R. R. Co. v. Richardson*, 91 U. S., 454. 1875.

124. — In an action against a railroad company for negligently setting fire to cordwood by coals dropped or sparks emitted from a locomotive, a witness was allowed to testify that a few weeks after the fire complained of another fire was caused on the same road by coals dropped from another engine of the same company. *Held*, competent evidence. *Longabaugh v. Virginia City and Truckee R. R. Co.*, 9 Nev., 271. 1874.

125. — At the trial of an action against a railway company for the destruction of the plaintiff's property by fire, the defendant introduced evidence that the engine was furnished with the ordinary appliances of a cone and netting for arresting sparks, which netting was examined on the following day and found to be whole and in good condition; and that the engine was in the same condition as on the previous day. *Held*, that it was competent for the plaintiff to show in

rebuttal that the engine on the day of the examination emitted sparks which set fire to property in the same neighborhood. *Loring v. Worcester and Nashua R. R. Co.*, 181 Mass., 469; 6 Amer. & Eng. R. R. Cases, 611. 1881.

126. — Testimony offered to prove the insufficiency of the engine or the negligence of the engineer by showing that fire had escaped from other locomotives of a similar pattern should be rejected as collateral and incompetent. *Coale v. Hannibal and St. Joseph R. R. Co.*, 60 Mo., 297, 1875; 9 Amer. R'y Rep., 210; *Lester v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 60 Mo., 265. 1875.

127. — When it appeared that plaintiff's loss, if indeed it was caused at all by the defendant's negligence, was attributable entirely to the escape of sparks at a particular time from one of two particular engines, evidence was held inadmissible on the part of the plaintiff, in order to prove defendant's negligence, to the effect that sparks of unusual size had been emitted for some time prior to the fire by defendant's engines generally. *Albert v. Northern Central R'y Co.*, 98 Pa. St., 316. 1881.

128. — In an action against a railway company for burning the plaintiff's property by sparks from its locomotive, evidence that fires on the line of the road have originated from such sparks, before the occurrence of the one in question, is admissible to enable the jury to judge whether the defendant, in view of the previous occurrence of such fires, exercised reasonable care at the time this one happened; but evidence of fires occurring from this cause subsequently to the one in question is inadmissible, unless the possibility of communicating fire by sparks from a locomotive is disputed by the defendant, in which case it is admissible solely for the purpose of proving such a possibility. *Smith v. Old Colony and Newport R. R. Co.*, 10 R. I., 22, 1871; 6 Amer. R'y Rep., 144.

129. — In an action against a railway company for burning a barn by sparks from its engine, there was evidence that the fire commenced at or near the track, and that engines had passed shortly before the barn was fired, raising the presumption that it was fired by sparks from an engine, the par-

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ticular one not being known. *Held*, that evidence by a witness living nineteen miles from the barn, that it was a common occurrence for engines about where he lived to set fire for rods from the track, was admissible. *Pennsylvania R. R. Co. v. Stranahan*, 79 Pa. St., 405. 1875.

130. Sufficiency of evidence. Witnesses who were a quarter of a mile away from a railroad track at the time a train passed, about fifteen minutes afterward observed fire, and, going to the place, found it was burning on the right of way, and also in the plaintiff's field, about fifteen yards west of the right of way. The wind was blowing from the east and the right of way was covered with very dry grass and weeds. There was no fire on the east side of the track and none had been observed before the passage of the train. *Held*, that this was evidence enough to submit to the jury on the question whether the fire escaped from the locomotive that drew the train. *Redmond v. Chicago, Rock Island and Pacific R'y Co.*, 76 Mo., 530. 1882.

131. — In an action to recover damages for property destroyed by fire, it appeared that the engine in passing over a distance of a few miles with an ordinary load, set the adjacent grass and stubble on fire several times; that though this engine had been backward and forward over the same road during all of that fall, and though other engines were passing and repassing, some upon the same day, yet no fires had been communicated other than these upon this day from this engine; that engines in good order, and carefully managed, seldom communicated fire to the adjacent grass and stubble; and where it appeared that something was seen to be thrown out of the smoke stack, and fall into the neighboring stubble, and almost immediately the stubble was in a blaze, and thereafter a piece of coal was found surrounded by ashes in the stubble, and apparently the remnant of a piece of coal six inches in diameter, which had been there burning; and where the conductor of the train, at the first station after passing these fires, telegraphed to the assistant superintendent of the road "that the engine was setting the country on fire," and where it appeared from the testimony of experts that where an en-

gine starts a succession of fires, and others operated along the same road under similar circumstances of wind and weather do not start any, the difference can be reasonably accounted for only upon the supposition of defects in the construction, condition or management of the engine doing the damage, *held*, that a verdict finding negligence would be sustained, although several competent witnesses who examined the engine at and shortly after the fire testified that it was in perfect order and supplied with the best appliances for preventing the escape of fire, and that the engineer was competent and careful, and that he testified that he used all possible care and precautions to prevent the escape of sparks and fire upon that day, and although there was no direct testimony contradicting these witnesses, and that it was impossible for any one from the testimony to point out in what respect, if at all, the engine was defective, or out of order, or the engineer guilty of negligence. *Atchison, Topeka and Santa Fe R. R. Co. v. Campbell*, 16 Kans., 200. 1876. See, also, *Kenney v. Hannibal and St. Joseph R. R. Co.*, 70 Mo., 243. 1879.

132. — Evidence preponderating in favor of the defendant, a new trial is awarded it in an action for negligence in setting fire to cotton stored near a railway. *Wood v. Atlanta and Charlotte R'y Co.*, 19 So. Car., 579. 1883.

133. — Evidence of ownership of hay and rails, destroyed by fire, *held* sufficient. *St. Louis and Southeastern R'y Co. v. Wheelis*, 72 Ill., 538. 1874.

134. — Where the issue was, whether the fire which destroyed plaintiff's barn was caused by negligence of the defendant in running its engine, defendant showed that the engine was a perfect one in all respects and was provided with all suitable appliances for preventing the escape of fire; and the persons in charge of the engine at the time testified that it was run in a careful manner, and that the spark-arrester on the smoke-pipe, and in the fire-box, were both closed, so that no dangerous coals or sparks could escape therefrom. The testimony for plaintiff was not only that the barn was found on fire shortly after the engine passed, but that, at the time of such passage, the engine was emitting sparks in great numbers and coals

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an inch or more in length; that some of these struck the barn, and some went under it; that coals of a similar size were seen immediately after on the track and on the snow beside the track, in the immediate vicinity of the barn; and that several stumps, a short distance from the barn and near the track, were also found to be on fire a short time after. Officers of the company also testified that, if the engine had been properly run and cared for, no coals of the size described could have escaped. *Held*, that the court did not err in refusing a non-suit. *Brusberg v. Milwaukee, Lake Shore and Western R'y Co.*, 55 Wis., 106; 7 Amer. & Eng. R. R. Cases, 505. 1882.

135. — The plaintiff is not required to prove which one of the defendant's engines set the fire complained of. *Bevier v. Delaware and Hudson Canal Co.*, 13 Hun (N. Y.), 254. 1878.

136. Title of land owner. For damages done to *the land itself*, as well as those affecting crops, fences, etc., by fire caused by negligence, the person who was in the actual possession and occupancy of the land may recover without proof of paper title, unless the defendant show an outstanding adverse title to the land higher than a mere possessory one. *McNarra v. Chicago and Northwestern Railway Co.*, 41 Wis., 69. 1876.

137. — In an action to recover for an injury to the freehold, plaintiff must show such title as entitles him to damages, not to the possession merely, but to the freehold. *Miller v. Long Island R. R. Co.*, 71 N. Y., 380, 1877; reversing *Same v. Same*, 9 Hun (N. Y.), 194, 1876.

138. — Where a person brings a suit to recover damages for a loss by fire of premises which he alleges to have belonged to him, the defendant may, in order to contradict the allegations of ownership, put in evidence the record of a judgment recovered by another party against an insurance company for the loss. This is some evidence, though not strong or important, that the plaintiff was not the owner. *Albert v. Northern Central R'y Co.*, 98 Pa. St., 316. 1881.

139. Verdict. Verdict held to be supported by the evidence. *Chicago and Northwestern R'y Co. v. Garfield*, 11 Bradwell (Ill.),

87, 1882; *Erd v. Chicago and Northwestern R'y Co.*, 41 Wis., 65, 1876.

140. Wood-yard; former fires. In an action against a railway company for negligence in setting fire to cord-wood, *held*, that the fact of a fire having occurred in the wood-yard previous to the building of the railway was entirely irrelevant. *Longabaugh v. Virginia City and Truckee R. R. Co.*, 9 Nev., 271. 1874.

V. DAMAGES.

141. Access to water cut off; damages; too remote. The street lay between plaintiff's property and the river and contiguous to the latter; the defendant filled up a portion of the river with deposits of earth, increasing the distance of plaintiff's property therefrom, and occupied it with tracks and buildings; a house belonging to plaintiff accidentally taking fire, the fire department were unable to obtain access to the river by reason of the use of the street and embankment by the railway company. Plaintiff having sued the latter for damages for the destruction of his building, *held*, that the damages were too remote and the company not liable. *Bosch v. Burlington and Mo. River R. R. Co.*, 44 Ia., 402. 1876.

142. Damage to land; special finding. It being alleged in the complaint that a part of plaintiff's land was burned over so as to injure the soil, and the bill of particulars specifying the land so burned as "*about nine and a half acres*," and the jury having found that the injury to the land was \$25 per acre, without finding expressly the number of acres thus injured, it cannot be presumed that plaintiff proved injury of that character to more than *nine and a half acres* of his land; and damages for that injury beyond \$237.50 must be treated as excessive. *McHugh v. Chicago and Northwestern R'y Co.*, 41 Wis., 75. 1876.

143. Hay; title of trespasser. A trespasser who cuts grass growing on land is not, as to the owner of the land, the owner of the hay made from the grass, and cannot recover for its destruction by the negligence of such owner. *Murphy v. Sioux City and Pacific R. R. Co.*, 55 Ia., 473, 1881; *Lindsay*

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v. Winona and St. Peter R. R. Co., 29 Minn., 411, 1893; 7 Amer. & Eng. R. R. Cases, 488.

144. — But a trespasser who sows and gathers crops is, after they are gathered, the owner of them, even as against the owner of the land. *Ib.*

145. Interest. A verdict being for a gross sum as damages, it cannot be set aside as erroneous, even if the amount found was reached in part by an allowance of interest. *Wilson v. Atlanta and Charlotte R'y Co.*, 16 So. Car., 587. 1881.

146. — Interest is not recoverable in an action for the loss of property burned through negligence. *De Steiger v. Hannibal and St. Joseph R. R. Co.*, 73 Mo., 33, 1880; 7 Amer. & Eng. R. R. Cases, 492; *Atkinson v. Atlantic and Pacific R. R. Co.*, 63 Mo., 367, 1876; 20 Amer. R'y Rep., 442.

147. — In actions of tort the plaintiff is generally not entitled to interest on his damages, when he refused, before suit, to accept for damages a sum larger than he was entitled to, though no formal tender had been made. *Thompson v. Boston and Maine R. R. Co.*, 58 N. H., 524. 1879.

148. — Where the property of the plaintiff was destroyed by a fire caused by the negligence of a railway company, but where there were no circumstances of aggravation, the rule of damages was held to be the value of the property at the time it was destroyed, with interest upon it from that time. *Parrott v. Housatonic R. R. Co.*, 47 Conn., 575. 1880.

149. — The interest is not allowed as interest, but as a part of the damages. *Ib.*

150. Timber; title. In an action in the nature of an action on the case for the negligent use of a locomotive by the employes of the defendant, by reason of which the timber land of plaintiff was damaged by fire, the plaintiff alleged ownership of the timber land, which was denied by the defendant. Held, that proof that plaintiff had been in the possession of the premises for a number of years next before and at the time of the injury was sufficient evidence of title *prima facie*. *Burlington and Missouri River R. R. Co. v. Beebe*, 14 Neb., 463. 1883.

VI. LESSEES AND CONTRACTORS.

151. Contractors. A railway company is not responsible for fires set out by a subcontractor engaged in clearing land for railway purposes. The fact that the company's engineer, who had no control of the employes engaged on the work, directed the burning of brush on the track, would not render the company liable. *Gillson v. North Grey R'y Co.*, 33 Upper Canada, Queen's Bench, 128, 1872; *Same v. Same*, 35 ib., 475, 1874.

152. Lessees. The defendant corporation is bound, under R. S. of 1857, c. 51, § 38, to make compensation for damage done by a fire communicated from an engine used upon its road by the Grand Trunk R'y Co., to whom the defendant leased its railway. *Beun v. Atlantic and St. Lawrence R. R. Co.*, 63 Me., 293. 1873.

153. — Under the Gen. Sts., ch. 63, § 101, a railway company which has leased the line of another company and is running thereon is liable in damages for injuries to land upon the line from fire caused by its engine. *Davis v. Providence and Worcester R. R. Co.*, 121 Mass., 134. 1876.

154. — The lessee of a railroad, who by contract permits another company to use the road, is liable for the negligent acts of the latter company. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Campbell*, 86 Ill., 443. 1877.

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155. Contributory negligence. A complaint for destruction of property by the defendant's negligence, which does not show that there was no contributory negligence on the part of the plaintiff, is bad on demurrer. *Pennsylvania Co. v. Gallentine*, 77 Ind., 332, 1881; 7 Amer. & Eng. R. R. Cases, 517; *New Orleans, New Albany and Chicago R'y Co. v. Boland*, 53 Ind., 398, 1876.

156. Duty as to dry grass and weeds. An averment in a declaration that it was the duty of the defendant to keep its right of way free from dry grass and weeds, and to so construct and operate its locomotives as to prevent the escape of fire to the adjoining property, by being communicated

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from its locomotives to such dry grass and weeds, is substantially an averment that it was the duty of the company to provide its locomotives with the best appliances to prevent the escape of fire, and to so use them that it would not be liable to escape; and the performance of this duty is sufficiently negatived by an averment that the engine was so negligently used that fire did, by reason of such negligence, escape and produce the injury complained of. *Toledo, Wabash and Western R'y Co. v. Corn*, 71 Ill., 493. 1874.

157. — A complaint sufficiently charges an injury to have been caused by the negligence of a railway company, which alleges that the plaintiff placed cord-wood on the right of way under a contract of the company to purchase it; that the agents of the company unreasonably delayed measuring and accepting the wood; that the company negligently permitted an accumulation of grass, weeds and other combustible material along its track and right of way; that coals were negligently dropped, and sparks emitted, from the engine of the company, which set fire to the accumulation of grass, etc., and the fire was thereby communicated to the wood, and destroyed it. *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Nelson*, 51 Ind., 150. 1875.

158. — Where the complaint charges that the defendant, while running its engine adjoining the plaintiff's premises, negligently set fire to said premises from sparks and coals of fire from said engine, and burned certain rails, etc., it is competent for the plaintiff to show that the sides of the track at the point of the fire, had dry rubbish, logs and grass thereon. *Toledo, Wabash and Western R'y Co. v. Wand*, 48 Ind., 476. 1874.

159. — Under such complaint it is unnecessary for the plaintiff to show that his premises were first ignited; it is sufficient if combustible material on the railway was first ignited, the natural tendency of which was to convey the fire to the adjoining premises of the plaintiff. *Ib.*

160. Engine described. In an action against a railway company for burning a house, it was alleged that the fire was communicated by engine No. 458; held, that the

condition of that engine and its management were all that was to be considered. *Erie R'y Co. v. Decker*, 78 Pa. St., 293. 1875.

161. Joinder of parties. An action may be brought against several defendants for tortious setting out of fire. A recovery may be had against such of the defendants as the proof shows to be liable. *Indianapolis and St. Louis R. R. Co. v. Hackell et al.*, 72 Ill., 612. 1874.

162. Negligence. A complaint for injury to property, consisting of growing grain and stacks of hay and straw, caused by fire from an engine igniting dry grass, weeds, rubbish and other combustibles negligently suffered to gather on the company's right of way, and communicated to plaintiff's land "by the medium" of such combustibles, is insufficient without an allegation that the fire was permitted to escape upon the plaintiff's land by the fault and negligence of the company. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Hixon*, 70 Ind., 111, 1891; 8 Amer. & Eng. R. R. Cases, 717.

163. — A complaint is not good that fails to charge negligence in permitting the fire to escape. *Louisville, New Albany and Chicago R'y Co. v. Spenn*, 87 Ind., 322; 11 Amer. & Eng. R. R. Cases, 60, 1882; *Same v. Ehler*, 87 Ind., 339; 11 Amer. & Eng. R. R. Cases, 61, 1882.

164. — Where the pleading alleges that the fire was wholly the result of defendant's negligence, it is not necessary to allege the negligence of defendant in permitting the fire to escape from its right of way. *Louisville, New Albany and Chicago R'y Co. v. Hanmann*, 87 Ind., 422. 1882.

165. — A complaint against a railway company for setting fire to the plaintiff's fences, etc., averring that the defendant carelessly permitted dry grass to accumulate on its right of way, which was set on fire by sparks from its passing engine, that the fire escaped to the plaintiff's lands adjoining, and destroyed his fences and grass, and that the fire and injury were not caused by the fault or neglect of the plaintiff, but wholly by the neglect and carelessness of the defendant, sufficiently shows that the escape of the fire from the engine, and its communication to the plaintiff's property, were the result of the defendant's negligence. *Pitts-*

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burgh, Cincinnati and St. Louis R. R. Co. v. Jones, 86 Ind., 496, 1882; 11 Amer. & Eng. R. R. Cases, 76.

163. — In an action for damages resulting from fire set out by the defendant on his own premises, the plaintiff must aver negligence on the part of the defendant not merely in starting the fire, but in permitting it to communicate to the property of the plaintiff. *Pittsburgh, Cincinnati and St. Louis Ry Co. v. Culver*, 60 Ind., 469, 1878.

167. — A person may lawfully set a fire on his own premises, and is not liable for damages resulting therefrom to the property of a contiguous proprietor, unless he is guilty of negligently permitting the fire to escape. *Ib.*

168. Sufficiency. The pleadings in an action for damages by fire examined. *Snyder v. P., C. and St. L. Ry Co.*, 11 W. Va., 14, 1877; 18 Amer. Ry Rep., 154.

169. Variance. Where the petition charges a railway company with carelessly permitting fire to escape from its locomotive, proof that fire was thrown out would amount only to a variance, which, at most, would require an amendment of plaintiff's petition. (Wagn. Stat., 1033, § 1.) *Lester v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 60 Mo., 265, 1875; 9 Amer. Ry Rep., 219.

170. Verdict. In an action against a railway company for damages sustained by the burning of a rick of wood piled along its track, alleged to have been set on fire by the engine of a passing train, the complaint not having been demurred to, the following charge of negligence is sufficient after verdict: "The defendant's locomotive emitted sparks which communicated with said wood and destroyed it . . . through the carelessness of the defendant and its agents and employes, without the fault of the plaintiff." *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Noel*, 77 Ind., 110, 1881; 7 Amer. & Eng. R. R. Cases, 524.

VIII. REMOTE FIRES.

171. Company held liable. Where fire, which is negligently permitted to escape from an engine of a railway company, does not fall upon the plaintiff's property, but

falls upon the property of another, setting it on fire, and then spreads by means of dry grass, stubble and other combustible materials, and passes over the lands of several different persons before it reaches the property of the plaintiff, and finally reaching the property of the plaintiff at a great distance from where the fire was first kindled, sets it on fire and consumes it, *held*, that the negligence of the company in such a case is not too remote from the injury to the plaintiff's property to constitute the basis of a cause of action against the company. *Atchison, Topeka and Santa Fe R. R. Co. v. Bales*, 16 Kans., 252, 1876.

172. — If sparks escaping from an engine kindle a fire upon the company's right of way, and the fire extends to and destroys adjoining property, the loss is *prima facie* the result of the company's negligence. The liability incurred will not be avoided by showing that the spread of the fire was caused by the wind, or that there was no considerable accumulation of combustible material on the right of way. *Kenney v. Hannibal and St. Joseph R. R. Co.*, 70 Mo., 252, 1879.

173. — Workmen employed by the defendant, after cutting the grass and trimming the hedges bordering the railway, placed the trimmings in heaps between the hedge and the line, and allowed them to remain there fourteen days during very hot weather, which had continued for some weeks. A fire broke out between the hedge and the rails, and burnt some of the heaps of trimmings and the hedge, and spread to a stubble-field beyond, and was there carried by a high wind across the stubble-field and over a road, and burnt the plaintiff's cottage, which was situated about two hundred yards from the place where the fire broke out. There was evidence that an engine belonging to the defendant had passed the spot shortly before the fire was first seen, but no evidence that the engine had emitted any sparks, nor any further evidence that the fire had originated from the engine, nor was there any evidence that the fire began in the heaps of trimmings and not on the parched ground around them. *Held*, first, that it being a matter of common knowledge that engines do emit sparks, there was evidence

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for the jury that the fire originated in sparks from the engine that had just passed. Secondly, that there was evidence for the jury that the defendant was negligent in leaving the dry trimmings, and that the trimmings either originated or increased the fire, and caused it to spread to the stubble-field. Thirdly, that if defendant was negligent it was responsible for the injury that resulted from its conduct to the plaintiff, although it could not have reasonably anticipated that such injury would be caused by it. *Smith v. London and South Western R'y Co.*, Law Reports, 6 Common Pleas Cases, 14, 1870; *Smith v. London and South Western R'y Co.*, Law Reports, 5 Common Pleas Cases, 98, 1870.

174. — Where two fires are caused by sparks emitted from one of the defendant's engines, and neither of said fires is kindled on the land of the plaintiff, but each is kindled on the land of a different owner, and these two fires spread, finally uniting, and then pass over the property of several landed proprietors and finally reach the plaintiff's property, three and a half to four miles distant from where the fires were first kindled, and there do the damage of which the plaintiff complains, *held*, that the damage is not too remote to be recovered. *Atchison, Topeka and Santa Fe R. R. Co. v. Stanford*, 12 Kans., 354, 1874; 8 Amer. R'y Rep., 230.

175. — The statute of Vermont applies to an injury to buildings and property caused by fire spreading from other buildings to which it was first communicated by the locomotive. *Grand Trunk R. R. Co. v. Richardson*, 91 U. S., 454. 1875.

176. — Sparks escaping from a railroad locomotive set fire to the prairie adjoining the company's right of way at a place where the grass was very rank and dry. The wind being high, the fire extended some three miles before night, and continued to burn during the night, though slowly, the wind having fallen. The following morning the wind rose again and blew with great violence, carrying the fire some five miles further, in the course of a few hours, to the plaintiff's farm, where it swept over a fire line of sixteen feet of plowed ground, and destroyed plaintiff's property. Such violent winds were not infrequent in that country.

In an action of damages against the company, *held*, that, as a rise of the wind was a thing which a prudent man might reasonably have anticipated, it could not be regarded as the intervention of a new agency, so as to relieve the company of the consequences of its negligence in permitting the fire to escape; and as the fire was in fact one continuous conflagration, notwithstanding the lapse of time and the great distance over which it traveled before reaching plaintiff's property, a judgment in his favor was affirmed. *Poeppers v. Missouri, Kansas and Texas R'y Co.*, 67 Mo., 715, 1878; *Hightower v. Same*, ib., 726, 1878.

177. — Where the sparks from the defendant's engine set fire to certain stubs of grass, where the grass had been previously mown, and the fire thus kindled spread until it reached the plaintiff's property, thirty rods distant, and then consumed the property; and where the stubs of grass, the ground over which the fire spread, as well as the property consumed by the fire, and for which the plaintiff sued, all belonged to the plaintiff, the damage to the plaintiff caused by said fire was not too remote to constitute the basis of a cause of action. *St. Joseph and Denver R. R. Co. v. Chase*, 11 Kans., 47. 1873.

178. — If, by the negligence of a railroad company, a fire, communicated from the sparks of an engine, commences on the premises of one proprietor and spreads to those of another, and destroys his crop, the latter may recover damages for the injury, if the injury was the direct consequence of the original firing. *Henry v. Southern Pacific R. R. Co.*, 50 Cal., 176, 1875; 12 Amer. R'y Rep., 168.

179. — Where grass and herbage on the right of way of a railroad was set burning by fire from an engine, the fire spreading rapidly and burning continuously until it reached the farm of plaintiff, situated a half mile from the track, destroying straw, timber, etc., *held*, that the damage was not too remote to be recovered. *Burlington and Missouri River R. R. Co. v. Westover*, 4 Neb., 268. 1876.

180. Company held not liable. In an action for damages against a railroad company for the destruction of plaintiff's fence by

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fire, it appeared that the plaintiff's fence was three-fourths of a mile from the fence which was first ignited by sparks emitted from an engine of defendant, but was connected with it by a continuous line of fence joined together by intermediate land owners, and that the owner of the fence which originally caught on fire was guilty of contributory negligence. *Held*, that the negligence of plaintiff in connecting with such fence was *remote* and did not affect his right to maintain the action. *Doggett v. Richmond and Danville R. R. Co.*, 78 N. C., 305, 1878; 10 Amer. R'y Rep., 193.

181. — Where it appeared that a warehouse standing near the railroad track was set on fire from sparks escaping from an engine, and that, at the time, there was a strong wind blowing in the direction of the plaintiff's stable, which was situated one hundred and one rods from the warehouse, and that there was no combustible material intervening, but that the high wind carried brands from the burning warehouse to the stable of plaintiff, which caused it to take fire, *held*, that the burning of the stable was not the natural and proximate consequence of the burning of the warehouse, and that the railway company was not liable therefor. *Toledo, Wabash and Western R'y Co. v. Muthersbaugh*, 71 Ill., 572. 1874.

182. **Damages.** It will not be presumed that injuries by fire to fences and timber a mile from the railway were considered in estimating damages for right of way. *Rodemacher v. Milwaukee and St. Paul R'y Co.*, 41 Ia., 297. 1875.

183. **Neglect of person whose building first took fire.** In an action to recover the value of an elevator alleged to have been burned by fire communicated to it from the building of another which was set on fire by sparks from a locomotive on defendant's railroad, it was held that the contributory negligence of the owner of the building first burned would not constitute a defense. *Small v. Chicago, Rock Island and Pacific R. R. Co.*, 55 Ia., 582. 1881.

184. **Pleading.** When a declaration, in a suit against a railway company for damages caused by burning wheat stacks, alleges that the stacks were set on fire by sparks from a locomotive belonging to the

company, evidence that the stacks were destroyed by a fire which originated in another field, even though such fire was occasioned by sparks from the defendant's engine, will not sustain the averment in the declaration, and the plaintiff will not be entitled to recover. *Toledo, Wabash and Western R'y Co. v. Morgan*, 72 Ill., 155. 1874.

185. — The allegations of the complaint held sufficient to charge defendant with liability, although the distance between plaintiff's premises and defendant's right of way was not alleged. *Louisville, New Albany and Chicago R'y Co. v. Krinning*, 87 Ind., 351, 1882; *Same v. Hagen*, ib., 602, 1882.

186. **Question for the jury.** The facts in relation to the burning of a mill and lumber by fire communicated to an elevator and thence to the mill, considered. The question of negligence in such cases held to be for the jury to determine. *Kellogg v. Milwaukee and St. Paul R'y Co.*, 5 Dillon (U. S. C. C.), 537. 1874.

187. — In a case where the fire has not been communicated directly to the plaintiff's property by sparks or cinders from the defendant's engine, as where it has spread from its first beginning, and thus been communicated indirectly to the plaintiff's property, it is a question proper to be submitted to the jury to determine from all the facts of the case, whether the injury complained of is the natural consequence of the defendant's negligence, or whether it has been caused by "some intervening force of power, which stands naturally as the cause of the misfortune." *Annapolis and Elk Ridge R. R. Co. v. Gantt*, 39 Md., 115, 1873; 11 Amer. R'y Rep., 210. See, also, *Philadelphia, Wilmington and Baltimore R. R. Co. v. Constable*, 39 Md., 149. 1873.

188. — If a crop is destroyed by fire on the line of a railroad, and the fire originates from a spark emitted from the engine, which ignites the grass some distance from the crop, the question whether the destruction of the crop was the proximate result to be reasonably expected from the carelessness of the railway company is one of fact for the jury. *Perry v. Southern Pacific R. R. Co.*, 50 Cal., 578, 1875; 12 Amer. R'y Rep., 187.

189. — Sparks were thrown from an en-

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gine to a point on land adjoining the plaintiff's, about three hundred feet from a lumber pile belonging to the plaintiff. The sparks set fire to combustible materials, consisting of leaves, briars, brush, stumps and logs, burning the same in its pathway, until it reached the plaintiff's lumber. The weather was dry and a high wind was blowing in the direction of the property destroyed. The fire reached the lumber about two hours after it started, and could not be extinguished by any effort. In a suit for the loss, there was evidence on the part of defendant tending to another theory as to the origin and extent of the fire. *Held*, that it was properly left to the jury to determine whether the negligence of defendant was the proximate or remote cause of the injury. *Lehigh Valley R. R. Co. v. McKeen*, 90 Pa. St., 122. 1879.

190. — Sparks from defendant's engine set fire to a railway tie, from which rubbish left by the defendant on its road was fired, communicated with plaintiff's fence next to the road, and spread over two fields, burned another fence and standing timber six hundred feet distant from the road. *Held*, that the proximity of the cause was for the jury. *Pennsylvania R. R. Co. v. Hope*, 80 Pa. St., 373. 1876.

191. *Verdict*. The finding of the jury, that the burning of the plaintiff's mill and lumber was the unavoidable consequence of the burning of the defendant's elevator, which had been caused by defendant's negligence, is, in effect, a finding that there was no intervening and independent cause between the negligent conduct of the defendant and the injury to the plaintiff. *Milwaukee and St. Paul R'y Co. v. Kellogg*, 94 U. S., 469. 1876.

IX. GENERAL MATTERS.

192. *Assignment of claim*. A claim for damages by fire may be assigned. *Ridell v. New York Central and Hudson River R. R. Co.*, 73 N. Y., 618. 1878.

193. *Company not chartered to use steam-engines; common law liability*. A company was empowered by act of parliament, passed in 1832, to make and maintain, and to

do all matters fit or necessary for making and using, a railway, or tramroad for the passage of wagons, engines, and other carriages, for the purpose of carrying minerals, etc. The company having obtained the certificate of the board of trade, ran passenger trains drawn by locomotive steam-engines, having taken all reasonable precautions to prevent the emission of sparks. The plaintiff's haystack having been fired by sparks from one of the engines, *held*, that as the company had not express powers given it by statute to use locomotive steam-engines, it was liable at common law for the damage, though negligence was negatived. *Jones v. Festonog Railway Co.*, Law Reports, 3 Queen's Bench Cases, 733. 1868.

194. *Connecting lines; cars of one company burned on line of another*. Under an agreement between plaintiff and defendant companies, between whose lines of road there was a connection at Merriam Junction, the defendant received from plaintiff at said junction eight of its cars, loaded with wheat, for transportation and delivery to consignees at Minneapolis, a point on defendant's road. By the terms of said agreement, defendant was required to haul the cars over its road, having exclusive charge and control thereof, make delivery of the wheat, and then return the same, either loaded or empty, to the plaintiff, in as good condition as when received, ordinary wear and tear by use excepted. Both parties were to share in the profits of the transportation of the wheat and other freight so carried, and plaintiff was to receive from defendant, in addition to its share of such profits, a stipulated compensation for such use of its said cars. While being so used by defendant, the cars were wholly destroyed by fire at Minneapolis, without any fault or negligence on its part amounting to want of ordinary care. *Held*, that defendant was not liable to plaintiff for such loss, either as a common carrier, bailee for hire, or otherwise. *St. Paul and Sioux City R. R. Co. v. Minneapolis and St. Louis R'y Co.*, 26 Minn., 243. 1879.

195. *Cotton near railway*. A railway company is not liable as a common carrier for cotton, placed by its owner near the track, where it was burned by a spark from

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a passing engine. *Brown v. Atlanta and Charlotte R. R. Co.*, 19 So. Car., 39. 1882.

196. Insurance. A person having his house and furniture burned from the carelessness of agents of a railroad company is entitled to recover the entire amount of his loss, in a suit against such company, notwithstanding he has been paid by an insurance company the sum for which they were insured. *Weber v. Morris and Essex R. R. Co.*, 36 N. J. Law, 213, 1873; 12 Amer. R'y Rep., 411; *Collins v. New York Central and Hudson River R. R. Co.*, 5 Hun (N. Y.), 503, 1875.

197. Jurisdiction. This court has no jurisdiction of an action brought against a railroad company organized in New York, for negligently causing sparks and burning wood to be thrown on the plaintiff's trees and plants, and setting fire to and burning and damaging the trees and plants growing on the lands of the plaintiff in the state of New Jersey. Trespass for injuries to real estate or its corporeal hereditaments cannot be brought beyond the jurisdiction where the land is situated. *Huermund v. Erie R'y Co.*, 48 Howard's Practice (N. Y.), 55. 1874.

198. Neglect of employe of oil company. Connected with a railway was a branch on which were oil stations, where the main company left its cars to be filled by the owners of the oil and then moved them. Two cars coupled together were placed at a station on a steep grade under charge of the oil company's superintendent, none of the railway company's employes being there. The superintendent having filled one car, detached it to fill another; the first car ran down the grade and collided with an engine which set fire to the cars and burned a neighboring house. In a suit against the company for burning the house, *held*, that, as between the company and third persons, it was liable for the negligence of the superintendent as that of its own employe. *Oil Creek and Allegheny River R'y Co. v. Keighron*, 74 Pa. St., 316, 1873; 6 Amer. R'y Rep., 192.

199. Negligence. Where the employes of a railway company left, in a house where the oil used by the company was kept, a stove red-hot, or so adjusted that it would

speedily become red-hot, around which was scattered inflammable waste, and upon which was a can of oil, the jury were warranted in finding that the conduct of the defendant's servants was negligent. *Read v. Pennsylvania R. R. Co.*, 44 N. J. Law, 280. 1882.

200. Negligence; lamp. A kerosene lamp was left burning after midnight and after all persons had left the building in defendant's telegraph office, and mounted upon a bracket attached to the frame of a window in the partition between such office and defendant's warehouse; and before morning the warehouse and plaintiff's goods therein were burned. Assuming that the fire was caused in some way by the burning lamp, the question was, whether defendant was guilty of a want of ordinary care in leaving the lamp thus burning; and there was no proper evidence upon that question apart from the above facts. *Held*, that it must be presumed that defendant used due care in respect to the lamp, its material, construction and location, the oil used therein, etc., and that there was nothing to support a verdict against defendant. *Wood v. Chicago, Milwaukee and St. Paul R'y Co.*, 51 Wis., 196. 1881.

201. Railway operated by trustees. An action was brought for an alleged injury to property by fire, under R. S., ch. 51, § 32, which provides: "When a building or other property is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury." The injury occurred while the line was operated by the trustees named in a mortgage to secure the bondholders and before the mortgage was foreclosed. Subsequently the bondholders organized a new company, and took possession of the road. No malfeasance or fraud was alleged on the part of any one, and there was no allegation of funds in the hands of the trustees. *Held*, that the new corporation was not liable, because it was not then the owner of the road or using the engine. *Stratton v. European and North American R'y Co.*, 74 Me., 422. 1883.

202. Right of way. It is immaterial who owns the right of way, when fire is set out. *Slossen v. Burlington, Cedar Rapids and Northern R'y Co.*, 11 Amer. & Eng. R. R.

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Cases, 67 (Ia.). 1882. See *Same v. Same*, 7 Amer. & Eng. R. R. Cases, 509; 51 Ia., 294. 1879.

203. Starting of fire; erroneous instruction. In a suit to recover for the burning of a stack of hay, alleged to have been burned by fire communicated from a railway, an instruction that if the jury believe the hay was destroyed by fire communicated from one of defendant's engines, and that defendant's right of way was not free from dry grass and other combustible matter at the place where the fire started, etc., is erroneous, because it assumes that the fire started on defendant's right of way, which was one of the questions in dispute. *Chicago and Alton R. R. Co. v. Bloomfield*, 7 Bradwell (Ill.), 211. 1880.

204. Storing coal oil; city ordinances. Plaintiffs in error brought suit for the destruction of their property by fire, alleging, among other things, that the loss of property was the immediate consequence of the unlawful keeping and storing by the defendants of large quantities of kerosene and other oils contrary to an ordinance of the city of Chicago, prohibiting the storing of such oils. There was a count in plaintiff's declaration setting out, with proper averments, the ordinance in question. *Held*, that a demurrer to the count was improperly sustained; that the averments were to show an unlawful storing of such articles, and the count stating with reasonable certainty that plaintiffs sustained actual damage as the proximate result of such wrongful act, there was a good statement of a cause of action. *Wright v. Chicago and Northwestern R'y Co.*, 7 Bradwell (Ill.), 438. 1880.

205. View by jury. In an action against a railway company for damages for the burning of a lumber yard, alleged to have been set on fire by sparks from defendant's engine, it was pleaded that the engine was fed with coal and emitted sparks only when steam was used, and that for some distance from the yard the grade was such that steam was not used; during the trial the jury inspected the ground, and the possibility of running a train as alleged was practically demonstrated. *Held*, that the experiment was without prejudice to the plaintiff.

Stockwell v. C. C. and D. R. R. Co., 43 Ia., 470. 1876.

206. Warehouseman. When it does not appear that goods transported by railroad have remained an unreasonable time in the depot of the company after they have reached their destination, and the agent of the consignee, on the ensuing Saturday, inquired of the agent of the company whether the goods must then be taken out, or if they could remain until the next Monday, and whether there would be additional charges therefor, and the agent of the company replied that the goods could be taken out on Monday without further cost, the rule of liability on the company, which was then that of ordinary diligence as warehouseman, was not thereby changed. *Western and Atlantic R. R. Co. v. Camp*, 53 Ga., 596. 1875.

207. Wood. Evidence held sufficient to sustain a verdict for damages for wood burned, the wood having been piled on the right of way of the company for inspection by authority of the company. *Western and Atlantic R. R. Co. v. Clements*, 60 Ga., 819. 1878.

 FIXTURES.

See LANDLORD AND TENANT.

1. Railway track. A railroad track laid down upon land with a view to its permanent improvement or beneficial enjoyment is deemed a fixture and part of the realty. *Van Keuren v. Central R. R. Co. of New Jersey*, 38 N. J. Law, 165, 1875; 13 Amer. R'y Rep., 43.

 FLOODS.

See CARRIAGE OF MERCHANDISE; CARRIAGE OF LIVE STOCK; EXPRESS COMPANIES.

 FLYING SWITCH.

See INJURIES TO EMPLOYEES; INJURIES TO PERSONS ON THE TRACK.

Miscellaneous.

FORECLOSURE.

See MORTGAGE.

FOREIGN CORPORATIONS.See ATTACHMENT; FEDERAL COURTS; GARNISHMENT;
JURISDICTION; REMOVAL OF CAUSES.**FORFEITURE.**See CHARTER; CONSTRUCTION OF RAILWAYS; SUB-
SCRIPTIONS BY INDIVIDUALS.

1. Contract; land sale. Where, in a contract for the sale of land on credit, payment to be made in instalments on days definitely fixed, and time being essential, with penalty of forfeiture for want of punctuality, the mere receipt of one or more payments overdue does not of itself operate as a waiver of the right to declare a forfeiture for non-payment of instalments subsequently falling due. *Lent v. Burlington and Missouri River R. R. Co.*, 11 Neb., 201. 1881.

FOREIGN STATUTE.

See CARRIAGE OF MERCHANDISE; PLEADING.

FRANCHISES.See CHARTER; CONSTITUTIONAL LAW; EMINENT DO-
MAIN; EXECUTIONS; MORTGAGE.**FRAUD.**

See ELECTION OF CORPORATE OFFICERS; MORTGAGE.

1. Agent. An incorporated company cannot be called on to answer in damages, in its corporate capacity, for the false and fraudulent representations of its agent, unless it authorized the representations. *Houston and Texas Central R. R. Co. v. McKinney*, 55 Tex., 176. 1881.

2. Agent of railway company; funding certificates. A railway company is liable for the fraud of its agents in the issuance of negotiable funding certificates. *Western Maryland R. R. Co. v. Franklin Bank*, 60 Md., 86. 1882.

3. Bubble. The defendants projected, *bona fide*, a railroad in Spain; but, before the plaintiff purchased shares in it, they knew that it was impracticable. *Held*, that the plaintiff was entitled only to the relief which he might have had if the project had been a bubble *ab initio*, namely, to be paid his purchase money. *Harvey v. Collett*, 15 Simons (Eng. Ch.), 332. 1846.

4. Construction contract. A construction contract is not void under §§ 58 and 59 of the railroad law (R. S. 1855, p. 438), because the contractor has an agreement with a director of the railroad company to divide the profits with him. *Sherwood and Napton, JJ.*, dissenting. *Chouteau v. Allen*, 70 Mo., 290. 1879.

5. Contract; guaranty. Defendant was asked to find a locomotive of a certain kind for plaintiff to purchase. Afterward defendant called on plaintiff's vice-president and stated that there were in a distant city two locomotives which had been thoroughly repaired; that B., in whom defendant knew the vice-president had confidence, had examined the locomotives. The same day defendant sent B. to the vice-president and B. stated that he had examined the locomotives; that they were good, serviceable engines and cheap at the price, which defendant claimed was \$14,000 each. At defendant's suggestion he was authorized to offer \$26,000 for the two, which offer defendant stated was accepted, and upon the vice-president saying that he should have a guaranty that these engines were equal to the specifications, defendant replied that he knew the parties and would give the guaranty. The vice-president then paid him \$26,000 and \$500 for his services in purchasing, and defendant executed to plaintiff a bill of sale of the engines, embodying the guaranty in his own name as vendor. It afterward appeared that B. had not made an examination of the engines; that the price paid by defendant therefor was only \$30,000, and that the engines were worthless. *Held*, that defendant was liable to the plaintiff for damages. *Held*, also, that the defendant's liability was not affected by the circumstance that the title to the locomotives came to the plaintiff through defendant. *Indianapolis, Peru and Chicago R'y Co. v. Tyng*, 4 Thomp-

Contract — Issue of Stock.

son & Cook (N. Y. Supreme Ct.), 524, 1874; 2 Hun (N. Y.), 311; 63 N. Y., 653, 1873; 48 Howard's Practice (N. Y.), 193, 1874.

6. Contract; secret interest of corporate officials. A contract made on behalf of a corporation by the executive committee of the board of directors with a third person, in which the members of the executive committee have a secret interest, is fraudulent as against the corporation, and the corporation may repudiate it, although it may have been long acted upon and recognized by the officers of the corporation who made it. *Wardell v. Union Pacific R. R. Co.*, 4 Dillon (U. S. C. C.), 330, 1877; 14 Amer. R'y Rep., 254.

7. Delivery of bonds. Where plaintiffs alleged in their complaint that the defendant falsely represented that the mortgage bonds delivered to the plaintiffs as security were first mortgage bonds upon the defendant's railroad; that in consequence of such false representations the plaintiffs had suffered loss, *held*, that the complaint could not be sustained on demurrer, where it appeared that there were no personal representations made by the defendant to the plaintiffs, but that the latter alleged that the bonds upon their face, and upon which they relied, were described as "first mortgage consolidated bonds," but it appeared by the mortgage accompanying the bonds that such consolidated bonds would become the first lien upon the road when they should be substituted in place of the old bonds after the retirement of the latter. *Caylus v. N. Y., Kingston and Syracuse R. R. Co.*, 49 Howard's Practice (N. Y.), 100. 1875.

8. Directors. As a corporation holds its property as trustee for the stockholders, if the corporation refuses to call to account, by proper legal proceedings, its officers who are abusing their trust, misapplying the funds of the corporation, and receiving profits from contracts made by other parties with the corporation, through their aid, or if such corporation is still under the control of those who necessarily must be made defendants in such proceedings, the stockholders who are the real parties in interest, or a part of them, may maintain an action to make such officers, and all parties who have participated with said officers in their unlawful transactions,

account for their wrongs and frauds; and the corporation is a proper party defendant with them. *Ryan v. Leavenworth, Atchison and Northwestern R'y Co.*, 21 Kans., 365. 1879.

9. — The contract entered into July 16, 1868, by the Union Pacific R. R. Co., by direction of the executive committee of the board of directors, with Godfrey and Wardell, which the latter assigned, without consideration, to a new company, in which a majority of the stock was taken by six directors of the old company, declared to be fraudulent and void. *Wardell v. Railroad Co.*, 103 U. S., 651, 1880; 1 Amer. & Eng. R. R. Cases, 427.

10. — The directors of a corporation are subject to the obligations which the law imposes upon trustees and agents. They cannot, therefore, with respect to the same matters, act for themselves and for it, nor occupy a position in conflict with its interests. *Id.*

11. — It is a fraud upon the rights of a railway company if a director, who buys lands for the use of the corporation and pays for them with its funds, takes the title in his own name or jointly with others; and the nominal grantees would hold in trust for the company. *Michigan Air Line R'y Co. v. Mellen*, 44 Mich., 321, 1880; 5 Amer. & Eng. R. R. Cases, 245.

12. Issue of stock. Where one railroad corporation is the owner of a large amount of stock in a connecting line, and both of the corporations are under the actual control of the same persons as officers of the corporations, and the officers of the connecting line are guilty of a misapplication of the corporate funds for their personal benefit, the stockholders of the former corporation, or a part of them, may institute a suit to compel the officers to account for such misapplication; and *held*, that where the stock of the first corporation in the connecting road has been fraudulently concealed by the officers of the two corporations, and a like amount of stock in the connecting road issued without consideration to S. and N. as trustees for the former corporation, and such corporation is the equitable owner of the same, the stockholders of said first corporation, or a part of them, may maintain a

Mortgage, etc.—Right of Way Contract.

suit to compel the officers of such connecting corporation to restore to said corporation the funds and property wrongfully taken by them, without first bringing an action to compel a transfer of the stock from S. and N. to the corporation equitably owning the same. *Ryan v. Leavenworth, Atchison and Northwestern R'y Co.*, 21 Kans., 365. 1879.

13. Mortgage to corporation of which officers of mortgagor are secret members. A company was organized as a corporation under the general laws of Missouri, whose declared object was "the completion and ownership" of the St. Louis and St. Joseph Railroad; the president and vice-president of this railway company were secret members of the above association; a mortgage was made by the railroad company to the said association. *Held*, considering the trust relations between the parties, and the effect of giving judicial sanction to the mortgage, that it was constructively fraudulent; but the association was allowed to prove in bankruptcy their advance to the railroad company as an unsecured debt. *Kappner v. St. Louis and St. Joseph R. R. Association*, 3 Dillon (U. S. C. C.), 228. 1875.

14. Negotiable paper. A *bona fide* holder of negotiable paper, purchased before its maturity upon an unexecuted contract on which part payment only had been made when he received notice of fraud, and a prohibition to pay, is protected only to the amount paid before the receipt of such notice. *Dresser v. Missouri and Iowa R'y Construction Co.*, 93 U. S., 92. 1876.

15. Railway bonds. Where a civil engineer, on settlement of his account with a railway company, was induced to accept bonds of the company in payment on the representations of the president of the company that the bonds were worth eighty-five cents on the dollar, and that the railroad had up to that time paid all expenses of its operation, and the interest on its indebtedness, and it afterwards appeared that the company had paid all expenses and interest as stated, but it was not from the earnings of the road, and it was not shown that the president had knowledge of this fact, and it was not shown in evidence what was the value of the bonds at the time, but only that

some three months afterwards they were of little value, it was held that the facts did not show such a fraud as to authorize an opening of the settlement, and a suit to recover for the services rendered. *St. Louis and Southeastern R'y Co. v. Rice*, 85 Ill., 406. 1877.

16. — The purchase of land by the president of a railway, by means of fraudulent misrepresentations as to the value of certain bonds given in exchange, set aside upon the evidence. *Kitchen v. Rayburn*, 19 Wallace, 254. 1873.

17. Railway wrecking; division of profits. A court of equity will not aid parties in the consummation or perpetration of a fraud, nor give *any* assistance whereby *either* of the parties connected with a betrayal of a trust can derive any advantage therefrom; nor will it unravel a tangled web of fraud for the benefit of any one enmeshed therein, through whose agency the web was woven. Especially must this be the rule where one of its own officers, whose position is both advisory and fiduciary, seeks its assistance to compel alleged confederates to share with him the spoils acquired through his own concealments and deceits in the betrayal of his trusts. The court refused to entertain a suit for division of profits in the "wrecking" of a railway company. *Farley v. St. Paul, etc., R'y Co.*, 14 Federal Reporter, 114, 1882; 4 McCrary, 138.

18. Rescission. In an action to set aside a deed to a railway company on the ground of fraud, the party claiming to set aside the conveyance should act promptly. He cannot stand by until the land is built upon and then demand rescission. *Memphis and Charleston R. R. Co. v. Neighbors*, 51 Miss., 412. 1875.

19. Right of way contract. Where a railway was located over a person's farm and through his orchard and a part of his dwelling-house, and the owner was an unlettered man, being unable to read or write, and a person acting in behalf of the company came to him while at work in the field and induced him to sign a paper for a subscription, including an agreement to secure to the company the right of way for its road through such township free of charge, but

Agent — Contract for Cattle Yards.

did not read or state that part of the agreement relating to the right of way to the owner, but assured him he could obtain compensation, and such person signed the owner's name by his direction, *held*, that the agreement as to the right of way was void *ab initio* as to the land owner on account of such misrepresentation, and that, as he was unable to read, no negligence was attributable to him. *Rockford, Rock Island and St. Louis R. R. Co. v. Shunick*, 65 Ill., 223. 1872.

20. — Evidence that four railway directors had told the grantor of a right of way, before making the deed, that he should have a depot upon his land, *held* incompetent, it not appearing that they had power to bind the company, and the testimony not showing that they made the declarations when performing an act authorized by the company. *East Line and Red River R. R. Co. v. Garrett*, 52 Tex., 133. 1879.

21. Rights of stockholders. Where any fraud has been perpetrated by the directors of a company, by which the property or interest of the stockholders is affected, the stockholders have a right to come in as parties to a suit against the company and ask that their property shall be relieved from the effect of such fraud. *Bayliss v. Lafayette, Muncie and Bloomington R'y Co.*, 8 Bissell (U. S. C. C.), 193. 1878.

22. Stock subscriptions; between corporations. Where one corporation becomes a stockholder in another, the officers of the former have no authority to make fraudulent representations which could subject their company to liability as a member of the latter company. *Langan v. I. and M. Construction Co.*, 49 Ia., 317. 1878.

23. Trustees. Where trustees use the name of a corporation in matters conducted for their private benefit, with knowledge on the part of him with whom they are dealing, it is no defense to an action brought by the corporation for a fraudulent disposition of its property, that it is *in pari delicto*, because its name has been used in committing the fraud. *Erie R'y Co. v. Vanderbilt*, 5 Hun (N. Y.), 123. 1875.

24. Voluntary conveyance by corporation. Where a corporation, solvent at the time, and having no actual intent to de-

fraud creditors, disposes of its lands for an inadequate consideration or by a voluntary conveyance, its subsequent creditors cannot question the transaction. *Graham v. Railroad Co.*, 102 U. S., 148, 1880; 1 Amer. & Eng. R. R. Cases, 416.

FRAUDS, STATUTE OF.

See GUARANTY.

1. Agent; principal. Where an agent, duly authorized to make purchases of and to accept wood purchased for his principal, entered into a verbal contract, void under the statute of frauds, for the purchase of a quantity of wood; and where, after an acceptance of a portion of the wood contracted for, the agency was terminated, but the vendor, without notice and in ignorance of such termination, delivered the residue of the wood, which was accepted and received by the former agent, *held*, that the principal was liable for all the wood delivered at the contract price. *Barkley v. Rensselaer and Saratoga R. R. Co.*, 71 N. Y., 205. 1877.

2. Contract for cattle yards. In 1855, the plaintiff and defendant entered into a parol agreement, by which the former conveyed to the latter certain lands and a right of way over other real property, and the latter agreed to lay a separate track to the adjoining lands of the plaintiff, and to bring the cattle and stock which might come to it from the west, to the said plaintiff's lands, to be there fed and cared for. The plaintiff conveyed the land and right of way to the defendant, but the latter shortly thereafter repudiated the agreement, and failed and refused to bring the cattle to the plaintiff's yard. In an action brought by the plaintiff in 1857 to recover the damages therefor, *held*, that, as the parol agreement was void, because it was not to be performed within one year, the plaintiff could not recover the damages occasioned by the breach thereof. *Day v. New York Central R. R. Co.*, 22 Hun (N. Y.), 412, 1880; *Day v. N. Y. Central R. R. Co.*, 89 N. Y., 616, 1882.

3. — As the defendant had repudiated the agreement after a partial performance, the plaintiff was entitled to recover the value of

When Payable in Money—Carriage of Passengers.

the land and right of way conveyed, after deducting therefrom the value of the partial performance of the agreement by the defendant, viz., the profits made by him from the business brought to him by the defendant. *Ib.*

4. Contract to pay laborers. An unwritten agreement by a railway company to a contractor, to pay the latter's obligations to his workmen, will not sustain an action. *Bottomley v. Port Huron and Northwestern R'y Co.*, 44 Mich., 542. 1880.

5. Contract to pay debt of another. A verbal promise of a corporation to pay a party's claim, contracted with other parties prior to the incorporation, is void by the statute of frauds, as an undertaking to pay the debt of a third person. *Little Rock and Ft. Smith R. R. Co. v. Perry*, 37 Ark., 164, 1881; 9 Amer. & Eng. R. R. Cases, 610.

6. Delivery; cord wood. A parol contract to cut and deliver one thousand cords of wood, no time being agreed upon, is taken out of the statute by partial delivery. *Van Woert v. Albany and Susquehanna R. R. Co.*, 67 N. Y., 538. 1876.

7. Railway land scrip. The sale of railway land scrip held subject to the provisions of the statute of frauds. *Smith v. Bouck*, 33 Wis., 19. 1873.

FREE PASSES.

See BAGGAGE; INJURY TO PASSENGERS.

FREEZING OF FRUITS.

See CARRIAGE OF MERCHANDISE.

FREIGHT SCRIP.

1. When payable in money. The ratification of an unauthorized act or contract, professedly done or entered into on behalf of a corporation, may be inferred from the subsequent conduct in respect thereto, the same as if it were a natural person. The amounts, specified in contracts to pay definite sums of money, with a certain rate of interest, on or before stated periods, in freight and passage over the promisor's railway, become

due, together with the stipulated interest, at once in money, upon the failure of the promisor to comply with the terms of its agreement, and its depriving itself of the power to comply with it, by the sale and disposal of the railway. *Branson v. Oregonian R'y Co.*, 10 Oreg., 278. 1882.

FREIGHT TRAINS.

See CARRIAGE OF LIVE STOCK; CARRIAGE OF MERCHANDISE; CARRIAGE OF PASSENGERS; INJURY TO PASSENGERS; TICKETS.

1. Carriage of passengers. A railway company is not required by law to carry passengers, as a common carrier, on its freight trains, but such company may agree to carry passengers on such trains, on such reasonable terms and conditions as it may prescribe. *Indianapolis and St. Louis R. R. Co. v. Kennedy*, 77 Ind., 507, 1881; 3 Amer. & Eng. R. R. Cases, 467; *Arnold v. Illinois Central R. R. Co.*, 83 Ill., 273, 1876.

2. — tickets. A railway company has the power to make, and in a reasonable manner to enforce, a rule or regulation to carry passengers on its freight trains, either not at all, or only upon the condition that they provide themselves with tickets. *Burlington and Missouri River R. R. Co. v. Rose*, 11 Neb., 177, 1881; 1 Amer. & Eng. R. R. Cases, 253.

3. — In the enforcement of such a regulation previous notice thereof must be given. It is not, however, required of a railway company to bring home to a passenger actual notice of the regulation before the train leaves the station where he entered the car, to justify his expulsion therefrom, for want of a ticket, at any other than a regular stopping place. All that is required is, that a suitable general notice to the public be given for such length of time, before the regulation is put into operation, as to make it reasonably certain that all passengers in the exercise of due diligence must become aware of its existence. And the right of expulsion for non-compliance with such regulation by a passenger may be exercised after leaving the station, at any suitable place, under all the circumstances of the particular case. *Ib.*

Contributory Negligence — Flagman.

FRIGHTENED TEAMS.

See INJURIES TO PERSONS ON THE TRACK.

1. Contributory negligence. A party who drives a horse toward a railway crossing upon or near which an engine is standing, and, notwithstanding the fact that the horse is frightened at the engine, thereafter leads him toward the crossing, until a narrower point in the street is reached, where it is difficult to turn him, and the horse becomes so frightened as to be ungovernable, and then rears and falls backward and kills himself, is guilty of contributory negligence, and cannot maintain an action against the company for such injury. *Louisville and Nashville R. R. Co. v. Schmidt*, 81 Ind., 264, 1881; 8 Amer. & Eng. R. R. Cases, 248.

2. Damage done by team. A person whose horses, frightened by a locomotive, became uncontrollable, ran away with him, went upon land of another, and broke a post there, is not liable for the damage if it was not caused by any fault on his part. *Brown v. Collins*, 53 N. H., 442. 1873.

3. — A complaint against a railway company, alleging that its employes and agents managed and operated its engine and cars in such a recklessly and culpably negligent manner as to wilfully and wrongfully cause a team of horses to take fright and run away, and that, because of such fright, and while unmanageable and running away, they ran against the plaintiff's horse and caused its death, contains facts sufficient to constitute a cause of action. *Billman v. Indianapolis, Cincinnati and Lafayette R. R. Co.*, 76 Ind., 166, 1881; 6 Amer. & Eng. R. R. Cases, 41.

4. — The liability of horses to become frightened at unusual noises or objects is a thing to be apprehended and guarded against, and the wrong-doer who does an act likely to cause such fright must be deemed to be responsible for injuries caused by horses running away under the influence of the fright. *Ib.*

5. — The fact that between the wrongful act of the company and the injury complained of was an intervening cause is not sufficient to defeat a recovery. An intervening agency does not always shield the wrong-doer from responsibility where the injury flows from his wrongful act. *Ib.*

6. Dummy engine. It is *prima facie* negligence for an engineer of a dummy railroad engine to discharge a sudden jet of steam upon a passing team. *Stamm v. Southern R. R. Co.*, 1 Abbott's New Cases (N. Y.), 438. 1876.

7. Escape of steam. A complaint which avers that the employes of a railway company, while the plaintiff's horse was upon a highway near a crossing, stopped the engine at the crossing, and negligently caused the steam to escape, making a great noise, after having been requested not to do so, whereby the horse became frightened, reared up and fell backwards, killing himself, shows that the injury was the "natural and proximate" result of the negligence. *Louisville and Nashville R. R. Co. v. Schmidt*, 81 Ind., 264, 1881; 8 Amer. & Eng. R. R. Cases, 248.

8. — A railway company is liable for damages for the act of its employes in negligently blowing off steam at a highway crossing, whereby a team is frightened and an accident ensues. *Stott v. Grand Trunk R'y Co.*, 24 Upper Canada, Common Pleas, 347. 1874.

9. — Evidence held sufficient to sustain a verdict against a railway company for negligently letting steam escape so as to frighten a team. *Gibson v. St. Louis, Kansas City and Northern R'y Co.*, 8 Mo. App., 488. 1880.

10. — A railway company, having a right to run its trains, has necessarily the right to make all reasonable and usual noises incident thereto, whether occasioned by the escape of steam, rattling of the cars, or other causes. *Whitney v. Maine Central R. Co.*, 69 Me., 208. 1879.

11. Evidence. On the question whether the noise of escaping steam from a locomotive was likely to frighten horses, evidence that other horses were frightened by it is admissible. *Gordon v. Boston and Maine R. R. Co.*, 58 N. H., 896. 1878.

12. Flagman. Where a flagman beckons to a traveler to pass, he has the right to presume that the crossing is safe. And if, in attempting to cross, his team is frightened by a sudden escape of steam from a locomotive, the railway company will be liable for the injuries resulting. *Borst v. Lake Shore and Michigan Southern R'y Co.*, 4

Highway.

Hun (N. Y.), 346, 1875; affirmed, 66 N. Y., 639, 1876.

13. — In a suit against a railway company, for personal injury to a passer-by, by moving cars frightening the plaintiff's team, at a street crossing of a railway where there is much travel upon the street, evidence for the plaintiff, showing that the company had, to the plaintiff's knowledge, kept a watchman at the crossing to give signals of danger until a short time before the accident, when, without the plaintiff's knowledge, the watchman was withdrawn, and that, as the plaintiff approached the crossing, he was careful to look for such signals and saw none, is admissible, for the purpose (with other circumstances), not only of showing negligence by the defendant, but also of showing the plaintiff was free from contributory negligence. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Yundt*, 78 Ind., 373, 1881; 3 Amer. & Eng. R. R. Cases, 502.

14. — In an action to recover for injuries received by the plaintiffs, by reason of the frightening of the team they were driving, caused by the sudden opening of the escape valves of an engine attached to one of the defendant's trains, standing at a public crossing, it was held that the fact that the defendant did not provide a flagman at the crossing, or give other signals to warn the plaintiffs of the movements of the engine, should be considered in determining the question of the defendant's negligence, such signals being required not alone to prevent collisions, but to enable travelers upon the highway to guard against other accidents as well. *Hart v. Chicago, Rock Island and Pacific R. R. Co.*, 56 Ia., 166. 1881.

15. Highway. Where a railway track passes along a street, both the trains and teams are entitled to the use of the street; and if horses are frightened by the appearance of the train or the ordinary noise of its passage, the railroad company is not liable for damages. *Hahn v. Southern Pacific R. R. Co.*, 51 Cal., 603, 1877; 12 Amer. R'y Rep., 226.

16. — So if the cylinder-cocks are opened and the steam is blown off, and this is necessary in the prudent management of the engine, and the horses are frightened thereby,

the railway company is not liable for the damages. *Id.*

17. — bridge. A railway company whose line passes over a highway by a bridge is not liable to a traveler in the highway for damage caused by the fright of his horse at the noise made by a train of cars passing over the bridge in the usual manner, although the corporation knew that, because of special circumstances, accidents of a similar character are peculiarly liable to happen there, and although no warning is given of the approach of the train. *Favor v. Boston and Lowell R. R. Co.*, 114 Mass., 350. 1874.

18. — cars standing in highway. A car standing upon a switch track in a highway close to, but not obstructing, the traveled part thereof (which at that point was upon a grade several feet above the ditches on the side of the street), could be seen for a considerable distance by persons passing along the highway. The plaintiff, who was on the top of a load of stave bolts upon a sleigh, attempted to pass the car, when the horses became suddenly frightened at the sight of it and sprang to one side, throwing the sleigh with its load off from the grade, upsetting it, and injuring the plaintiff. Held, that these facts did not conclusively show negligence on the part of the plaintiff. *Busian v. Milwaukee, Lake Shore and Western R'y Co.*, 56 Wis., 325, 1882; 10 Amer. & Eng. R. R. Cases, 716.

19. — obstruction. In an action against a railway company for personal injuries alleged to have resulted from defendant's neglect in placing an obstruction in a highway crossing, which was struck by the wheel of plaintiff's vehicle, thereby causing the horse to take fright and run away, and the plaintiff to be injured, held, error to submit issues involving only defendant's right to use the highway, and whether the use amounted to a partial or complete obstruction. *Myers v. Richmond and Danville R. R. Co.*, 87 N. C., 345, 1882; 8 Amer. & Eng. R. R. Cases, 293.

20. — The injury should have extended to the neglect of the defendant in thus placing upon a highway obstacles calculated to frighten the horses of travelers. *Id.*

21. — obstruction; hand-car in highway. A railway company was held liable for dam-

Pleading — Team Hitched near Railway.

ages resulting from leaving a hand-car standing in the edge of a highway, whereby a horse was frightened and ran away, injuring its owner. *Vars v. Grand Trunk R'y Co.*, 23 Upper Canada, Common Pleas, 143. 1878.

22. — use of steam. A person driving an unbroken horse, or one easily frightened by a locomotive, along a public highway running side by side with a railway, does so at his own peril; the right of the company to move its trains on its road is as high as that of the individual to use the public road. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Stinger*, 78 Pa. St., 219. 1875.

23. Pleading. Where a declaration alleged that the employes of a railway company had violently, unnecessarily and improperly blown the whistle of the engine, thereby frightening the plaintiff's horse and causing him to run away and injure the plaintiff, it could be amended by setting out more fully and distinctly the circumstances and facts of the tort. Such an amendment did not add a new cause of action. *Georgia R. R. Co. v. Thomas*, 68 Ga., 744. 1882.

24. — In a suit for a personal injury received by frightening a team and causing it to run away, by the sounding of a whistle on a locomotive, under an allegation that, while the defendant's train was approaching, from the rear of the team, its servants caused the whistle to be sounded in a loud, shrill, unnecessary and negligent manner, "needlessly, wantonly, negligently and maliciously," whereby the team was frightened, etc., it was held competent for the plaintiff to show a case of negligence on the part of the defendant, and for the latter, in defense, to show plaintiff's negligence in putting himself in a place of danger; and in such case, unless the negligence of the defendant was gross, and that of plaintiff slight in comparison, no recovery could be had. *Chicago, Burlington and Quincy R. R. Co. v. Dickson*, 83 Ill., 431, 1878; 21 Amer. R'y Rep., 828.

25. Signals. The failure of a railway company to sound the whistle at a crossing, in obedience to the statute, will render it liable for injury resulting through a frightened team, where the fright could have been avoided had the signal been given. *Rosenberger v. Grand Trunk R'y Co.*, 32 Upper

Canada, Common Pleas, 349. 1882. See, also, *Norton v. Eastern R. R. Co.*, 113 Mass., 366, 1873; *Prescott v. Same*, 113 ib., 370, 1873; *Texas and Pacific R'y Co. v. Chapman*, 57 Tex., 75, 1889; *Pollock v. Eastern R. R. Co.*, 124 Mass., 158, 1878.

26. — In a suit to recover for injuries caused by the plaintiff's horse becoming frightened by cars on the defendant's railway, it appeared that the track crossed the highway on which the plaintiff was traveling; that the horse became frightened when about five rods from the crossing by the approach of two cars about ten rods therefrom; that the cars were coming on a down grade by the force of gravitation at the rate of eight or ten miles an hour, and that no signal was given of their approach. *Held*, that these facts would not warrant the jury in returning a verdict for the plaintiff. *Flint v. Norwich and Worcester R. R. Co.*, 110 Mass., 223. 1872.

27. — Trains out of time should give notice of their coming if there are reasonable grounds to apprehend that teams on a turnpike, near by, would be frightened. *Hudson v. Louisville and Nashville R. R. Co.*, 14 Bush (Ky.), 303. 1878.

28. — To negligently frighten an animal, being at the time driven by the plaintiff, renders the person guilty of the negligence liable for the damages sustained in consequence of the fright. *Ib.*

29. — In order to recover for such injuries, it must be shown that the circumstances attending the use were such that a prudent regard for the rights of others forbade it. *Ib.*

30. Statute; Tennessee. The statute in relation to obstructions, etc., on the track has no application where the injured person is traveling along a highway near to and parallel with the railway. *East Tenn., Va. and Ga. R. R. Co. v. Feathers*, 10 Lea (Tenn.), 103. 1882.

31. Team hitched near railway. P. drove his team of horses to a mill on a public highway, about one hundred yards from the railroad crossing. It was a cold, stormy day; he fastened the team to the usual hitching post at the mill, in plain view of the railway; also fastened the lines, locked the wagon, and went into the mill. The team

Team on Track — Whistle.

was tied about ten feet from the mill door, so that plaintiff could see it from the window; he could have seen the train eighty to one hundred and fifty yards before it approached the crossing. He sat down by the window to watch; the miller told him it would soon be train time. Suddenly the team became frightened at an approaching freight train, broke loose, and started across the railroad track. The train and team met at the crossing and the team was injured. *Held*, as plaintiff was not traveling on the highway at or near the railroad crossing, and as his team was not at large or traveling at or near the crossing, the company owed him no duty, under the statute, to sound the whistle for the purpose of giving him warning. (Comp. Laws 1879, ch. 23, § 60.) *St. Louis and San Francisco R'y Co. v. Payne*, 29 Kans., 166. 1883.

32. Team on track. Where a team of horses ran away from their driver, and got upon a railway track, in an incorporated town, where the company was not required by law to fence its track, and ran along the track until they fell into an old cattle-guard, and a freight train came along, and the engine-driver did all that he could to stop his train as soon as he saw the team, but was unable to do so, and the horses were injured, it was *held* that there was no negligence on the part of the company, and that a recovery against it could not be maintained. *Chicago and Alton R. R. Co. v. Rice*, 71 Ill., 567. 1874.

33. Turnpike. A railway company was required by its charter to so locate its road that in its construction and use it should not interfere with a certain turnpike so as to endanger travel upon it; and the charter provided for the appointment of a committee who should determine and certify whether it had done so. In a suit against the company for an injury to a person traveling on the turnpike, the declaration alleged that the defendant had not constructed its road in the manner so required, and the defendant set up in its plea the approval of the committee appointed under its charter. To this the plaintiff replied that the approval was obtained by fraud. To this replication the defendant demurred specially, on the ground that it was not averred in what the

fraud consisted. *Held*, that the replication was sufficient. *Durand v. New Haven and Northampton Co.*, 42 Conn., 211. 1875.

34. Whistle. The unnecessary and extraordinary use of a steam whistle is negligence. *Philadelphia and Reading R. R. Co. v. Killips*, 88 Pa. St., 405. 1879.

35. — A train was passing through a city on a track which had a number of short curves, so that persons could see the train but for a short distance; it was crossed by several streets and passed over a river on a draw-bridge; the rule of the company required that the whistle should be sounded about a certain point to warn the bridge tender and persons about to cross at other streets. *Held*, the use of the whistle at that point in the ordinary manner was not negligence. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Stinger*, 78 Pa. St., 219. 1875.

36. — The evidence in this case was sufficient to warrant the trial court in sending it to the jury and to uphold the verdict. *Gibbs v. Chicago, Milwaukee and St. Paul R'y Co.*, 26 Minn., 427. 1880.

37. — The blowing of a steam whistle, and the letting off of steam, are not *per se* acts of negligence, or evidence of wrongful conduct on the part of those in charge of a railroad train. But when those acts are done carelessly, heedlessly and without any necessity therefor, they may become acts of negligence, and the railroad company be responsible for injuries caused thereby. *Culp v. Atchison and Nebraska R. R. Co.*, 17 Kans., 475. 1877.

38. — Negligently and wantonly sounding a whistle, so that horses lawfully near are caused to run off and inflict an injury, renders a railway company liable to the one injured by the intervening agency. Facts showing a necessity, or a reasonable excuse, for the use of the whistle, render a different rule applicable. *Billman v. Indianapolis, Cincinnati and Lafayette R. R. Co.*, 76 Ind., 166, 1881; 6 Amer. & Eng. R. R. Cases, 41.

39. — Where it is alleged and denied that the blowing of a whistle was the cause of an accident, it is for the jury to say whether the whistle was blown in an unnecessary and extraordinary manner, and whether the

Abatement—Answers.

accident was caused thereby. *Philadelphia and Reading R. R. Co. v. Killips*, 88 Pa. St., 405, 1879.

40. Wilful act of employes. Where the employes of a railway company, while in the discharge of their duties, pervert the appliances of the company to wanton and malicious purposes to the injury of others, the company is liable for such injuries. *Chicago, Burlington and Quincy R. R. Co. v. Dickson*, 63 Ill., 151, 1872; 7 Amer. R'y Rep., 45.

41. — Because of the absolute necessity for more stringent rules in the protection of life and property against the perils of the steam-engine with its capacity for mischief, the common law rule, that the master is not liable for the tortious acts of his servant committed without the scope of his employment, does not apply to railway companies. *Nashville and Chattanooga R. R. Co. v. Starnes*, 9 Heiskell (Tenn.), 53, 1871; 19 Amer. R'y Rep., 280.

42. — If the alarm whistle of a locomotive is needlessly sounded in the rear of a team while traveling in a narrow lane near the railroad track, and is continued while the horses are running away with the plaintiff and his conveyance, the engineer having full knowledge that they are running away, and until the train comes abreast of the team, whereby the conveyance is overturned and the plaintiff injured, such sounding of the whistle is wanton, wilful and reckless, if not malicious. *Chicago, Burlington and Quincy R. R. Co. v. Dickson*, 88 Ill., 431, 1878; 21 Amer. R'y Rep., 328.

43. — Under §§ 3033 and 3368 of the Code, a railway company is responsible for damages done to any person by the carelessness or negligence or improper conduct of its agents in or by the running of the cars or engines of the company, and the presumption fixed by the first of the sections cited against the company is not rebutted by proof that the engineer whose negligence, carelessness and improper conduct in the use of the whistle caused the injury was prompted by personal malice and revenge toward the plaintiff, but the plaintiff may recover from the company the same amount of damage for the injury as if it had been a case of carelessness and improper conduct unmixed with personal grievances of the en-

gine-driver. *Ga. R. R. Co. v. Newsome*, 60 Ga., 493, 1878.

GARNISHMENT.

See EXPRESS COMPANY; MORTGAGE.

1. Abatement; pendency of another suit. Where a garnishee, in his answer, shows that prior suits are pending against him in which his indebtedness to the defendant in attachment is involved, so that it is impossible for him to state what amount, if anything, he may owe when the prior litigation is adjusted, and no issue is taken upon the answer, it is error to render judgment against the garnishee. *Cairo and St. Louis R. R. Co. v. Hindman*, 85 Ill., 521, 1877.

2. Alteration of writ. A writ of foreign attachment is not illegally altered, by changing the name of an alleged trustee from Azro Jones to Azro H. Jones after service on other parties, and then attempting to serve upon him as a new name under the statutory provision allowing the names of new trustees to be inserted under certain circumstances, the service proving ineffectual, and the plaintiff claiming only to hold another distinct and unconnected trustee. *Bowler v. European and North American R'y Co.*, 67 Me., 395, 1877.

3. Answers. The sufficiency of garnishee answers determined. *Nutter v. Framingham and Lowell R. R. Co.*, 131 Mass., 231, 1881.

4. — If the answer of a garnishee shows that the defendant has performed services for him, under a contract which is still subsisting, but does not show the time when, by the terms of the contract, the compensation for his services is to be paid, he cannot claim to be discharged on his answer. *South and North Ala. R. R. Co. v. Falkner*, 49 Ala., 115, 1878.

5. — To an answer by a garnishee, that nearly four years after the service of summons the plaintiff had amended his affidavit of garnishment by striking out the name of the debtor "Jonathan" and inserting instead the name "Johnson," and that before said amendment the garnishee had fully paid said "Johnson," without notice, etc., it was replied that the principal defendant was as well known, at the commencement of the

Attachment Proceedings in Sister State Pleaded in Bar — Connecting Lines.

suit, by the name "Jonathan" as "Johnson," which was well known by the garnishee before he paid said "Johnson." *Held*, that the reply was good on demurrer. *Baltimore, Ohio and Chicago R. R. Co. v. Taylor*, 81 Ind., 24. 1881.

6. — Where a garnishee admits an indebtedness in his answer, or it is established against him on a contest of his answer, he may reduce the amount of the plaintiff's recovery against him by showing that another creditor has recovered a judgment in garnishment against him, which he has paid; but he cannot complain of the rejection of such garnishment and judgment as evidence, when he does not show that his indebtedness was less than the amount of the two judgments rendered against him. *New Orleans, Mobile and Chattanooga R. R. Co. v. Long*, 50 Ala., 498. 1874.

7. Attachment proceedings in sister state pleaded in bar. In a suit for money due on contract, it is a sufficient defense to show that the money sought to be recovered has been attached by process of garnishment duly issued by a court of a sister state, in an action there prosecuted against the plaintiff by his creditors, although it appear that the plaintiff and such creditors are all residents of the state in which the former action is brought. *Baltimore and Ohio R. R. Co. v. May*, 25 Ohio St., 347, 1874; 10 Amer. R'y Rep., 155.

8. Baggage in transit. A garnishment directed to the Western R. R. Co. of Alabama, a corporation of that state, and served on its local agent at Columbus, Ga., did not bind the company as to the trunk of a passenger which was, at the time of the service, *en route* with the passenger in the state of Alabama, on the way over the company's road from Columbus, Ga., to West Point, Ga. As the trunk was not in reach of process issued by the state when the garnishment was served, that it was subsequently brought by the company into the state at West Point in the due performance of its contract with the passenger, would not render the garnishment effective; more especially as Columbus and West Point are in different counties, and as it was not made to appear that the local agent at Columbus had any power or authority to control the

custody or disposition of the trunk at West Point. *Western R. R. Co. v. Thornton*, 60 Ga., 300. 1878.

9. Bonds. The bonds of a railway company, not sold and negotiated, but merely pledged by it as collateral security, when discharged and surrendered are not property of the company liable to be reached by garnishment against an officer of the company receipting for the same, but who in fact never received them. *Galena and Southern Wisconsin R. R. Co. v. Stahl*, 103 Ill., 67. 1882.

10. Cars of connecting line cannot be held by garnishment. A railroad company is not liable to garnishment for cars received of a connecting line, under running arrangements existing between them, such as are usually adopted by connecting lines throughout the country, whereby, instead of unloading and transferring their freight from the cars of one company to the cars of the other at the points of connection, each received from the other the cars loaded with freight and hauled them to the place of destination on its own line of road, and, after discharging the freight, returned the cars as soon as practicable in due course of business. *Michigan Central R. R. Co. v. Chicago and Michigan Lake Shore R. R. Co.*, 1 Bradwell (Ill.), 399. 1878.

11. Cashier of company. C. was the cashier and auditor of a railway company, and was garnished as a debtor holding funds of the latter. After service of the process he surrendered the key of the safe to another employe, who in his absence removed the funds of the company therefrom; in his capacity as an employe of the company, he acted under the orders of a general manager, who had the entire control and disposition of the money of the company in the hands of the cashier. *Held*, that the cashier was liable as garnishee. *First National Bank of Davenport v. Davenport and St. Paul R. R. Co.*, 45 Ia., 120. 1876.

12. Connecting lines. Money received by the cashier of a railway company, from its agents along its line, as proceeds of the sale of tickets and for freight, and held by him as such cashier, though collected for other connecting companies and credited to them on his company's books, is still the money of his company and subject to a

Contract — Lessee of Railway.

judgment against it; the connecting companies having no specific interest therein. *Everdell v. Sheboygan and Fond du Lac R. R. Co.*, 41 Wis., 395. 1877.

13. Contract. Process of garnishment cannot be made to operate so as to annul the contracts of parties, or to subject a party to recovery by the creditor of his creditor, when the latter could not himself recover. *McPherson v. Atlantic and Pacific R. R. Co.*, 66 Mo., 103. 1877.

14. Corporation. Where a judgment is rendered in the circuit court, process of garnishment can be sent to any county in the state where the garnishee may be found, and in this respect there is no difference between natural persons and corporations. Either may be served as garnishee. *Toledo, Wabash and Western R'y Co. v. Reynolds*, 72 Ill., 487. 1874.

15. Corporation organized in two or more states. Garnishment proceedings against a corporation considered; and *held*, that such corporation, organized under the laws of two different states, may be garnished in either. *Mahany v. Baltimore and Ohio R. R. Co.*, 15 West Va., 609. 1879.

16. Error; equitable relief. Where, in a garnishment proceeding, a justice of the peace having jurisdiction of the person of the garnishee, as well as of the subject matter, renders an erroneous judgment against him, from which he neglects to appeal, a court of equity will not grant relief. *Burlington and Missouri River R'y Co. v. Hall*, 37 Ia., 620. 1873.

17. Execution; validity. A valid garnishment cannot be had upon an invalid execution. *Kentzler v. Chicago, Milwaukee and St. Paul R'y Co.*, 47 Wis., 641. 1879.

18. Foreign attachment; equity. The General Statutes, tit. 1, § 324, provide that where a debt or goods are attached by process of foreign attachment, as the property of the debtor therein, and are claimed by another party, whose demand for them is refused by the garnishee because of such attachment, such party may bring a bill in equity, in the nature of an interpleader, against all the parties to such attachment, and that the court shall have full power to decide as to the ownership, and do justice between the parties. *Held*, that the court

of equity was authorized to take entire jurisdiction of the matter. *Darrow v. Adams Express Co.*, 41 Conn., 525. 1874.

19. Foreign corporation. A foreign corporation is liable to garnishment, the same as a domestic corporation. *Hannibal and St. Joseph R. R. Co. v. Crane*, 102 Ill., 249, 1882; *Selma, Rome and Dalton R. R. Co. v. Tyson*, 48 Ga., 351, 1873; *Pennsylvania R. R. Co. v. Peoples*, 31 Ohio St., 537, 1877.

20. — Exemption from garnishment in another state, where the debtor resides, cannot be pleaded by a garnishee in Iowa, unless the amount due the debtor from the garnishee is also exempt by the laws of Iowa. *Leiber v. Union Pacific R'y Co.*, 49 Ia., 688. 1878.

21. — A writ was served by foreign attachment on the treasurer of a corporation. The corporation made its garnishee's affidavit by its assistant treasurer. *Held*, that the affidavit was legal. *Duke v. Rhode Island Locomotive Works*, 11 R. I., 599. 1877.

22. Foreign state. A garnishment in a foreign state may be introduced in evidence without first introducing proof of the law of such state. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Conway*, 57 Ind., 52. 1877.

23. Goods in hands of carrier. A railway company, being garnished, disclosed by its agent that, as a common carrier, it had in its possession goods consigned to the principal defendant, but the agent did not know whether they belonged to such defendant, and had no personal knowledge of his business or of other consignments. *Held*, insufficient to make the company liable as garnishee in a proceeding before a justice. *Walker v. Detroit, Grand Haven and Milwaukee R. R. Co.*, 49 Mich., 446, 1883; 9 Amer. & Eng. R. R. Cases, 251.

24. Jurisdiction. Where the defendant in attachment is personally present in court the garnishee is not required to question the jurisdictional legality of the proceedings or their regularity as to the defendant, nor is he in a condition to do so. *Ohio and Mississippi R'y Co. v. Alvey*, 43 Ind., 180. 1873.

25. Lessee of railway. The lessee of a railway is not bound to answer irrelevant interrogatories. *Rhine v. Danville, etc., R. R. Co.*, 10 Philadelphia, 336. 1874.

Mortgage — Proceedings in Rem.

26. Mortgage. The earnings of the Eastern R. R. Co. accruing after the mortgage authorized by the statutes of 1876, ch. 236, took effect, may, so long as the company remains in the use and control of its property, be attached by trustee process, to secure a claim accruing since that date for negligently injuring the property of the plaintiff at a highway crossing, such claim being "operating expenses" within the meaning of those words in the statute. *Smith v. Eastern R. R. Co.*, 124 Mass., 154. 1878.

27. — The earnings of a railway company from the operation of its road, though mortgaged to secure the payment of certain bonds, before foreclosure or possession taken by the trustee, may be reached by other creditors of the company, and is liable to garnishment, where the mortgage provides that, until default, the company may possess and use the road, etc., and receive the rents, profits and increase arising therefrom. *Mississippi Valley and Western R'y Co. v. United States Express Co.*, 81 Ill., 534. 1876.

28. — net income. A general judgment creditor of a railway company, in a case where the trustees under a prior mortgage of the road and income never obtained possession of the road, or demanded the income, was held entitled, by virtue of a garnishment of the officers of the railroad company, to the net income of the road between the date of a decree of foreclosure and the appointment of a special receiver, the decree of foreclosure being silent as to such income, and the road meanwhile being operated by the company. *Gilman v. Illinois and Mississippi Telegraph Co.*, 1 McCrary (U. S. C. C.), 170. 1874.

29. Officer of corporation. The cashier or other officer of a railway company is subject to garnishment for money or property of the company in his possession as such, under the statute. *Everdell v. Sheboygan and Fond du Lac R. R. Co.*, 41 Wis., 395. 1877.

30. — Where a secretary of a corporation received from the payee a check drawn by the corporation in favor of its creditor, and collected the money and paid it out to the creditor of the payee of the check, the corporation did not become again liable for anything done by its secretary not for the benefit of the corporation. *East Line and*

Red River R. R. Co. v. Terry, 50 Tex., 129. 1878.

31. Order of payment. In Kansas, an order of a court in a proceeding in aid of execution, directing a garnishee to pay to the judgment creditor money which he owes to the judgment debtor, is not a judgment, and does not determine finally the liability of the garnishee. *Atlantic and Pacific R. R. Co. v. Hopkins*, 94 U. S., 11. 1876.

32. Payment. Payment in good faith, and without knowledge of the service of trustee process, will discharge the trustee, although legal service upon him had been made before such payment. The true name of the employe was not given to his employer in this case. *Landry v. Chayret and Nashua and Rochester R. R. Co.*, 58 N. H., 89. 1877.

33. — Where a corporation is summoned as trustee, and the service is made on an officer of the corporation away from its office and place of business, and the debt due the principal defendant from the trustee is paid by another officer of the corporation, acting in his ordinary course of business and line of duty, without actual notice of the service of the trustee writ, or reasonable cause to believe that such service had been made at the time of payment, and it appears that the corporation, or its officer upon whom service was made, was guilty of no negligence in giving notice to the officer making the payment, the trustee will be discharged. *Lyon v. Russell*, 72 Me., 519. 1881.

34. Place of payment in another state. In garnishee proceedings in a court of Wisconsin against a resident of that state, where the court has obtained jurisdiction of the principal debtor, the fact that the garnishee's indebtedness to the latter is by its terms payable at a particular place in another state, where the principal debtor resides, is no defense. *Commercial National Bank v. Chicago, Milwaukee and St. Paul R'y Co.*, 45 Wis., 172. 1878.

35. Proceedings in rem. Where, in an action against a non-resident defendant, which was commenced by attachment served by garnishing a supposed debtor of the defendant, and the defendant was served by publication only, the answer of the garnishee showed that it was not indebted to the defendant at the time of the service of the

Receiver — Stock and Stockholder.

attachment; it was held that the court acquired no jurisdiction to proceed in the action, though such answer disclosed an indebtedness to the defendant at the time it was made. *Morris v. Union Pacific R. R. Co.*, 56 Ia., 135. 1881.

36. Receiver. The earnings of a railroad are attachable in the hands of a trustee, although they came into his possession as the receiver of a connecting railroad. *First National Bank of St. Johnsbury v. Portland and Ogdensburg R. R. Co.*, 2 Federal Reporter, 831. 1880.

37. Rights acquired by garnishment. A garnishing creditor can acquire no higher rights against the garnishee than the principal debtor had when the process was served. *Oregon R'y and Navigation Co. v. Gates*, 10 Oreg., 514. 1882.

38. Salary of officer. When a garnishment is issued out against a railroad company as the debtor of its president, and its answer states that he has performed services for it as president, but that his salary has not been fixed by the board of directors, judgment may be rendered against the company, on its answer, for the amount admitted therein to have been paid to his immediate predecessors for the performance of the same services; although the answer further states that the president has in his hands a large amount of money and other property belonging to the company, for which he has never accounted, but as to which he is not in default. *South and North Ala. R. R. Co. v. Falkner*, 49 Ala., 115. 1873.

39. — The salary of the president of a railroad company is not exempt from attachment or garnishment under the act of 1863 (Session Acts 1863, p. 249), which exempts "the wages of laborers and employes;" but one-half of it may be claimed as exempt under former laws (Rev. Code, § 2833), if he is the head of a family, and has not more than \$500 worth of exempt property. *Ib.*

40. Scire facias. *Scire facias* may be maintained against a trustee in the name of the assignee of the original judgment. *Ware v. Bucksport and Bangor R. R. Co.*, 69 Me., 97. 1879.

41. — In a suit against a garnishee by *scire facias*, and judgment therein by default, it cannot be alleged on error that the

writ of attachment, as appears by the record of the proceedings against the defendant in attachment, was not duly served on such garnishee. The recital in the *scire facias* that the writ was duly served on the garnishee, and the judgment by default, are conclusive against him. *Young v. Delaware, Lackawanna and Western R. R. Co.*, 38 N. J. Law, 502. 1875.

42. Service of garnishment. Service of garnishment on a domestic corporation, whose president resides in this state, must be upon the president, and cannot be effected upon a subordinate officer or agent, though the president be temporarily absent. *Steiner v. Central R. R. Co.*, 60 Ga., 552. 1878.

43. — The "general or special agent" of a corporation upon whom a summons in garnishment may be served (Comp. L., § 6463) is an agent having a controlling authority, either generally or in respect to some particular department of corporate business. *Lake Shore and Michigan Southern R'y Co. v. Hunt*, 39 Mich., 469. 1878.

44. Set-off. The right of set-off in garnishment determined. *Nutter v. Framingham and Lowell R. R. Co.*, 132 Mass., 427. 1882.

45. Station agent. The station agent of a railway company, in a suit against it, is chargeable as trustee for money collected from the sale of passenger tickets and for freight carriage. *Bank v. P. and O. R. R. Co.*, 58 N. H., 104. 1877.

46. Statute; Maine. The statute of Maine in relation to trustee process construed. *Donnell v. Portland and Ogdensburg R. R. Co.*, 73 Me., 567, 1892; 9 Amer. & Eng. R. R. Cases, 139.

47. Stipulation. A stipulation that, if the court finds for the plaintiff, the judgment shall be for a given sum is no evidence of the garnishee's indebtedness. *Cairo and St. Louis R. R. Co. v. Killenberg*, 92 Ill., 142. 1879.

48. Stock and stockholder. A stockholder can only be made liable to an execution creditor of the corporation on garnishment when he is in default to the corporation for instalments due on his stock, or for calls made by the directors. *Simpson v. Reynolds*, 71 Mo., 594. 1880.

Subscription to a Railway by a County — Wages of Employees.

49. — The shares of a stockholder in a joint stock company, incorporated by and conducting its operations, in whole or in part, in the state, are such estate as is liable to be attached in a proceeding instituted for that purpose by one of the creditors of such stockholder; and such estate may properly be considered, for the purpose of such proceeding, as in the possession of the corporation in which the shares are held, and such corporation may properly be summoned as garnishee in the case. *Chesapeake and Ohio R. R. Co. v. Paine*, 29 Grattan (Va.), 502. 1877.

50. — In such a proceeding, if the stock should appear to be liable to the lien of the attachment, it ought to be sold for the satisfaction of the same under an order of the court made for that purpose in the attachment proceeding; but it is error for the court to render a judgment against the garnished corporation for the value of the stock, unless it appear that the lien of the attaching creditor on the stock was lost by the act of the corporation. *Id.*

51. Subscription to railway by a county. It is not competent for a railroad creditor to subject an unpaid balance of a county subscription to the satisfaction of his claim against the company, by attachment, etc., and decree over against the county, to be made effectual through process of the chancery court to compel the assessment and collection of the necessary taxation, these being compellable only by *mandamus*, etc.; but the creditor may, by attachment and injunction, fasten a lien upon the unpaid balance of the subscription, and have secured to him by decree the right of the company to apply to the circuit court to compel the assessment and collection by the county of the necessary tax, and its payment to himself when collected; or the chancellor may carry out by decree in the case any arrangement between the creditor and the company for securing to the former a preference over the other creditors of the latter. *Humphreys County v. McAdoo*, 7 Heiskell (Tenn.), 585. 1872.

52. Trust. A proceeding by garnishment in behalf of a judgment creditor is ordinarily intended to reach such rights, credits and effects only as are of a legal

nature, and not incumbered with trusts; when they are thus incumbered a proceeding in equity is the appropriate remedy. *Galveston, Harrisburg and San Antonio R. Co. v. McDonald*, 53 Tex., 510. 1880.

53. Verbal acceptance. The verbal acceptance of a draft, prior to the attachment, is insufficient to exonerate the company. So held where the salary of an employe had been garnished. Reversing *Ryan v. Montreal and Champlain R. R. Co.*, 2 Lower Canada Jurist, 203, 1858; on appeal, 4 ib., 38, 1859.

54. Void judgment. A garnishment, founded on a void judgment, is also void. *Railroad Co. v. Todd*, 11 Heiskell (Tenn.), 549. 1872.

55. — Where a garnishment in another state was pleaded as a defense to an action on an account, it was held competent for the plaintiff to show that the foreign judgment on which the garnishment was based was void for want of jurisdiction, because of matters extrinsic to the record. *O'Rourke v. C., M. and St. P. R. R. Co.*, 55 Ia., 332. 1880.

56. Wages of employes. The wages of a railway employe, accruing after date of service of notice of garnishment, are not held by the proceedings. *Phelps v. Atchison, Topeka and Santa Fe R. R. Co.*, 28 Kans., 165. 1882.

57. — A debtor who is married, or upon whom a family is entirely dependent for support, cannot claim as exempt from process, under ch. 280, Laws of 1861, his earnings for the sixty days next preceding the issue of such process, whether neither such debtor himself nor his family resides within this state. *Commercial National Bank v. Chicago, Milwaukee and St. Paul R'y Co.*, 45 Wis., 172. 1878.

58. — Section 36 of art. 10 of the Code embodies the substance of the acts of 1852, ch. 340, and of 1854, ch. 23, by exempting from attachment all wages not actually due, and of the wages actually due the sum of \$10. *House v. Baltimore and Ohio R. R. Co.*, 48 Md., 130, 1877; *Shryock v. Same*, 56 ib., 519, 1881.

59. — Where a railway company issues to its employes certificates of indebtedness, and is afterwards garnished on account of such

Change of.

indebtedness, it will not be liable if the payees of the certificates have sold the same before the service of garnishee process, notwithstanding such certificates are not negotiable in law. *Cairo and St. Louis R. R. Co. v. Killenberg*, 82 Ill., 295. 1876.

60. — The statute of Illinois exempting \$25 of wages due a party who is the head of a family and resides with the same, from garnishment, is not confined to residents, but applies also to wages due a non-resident. *Mineral Point R. R. Co. v. Barron*, 83 Ill., 365. 1876.

61. — The exemption law of Ohio does not extend to wages of an employe garnished in West Virginia. *Eichelburger v. Pittsburgh, etc., R'y Co.*, 9 Amer. & Eng. R. R. Cases (Ohio), 158. 1883.

62. — Wages earned and due to a citizen of Pennsylvania may be attached for a debt in another state where no law exists prohibiting the attachment of wages. *Bolton v. Pennsylvania Co.*, 83 Pa. St., 261. 1878.

63. — Where a railway company, existing under the laws both of Wisconsin and of another state, has been garnished in the latter state in an attachment suit against a resident of Wisconsin, and has suffered and satisfied a judgment against it as garnishee, and is afterwards sued in Wisconsin by the attachment defendant for the same property or indebtedness for which it was thus garnished, it must be treated in such action as a domestic corporation, and presumed to know the exemption laws of Wisconsin. *Pierce v. Chicago and Northwestern R'y Co.*, 36 Wis., 283. 1874.

64. — A debt due from one who may be sued in Iowa to a non-resident, for services performed in the state of his residence, may be garnished in a suit instituted against him in the courts of Iowa,—personal service, or service by publication having been duly made on him,—although his salary has always been paid in the state where he lived, and would have been exempt by the laws of that state. *Mooney v. Union Pacific R'y Co.*, 9 Amer. & Eng. R. R. Cases (Ia.), 131. 1882.

65. — duty of garnishee to plead debtor's exemption. M. was employed in Iowa by the defendant, a corporation operating a railway in both Iowa and Missouri; a judgment

was rendered against him in the latter state by a court having jurisdiction, and wages due him by defendant were garnished, notwithstanding under the laws of Iowa they would have been exempt. *Held*, that the garnishee was not bound to interpose a defense based upon the Iowa exemption laws, and that the judgment rendered against the garnishee could not be attacked in a collateral proceeding, for the purpose of again holding defendant liable to M. *Moore v. Chicago, Rock Island and Pacific R. R. Co.*, 43 Ia., 395. 1876.

66. — A garnishee is not a party to an action in the sense that he is required to make defense for either of the parties, between whom he is presumed to be indifferent respecting the merits of the case. *Ib.*

67. — A judgment *in rem* in such case, rendered in one state by a court of competent jurisdiction, cannot be assailed in another by a party to the record, who claims the subject matter of the judgment. *Ib.*

68. — A railway company, when garnished as the debtor of its employe for wages due him, he being the head of a family, residing with the same, is bound to set up that fact for such employe, and claim the benefit of the exemption given him by law in such cases. *Chicago and Alton R. R. Co. v. Ragland*, 84 Ill., 375, 1877; *Chicago, Rock Island and Pacific R. R. Co. v. Mason*, 11 Bradwell (Ill.), 525, 1882.

69. — A garnishee who knows that the property of the debtor in his possession, or the money which he owes such debtor, is by law exempt from levy, must bring that fact to the notice of the court; otherwise the judgment against such garnishee, and satisfaction thereof, will not bar an action against him by the attachment debtor. So held in a case where the principal debtor was not personally served with process in the attachment suit, and had no notice either of that suit or of the proceeding in garnishment. *Pierce v. Chicago and Northwestern R'y Co.*, 36 Wis., 283. 1874.

GAUGE.

See CONNECTING LINES.

1. Change of; expenses of; statute. Where a railway act provided that the ex-

Bonds of Cities—Bonds of Railway Companies.

penses of altering the gauge of a railway should be borne by several companies in equitable proportions, to be determined in case of difference by the board of trade, *held*, that the board of trade and commissioners of railways (who succeeded to the functions of the board) were not in the position of private arbitrators, but had a discretion which the court could not control, and that a bill to set aside their award, on the ground of undue delegation of authority, and the admission of *ex parte* statements, could not be sustained. *Newry Railway Co. v. Ulster Railway Co.*, 8 De Gex, McNaghten & Gordon, 487; 57 Eng. Ch., 487, 1856; 39 Eng. Law & Equity, 553.

GRANTS.

See EMINENT DOMAIN; LAND GRANTS.

GRATUITOUS PASSENGER.

See BAGGAGE; INJURIES TO PASSENGERS.

GUARANTY.

1. Bonds of cities. The city of Memphis issued bonds, with interest coupons. The Memphis and Charleston R. R. Co. indorsed upon the bonds a guaranty of prompt payment and interest. *Held*, a holder of a detached coupon may sue the guarantor in his own name, and he is not required to use the name of the holder of the bond. *Taylor v. Memphis and Charleston R. R. Co.*, 11 Lea (Tenn.), 186, 1883.

2. — A railroad company is bound as indorser of a negotiable bond issued by a municipal corporation, payable to the railroad company or assigns in twenty years, which the company has transferred by indorsement, the municipal corporation having failed to pay on demand at maturity, and the proper steps having been taken to charge the company as indorser. *Bonner v. New Orleans*, 2 Woods (U. S. C. C.), 135. 1875.

3. Bonds of manufacturing company. An act of assembly authorizing a certain railway company to guaranty the bonds of any incorporated company, individual or

firm engaged in any manufacture in any county through which said railway company's line may pass is a private and not a public act. *Timlow v. Philadelphia and Reading R. R. Co.*, 99 Pa. St., 234. 1882.

4. Bonds of railway companies. One railway company may, for a sufficient consideration, guaranty the bonds of another company. *Low v. California Pacific R. R. Co.*, 21 Amer. R'y Rep., 199; 52 Cal., 53. 1877.

5. — The defendant, in pursuance of an agreement made with the Boston, Hartford and Erie R. R. Co., guarantied the payment of the interest on certain bonds issued by the latter company. Subsequently these bonds came into the possession of the defendant, and some of them were by it, for a valuable consideration, transferred to the plaintiff's testator. In an action brought to recover interest falling due on such bonds, *held*, that the defendant, having itself transferred the bonds and received the avails thereof, was estopped from denying its liability upon its guaranty of the coupons. *Arnot v. Erie R'y Co.*, 5 Hun (N. Y.), 608. 1875.

6. — Even if the guaranties, when made, were *ultra vires*, and, therefore, not binding, defendant, having transferred the bonds with the guaranties thereon uncanceled, it was to be presumed that they were intended to be, and were, taken by the purchaser as additional security and as a part of the purchase; that they were to be treated as if written at the time of the transfer, and, so treating them, it was immaterial that the true consideration was not expressed therein. *Same v. Same*, 67 N. Y., 315. 1876.

7. — In an action by stockholders to enjoin a railway company from the payment of further interest upon the bonds of another corporation which it had indorsed, and also to restrain it from consummating the purchase of the railway of said corporation, it was held that, under the facts of the case, it was not erroneous to refuse an injunction, as the agreement in question had been in force and acted upon for nearly five years. *Cozart v. Ga. R. R. and Banking Co.*, 54 Ga., 379. 1875.

8. — Where a railroad company has, under general statute, though not by charter, authority to guaranty the payment of the

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bonds of another such company, in an action upon the guaranty it is not necessary to set forth in the declaration such authority for making the indorsement. *Toppan v. Cleveland, Columbus and Cincinnati R. R. Co.*, 1 Flippin (U. S. C. C.), 74. 1863.

9. — Where one railroad company holds stock in another, and the latter's road, when constructed, will become a feeder to the former's line, there is a sufficient consideration for the guaranty by the former of bonds issued by the latter to aid in the construction of its road. *Harrison v. Union Pacific R'y Co.*, 13 Federal Reporter, 522. 1832.

10. — The holder of bonds issued by a company in which he is a stockholder, and guarantied by another corporation, may recover the full amount due upon the bonds from the latter company, in case of default in payment by the former. *Harrison v. Union Pacific R'y Co.*, 13 Federal Reporter, 522. 1832.

11. **Contractor's debts.** An agreement in behalf of a railway company to pay the debts of a contractor, though in writing, must be founded upon a sufficient consideration or it will not be enforced. *Winkler v. Chesapeake and Ohio R. R. Co.*, 12 W. Va., 699. 1878.

12. — An agreement to pay the laborers out of the funds of the contractors in the hands of the company is valid. *Handley v. Same*, 9 ib., 474. 1876.

13. **Statute of frauds.** A verbal guaranty of notes delivered to a contractor in payment for his work is not within the statute of frauds. *Mobile and Girard R. R. Co. v. Jones*, 57 Ga., 193. 1876.

14. **Ultra vires; pledge of rolling stock.** A railway company being in want of money, and being advised that it had no power to borrow, sold part of its rolling stock to a wagon company for £30,000, at the same time making a contract with the wagon company for the hire of this rolling stock at a rent which would repay the £30,000 and interest in five years. At the same time three of the directors of the railway company guarantied to the wagon company the payment of the rent. The wagon company brought an action against the sureties and the railway company for rent due. *Held*, that on the evidence the alleged sale and hiring were

in fact a borrowing of £30,000 on the security of the rolling stock; that this was an illegal and void transaction under 7 and 8 Vict., c. 85, s. 19, and 30 and 31 Vict., c. 127, s. 4; and that this defense was available both in law and in equity. *Held*, nevertheless, that the guaranty was valid, and the sureties were liable under it. *Yorkshire R'y Wagon Co. v. Maclure*, Law Reports, 19 Chancery Division, 478. 1891.

15. — Kay, J., having held that the transaction was void as against the railway company, but could be enforced against the sureties, *held*, by the court of appeal, that the transaction was not a borrowing of money, but a *bona fide* sale and hiring of the rolling stock, and was valid both against the railway company and the sureties. *Yorkshire R'y Wagon Co. v. Maclure*, Law Reports, 21 Chancery Division, 309. 1893.

HARBOR.

See EMINENT DOMAIN; RIGHT OF WAY.

1. **Filling in flats; streets.** A corporation was empowered by the legislature to fill in flats within a harbor, and a city was authorized to lay out streets over the flats within a certain time. The city laid out streets within the time, and, after the time had expired, discontinued one of the streets, except a small part at one end, and laid out a street which, beginning at a different point, took in the part not discontinued, and ran in a somewhat different direction. *Held*, that the second street was a new street, and not merely an alteration of the first one. *New York and New England R. R. Co. v. Boston*, 127 Mass., 229. 1879.

2. — Upon an information by the attorney-general under the St. of 1866, ch. 149, to restrain the defendant from filling in its flats without the authority of the harbor commissioners, it appeared that the defendant began the work prior to the passage of the statute, and that the extent of the flats which it intended to fill up had not, when the information was filed, been defined by any legislative act or by any line of wall or piles except by a sea wall built along one side and about a fourth part of the flats,

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thence turning and running back a short distance towards the upland and there stopping. The further direction of the wall was not indicated except as its course might be surmised from the fact that piles had begun to be driven for a continuation of the proposed line and by a plan of the work on paper. *Held*, that the defendant was not exempt from the supervision of the harbor commissioners under the St. of 1866, ch. 149, §§ 4, 5, excepting from their supervision such erections upon flats covered by tide waters as had been begun before the passage of the statute. *Attorney-General v. Boston and Lowell R. R. Co.*, 118 Mass., 345. 1875.

HEADLIGHT.

See INJURIES TO DOMESTIC ANIMALS; INJURIES TO PERSONS ON THE TRACK.

HEDGE.

1. Obstruction of railway. Where a hedge planted by the owner on his own land is suffered to grow and extend over the right of way of a railway company so as to obstruct it, the company will have the clear right, and it is its duty, to trim such hedge, doing no unnecessary damage. *Toledo, Wabash and Western R'y Co. v. Green*, 67 Ill., 199. 1873.

HIGHWAY.

See CERTIORARI; CONSTRUCTION OF RAILWAYS; EJECTMENT; EMINENT DOMAIN; INJURIES TO DOMESTIC ANIMALS; INJURIES TO EMPLOYEES; INJURIES TO PERSONS ON THE TRACK; MANDAMUS; MUNICIPAL CORPORATION; NUISANCE.

I. ESTABLISHMENT AND ALTERATION OF HIGHWAYS.

II. CROSSINGS.

III. OBSTRUCTION OF HIGHWAYS.

IV. CONSTRUCTION OF RAILWAYS.

V. TAKING HIGHWAY FOR RAILWAY PURPOSES.

VI. ADVERSE ENJOYMENT.

VII. INJURIES TO PERSONS BY DEFECTS IN HIGHWAYS.

VIII. REPAIRS.

I. ESTABLISHMENT AND ALTERATION OF HIGHWAYS.

1. Damages; jury. The owner of land taken for the laying out or altering of a highway is entitled to a jury under the Statutes of 1870, ch. 75, and 1873, ch. 261, although he has not claimed damages before the county commissioners. *Gilman v. City of Haverhill*, 1 Amer. & Eng. R. R. Cases (Mass.), 20. 1879.

2. Establishment. On a petition for the laying out of a town way, the selectmen ordered notice to be given to the land owners that the selectmen would meet at a time and place named, and "proceed to view the route set forth in said petition, to hear all persons interested therein, who may then and there desire to be heard thereon; and if they shall adjudge the prayer of said petition ought to be granted, they will then proceed to lay out and locate a road over said route, agreeable to said petition." *Held*, that a notice given in accordance with this order was insufficient. *Fitchburg R. R. Co. v. City of Fitchburg*, 121 Mass., 132. 1876.

3. — By Gen. Stats., ch. 233, §§ 7, 8, when all the selectmen are disqualified to act, they may appoint a board to hear and determine a petition for a new highway; but if there remain one of the board who is qualified, he must appoint those who are to take the place of the persons who are disqualified. *Northern R. R. Co. v. Enfield*, 57 N. H., 508. 1876.

4. Evidence of establishment. Where the evidence showed that a road intersected by a railroad was traveled by the public and had been worked and repaired by the authorities having charge of highways in that district, it was held *prima facie* evidence that it was a public highway, legally established, and sufficient to require a railroad company, when sued for injury caused by a neglect to ring a bell or sound a whistle when approaching the same, to show that it was not legally established, in order to excuse itself from liability for neglect of this duty. *Illinois Central R. R. Co. v. Benton*, 69 Ill., 174. 1873.

5. Taking for railway. It having been held that the petitioner obtained no title to

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the lands, as against the owners of the fee, by the legislative permission to lay down its tracks on a certain highway on which it had built its road, orders made on an application by them for the appointment of commissioners to assess the value of the lands, for the purpose of compensating the owners, should be sustained on the ground that the case comes within that part of the general railroad act (ch. 140, Laws of 1850) which permits a railroad company to perfect a title found defective. *Prospect Park and Coney Island R. R. Co., In re*, 8 Hun (N. Y.), 80. 1876.

6. — An appeal to the township board from the decision of a highway commissioner in awarding damages for railway property taken for a highway is provided for by Comp. L., § 1264; and if the only question is as to the amount of damages, *certiorari* will not lie to the commissioner to remove the proceedings to the supreme court, where no reason is given for not resorting to the remedy by appeal. *Detroit and Bay City R. R. Co. v. Graham*, 46 Mich., 642. 1881.

7. **Width.** Under Gen. Stat. R. I., ch. 59, §§ 1-7, a town council, in its decree declaring a highway necessary, and appointing a committee of lay out, need not specify the width of the proposed highway. *Boston and Providence R. R. Co. v. Lincoln*, 13 R. I., 705. 1882.

II. CROSSINGS.

8. **Bridge.** A railway company being about to erect a bridge over its road at a road crossing, the present plaintiff, who was interested in the road, objected, and requested that it make instead a grade-crossing. Afterward he changed his mind, and when the grade-crossing was half made demanded a bridge, which the company refused to build. In an action against the company, *held*, that the plaintiff could not recover the additional damage resulting to him in consequence of the company having made a grade-crossing instead of a bridge. *Kansas City, St. Louis and Chicago R. R. Co. v. Furrell*, 76 Mo., 183. 1882.

9. — The duty of restoration of "the

highway as near as may be to its former state, so as not to unnecessarily impair its usefulness," imposed by its charter upon the N. Y., N. H. and H. R. R. Co., does not absolutely require it, at such a crossing, to construct a bridge of the full width of the highway; the requirement is simply to so construct the bridge as, in view of the circumstances, not unnecessarily to impair the use of the highway. *People v. New York, New Haven and Hartford R. R. Co.*, 89 N. Y., 266, 1882; 10 Amer. & Eng. R. R. Cases, 230.

10. — The construction by a railway company, whose road crosses a highway below grade, of a bridge of less grade than the highway is not *per se* a nuisance. *Ib.*

11. — **approaches.** Under s. 46 of the Railways Clauses Consolidation Act, 1845, 8 and 9 Vict., c. 20, a railway company which, in carrying its railway over a highway by a bridge, lowered the level of the highway, is not bound to keep the slope of the road in repair as being part of the approaches on each side of the bridge. *London and North Western Ry Co. v. Skerton*, 5 Best & Smith, 559; 117 E. C. L., 558. 1864.

12. — Such repair includes not only the structure of the bridge and the approaches, but the metaling of the road on both. *North Staffordshire Ry Co. v. Dale*, 8 Ellis & Blackburn, 886; 92 E. C. L., 835. 1858.

13. — By the "North Staffordshire Railway Act, 1847" (10 and 11 Vict. c. cviii), with which is incorporated the Railways Clauses Consolidation Act, 1845, it is enacted "that where the railway is proposed to cross the turnpike road leading from Newcastle-under-Lyne to Leek, the company shall erect a proper and sufficient, bridge constructed of bricks, stone, iron or other materials, so as to carry the said turnpike road over and across the railway; such bridge also to be constructed with parapet walls of brick, stone or other materials, of five feet in height, and of the clear and open width of thirty-three feet at the least between such parapets; and that the said turnpike road shall be made and altered at the expense of the company, on both sides of such bridge, so that the surface of the turnpike road shall, when completed, have one uniform inclination on both sides, not exceeding one in

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thirty; and that so much of the said turnpike road as shall be broken up or damaged for the purposes of this act shall be reinstated and made good with the same materials as the road is now composed of, and the fences thereof, whenever necessary, reconstructed and put into complete order by the company, and kept in repair for the space of twelve calendar months after the making, forming and completing thereof." *Held*, that, under s. 46 of the Railways Clauses Consolidation Act, 1845 (without reference to the special act), the company was bound, at all times, to keep in repair the approaches to and road over the bridge. *Newcastle-under-Lyne Road Trustees v. North Staffordshire R'y Co.*, 5 Hurlstone & Norman (Exchequer), 160. 1860.

14. — constitutional law. The act of 1874 (ch. 648, Laws of 1874), requiring the B. and A. R. R. Co. to construct a bridge in the manner specified over the R. and C. turnpike road, is constitutional. Additional burdens may, for the public good, be imposed upon railway companies. *People ex rel. v. Boston and Albany R. R. Co.*, 70 N. Y., 569, 1877; 19 Amer. R'y Rep., 321.

15. — foot-paths. The statute, 6 and 7 Wm. 4, c. 140, s. 94, authorized the defendant to build crossings, but required it to reform and relay the "road." The company built a bridge, but did not reform the footways. *Held*, that the term "road" included the footways, and that the company had not complied with the act. *Queen v. Manchester and Leeds R'y Co.*, 2 Eng. R. R. & Canal Cases, 711. 1841.

16. — repairs. The question of the grade of the railroad is not a proper element of inquiry upon the question whether the highway has been restored to usefulness. Where a railway company carries a highway over its track by a bridge, it is its duty not only to properly make the approaches to the bridge, but also to keep them in suitable repair. For a failure to comply with this duty, an indictment against the corporation for a nuisance in obstructing the highway is proper. *People v. New York Central and Hudson River R. R. Co.*, 74 N. Y., 302, 1878; reversing *N. Y. Central and Hudson River R. R. Co. v. People*, 12 Hun (N. Y.), 195, 1877.

17. — To render a railroad company liable for damages, on account of personal injuries caused by its failure and neglect to keep in repair a bridge across a public highway, it is not necessary to show that the company had knowledge of the defect in the bridge; it is its duty to exercise watchful diligence in keeping the bridge in repair, and it is chargeable with knowledge of every defect which such diligence would have discovered. *South and North Ala. R. R. Co. v. McLen-don*, 63 Ala., 266. 1878.

18. Cable cars; statute. The provision of the general railroad act (§ 28, ch. 140, Laws of 1850), giving to every railroad company authority to build its road across any intersecting street or highway, was not repealed by implication by the acts of 1869 and 1874, providing for the laying out of the highways or avenues known as "Ocean Parkway" (ch. 861, Laws of 1869; ch. 583, Laws of 1874), so far as it pertains to those highways; they are highways within the meaning of the railroad act, and railroads have the same authority to cross them as they have to cross other highways. *Stranahan v. Sea View R'y Co.*, 84 N. Y., 308. 1881.

19. — The act of 1871 has reference to railways moving cars in the ordinary way by means of locomotives; it does not include railways moving their cars by a propelling rope or cable attached to stationary power. *Id.*

20. Certiorari. If the adjudication of the county commissioners does not contain a description of the road, so that it may be ascertained from the record, a writ of *certiorari* will be granted. *Portland, Saco and Portsmouth R. R. Co. v. Comm'rs of York County*, 65 Me., 292, 1876; 10 Amer. R'y Rep., 119.

21. Change of highway. A report of county commissioners had been made and filed in the clerk's office in the circuit court, to the effect that a bridge was necessary for the public safety and convenience over a certain railroad crossing. Afterwards, on petition of a land owner, a report of the same commissioners was made and filed in the same court, laying out a substitute for the highway at that place, and discontinuing the old highway. Both petitions and reports were pending in said court in the same term.

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Held, that a motion to accept the second report and recommit the first for inquiry as to change of circumstances ought to be granted. *Nashua and Rochester R. R. Co. v. Lec*, 55 N. H., 568. 1875.

22. — Where a crossing becomes inadequate by reason of the growth of the population, it is the duty of the railway company to make such alterations as will meet the requirements of the increased use. *Cooke v. Boston and Lowell R. R. Co.*, 10 Amer. & Eng. R. R. Cases (Mass.), 328. 1888.

23. — The Illinois Central R. R. Co., being empowered in its charter to change highways intersected by its line so as to afford a more convenient crossing, or carry such highway either under or over its track, as might be found most expedient, it was held that the option to change highway crossings was vested in the company, to be exercised by it, and that the exercise of such option could not be controlled by a court of equity when there was no pretense that the company, in the execution of the power, had failed to exercise the proper care, skill and precaution. *Illinois Central R. R. Co. v. Bentley*, 64 Ill., 438. 1872.

24. **Duty to construct crossings.** The duty of a railway company to construct crossings at public roads under the statute applies only to lawful roads. *International and Great Northern R'y Co. v. Jordan*, 10 Amer. & Eng. R. R. Cases, 301 (Tex.). 1888. But after the company has constructed a crossing it is estopped from denying the existence of the road. *Ib.*

25. — Where a road is used openly and notoriously by the public as a highway, and a railroad company recognizes it as such by permitting the public to cross its track, and by assuming to maintain a public crossing at that point, it is immaterial whether the road be a legal highway or not. *Kelly v. Southern Minnesota R'y Co.*, 28 Minn., 98, 1881; 6 Amer. & Eng. R. R. Cases, 204.

26. — In the absence of express provision in its charter to the contrary, a railway company is under obligation to leave every highway that it crosses in a safe condition for the use of the public; and when this duty was imposed by the original charter under which a road was built, the same duty will rest upon any company which may after-

wards own the road, so long as the same is operated. *People v. Chicago and Alton R. R. Co.*, 67 Ill., 118. 1878.

27. **Injunction.** When the charter of a railway company requires it, if its road should cross any highway, to so construct the same as not to impede or obstruct the safe and convenient use of said highway, and empowered it to raise or lower the highway, so that the railroad, if necessary, might conveniently pass under or over it, *held*, that the crossing by it of a highway at the same level is not in itself a nuisance to the highway, nor evidence of a nuisance. A court of equity will restrain such corporation by injunction from such a crossing only when it unreasonably impedes or obstructs the safe and convenient use of the highway. *Johnston v. Providence and Springfield R. R. Co.*, 10 R. I., 365. 1872.

28. **Injury to vehicles and teams.** Where a railway company constructs its line across a highway on a level under the sanction of an act of parliament, it is its duty to keep the crossing in a proper state, and if a carriage is damaged in consequence of the rails being too high above the surface of the roadway, the company is liable. *Oliver v. North Eastern R'y Co.*, Law Reports, 9 Queen's Bench Cases, 409, 1874; 9 Eng. (Moak), 350.

29. — In an action for damages, the complaint alleged that the defendant, "by the culpable carelessness, negligence, unskilfulness and mismanagement of said defendant and its employes, wrongfully ran a locomotive with a train of cars thereto attached," against plaintiff's horses and wagon, while lawfully traveling along the public highway. *Held*, that on demurrer the complaint was sufficient, although it did not state the specific physical acts constituting the alleged negligence and carelessness. *Clark v. Chicago, Milwaukee and St. Paul R'y Co.*, 28 Minn., 69. 1881.

30. — In an action to recover damages for an injury to plaintiff's horse, received while passing over a railway crossing, the plaintiff was allowed, against the defendant's exception and objection, to show that shortly after the accident the defendant took up the planks at the crossing and replaced them by new ones. *Held*, that this was error. *Payne*

Crossings.

v. Troy and Boston R. R. Co., 9 Hun (N. Y.), 526. 1877.

31. — stalled team; contributory negligence. The act by plaintiff's servant of driving a loaded cart across the track, at a point where the ground was soft and heavy, and without any planking or other means of surmounting the rails, which projected above the ground, in consequence of which it became fast and was struck by defendant's train, though the plaintiff had a right to cross there, was in itself negligence and barred a recovery. *Gramlich v. Railroad Co.*, 9 Philadelphia, 78. 1872.

32. Obstruction to view. A railway company should not permit obstructions upon its right of way, near a crossing, which will prevent the public from observing the approach of trains on the track. *Rockford, Rock Island and St. Louis R. R. Co. v. Hillmer*, 72 Ill., 235. 1874.

33. Rate of speed. A railway company is not responsible for not slackening the speed of its train at a place where a public highway crosses its track, unless special circumstances existed which rendered such slackening necessary; and whether such necessity existed is for the jury. *Zeigler v. Railroad Co.*, 5 So. Car., 221. 1873.

34. Repairs. Railway companies are required to repair and keep in safe condition for travel the crossings which the statute requires them to construct, although the requirement does not relieve the road districts from the duty of maintaining the highway in good condition. *Farley v. Chicago, Rock Island and Pacific R. R. Co.*, 49 Ia., 234. 1875.

35. — The embankment which is constructed as a necessary approach to the railway track is in legal contemplation a part of the crossing. *Ib.*

36. Restoration. The provision in § 16 of the act of May 1, 1853, which requires a railway company to place a highway crossed or diverted "in such condition as not to impair its former usefulness," is a condition inseparable from the right or franchise granted to such company to cross the highway with its track, or to divert it from its location. *State ex rel. v. Dayton and South Eastern R. R. Co.*, 36 Ohio St., 434, 1881; 5 Amer. & Eng. R. R. Cases, 812.

37. — The duty of restoration of the highway carries with it the necessary powers for that purpose, and among them the power to take lands compulsorily where a removal or a change of the highway is necessary; and to accomplish this such lands must be acquired. *People ex rel. v. Dutchess and Columbia R. R. Co.*, 58 N. Y., 152, 1874; 7 Amer. R'y Rep., 10.

38. — Power given by a charter of a railway company to construct its road across a highway upon condition that the same be restored to its former state, "or in sufficient manner not to impair its usefulness," does not authorize the company permanently to appropriate any portion of the highway by obstructions which materially interfere with the public travel. *Little Miami R. R. Co. v. Commissioners of Greene County*, 31 Ohio St., 338, 1877; 16 Amer. R'y Rep., 278.

39. Signalmen. As a general rule, a railway company is not bound to keep a flagman at the points where its road intersects public highways. But this obligation may become due by reason of such company constructing its road so as to make the crossing or use of such highways unnecessarily dangerous. *Pennsylvania R. R. Co. v. Matthews*, 36 N. J. Law, 531. 1873.

40. — A railway company is liable for the neglect of its gate keeper, who negligently announces the track clear, when in fact a train is approaching. *Lunt v. London and North Western R'y Co.*, Law Reports, 1 Queen's Bench Cases, 277. 1866.

41. Statute. The word "track," in the provision of the act regulating "the construction of roads and streets across railroad tracks" (§ 1, ch. 62, Laws of 1863), which authorizes the laying out of "any street and highway across the track of any railroad," without compensation, signifies the entire road-bed, including turn-outs and switches. *Delaware and Hudson Canal Co. v. Village of Whitehall*, 90 N. Y., 21, 1882; 10 Amer. & Eng. R. R. Cases, 227.

42. — The statute of Massachusetts in relation to highway crossings, and the duty of county commissioners, construed. St. 1872, ch. 262. *Boston and Albany R. R. Co. v. County Commissioners*, 116 Mass., 73. 1874.

Obstruction of Highways.

III. OBSTRUCTION OF HIGHWAYS.

43. Damages. Injuries resulting from the obstruction of highways leading to the premises of the party complaining, and interfering with access to them, are proper grounds of recovery by the injured party, even though many others sustain like injuries from the same cause. *Park v. Chicago and Southwestern R. R. Co.*, 43 Ia., 686, 1876; 14 Amer. R'y Rep., 489.

44. — Where a railway company laid its track across a highway leading to the plaintiff's place of business and near thereto, and constructed it in such a manner as to cause a diversion of travel and consequent diminution in plaintiff's business, it was held that he could recover therefor. *Ib.*

45. — To determine the damages for such an obstruction, its effect upon the use and enjoyment of plaintiff's property, and upon the extent of his business, may properly be considered. *Ib.*

46. Delay in restoring highway. An action will not lie at the suit of a private party for delay in restoring a highway to a passable condition. The company may be indicted for nuisance. *Ward v. Great Western R'y Co.*, 18 Upper Canada, Queen's Bench, 315. 1856.

47. Duty to restore highway. If a railway company lays its track upon the highway, it becomes bound to the public that the highway shall be put in as good repair as it was before, and for a failure to do this it may be indicted. *Gear v. C. C. and D. R. R. Co.*, 43 Ia., 83. 1876.

48. Ditches dug by railway company. A count seeking recovery for personal injuries, occasioned by falling in a ditch dug by defendant in the public highway, and averring that the injury was suffered and caused by the gross negligence of defendant in cutting the ditch and leaving it exposed without proper safeguards, etc., is in case; and so, also, is a like count, which alleged a duty of defendant to furnish bridges, barricades, or other useful means, to protect the public from injury, which defendant failed to provide, and that plaintiff suffered the injury by reason of the gross negligence of the defendant in cutting the ditch and leaving it exposed without using proper precautions

to guard the public, etc. *South and North Ala. R. R. Co. v. Chappell*, 61 Ala., 527. 1878.

49. Hand-car. Where a hand-car was negligently left in a highway, by reason of which the plaintiff was injured while passing in the night, it was held that evidence was admissible to show that defendant's employees left the car there when engaged in the lawful business of defendant. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Sponier*, 85 Ind., 165, 1882; 8 Amer. & Eng. R. R. Cases, 453.

50. Indictment. A corporation aggregate may be indicted for a misfeasance. As, an incorporated railway company, for cutting through and obstructing a highway by works performed in a course not conformable to the powers conferred on the company by act of parliament. *Queen v. Great North of England R'y Co.*, 9 Adolphus & Ellis (N. S.), 315; 58 E. C. L., 314. 1846.

51. — Where a highway is taken for railway uses, and a new highway is not substituted within a reasonable time, the railway company is liable to indictment for nuisance. *Pittsburg, Virginia and Charleston R'y Co. v. Commonwealth*, 10 Amer. & Eng. R. R. Cases, 321 (Pa.). 1883.

52. — A statute authorized the obstruction of highways by a railway company, but required it to make a new way as convenient as the old one. A failure to make the new way as convenient as the former one was held sufficient ground for an indictment for nuisance for the obstruction of the old highway. *Regina v. Scott*, 3 Adolphus & Ellis (N. S.), 543; 43 E. C. L., 858; 3 Eng. R. R. & Canal Cases, 187. 1842.

53. — The company having encroached on an old road without making a new one, held, that it was indictable for a nuisance, and that it was no answer to that indictment that the state of the earth rendered it impracticable to make a new road. *Regina v. Scott*, 2 Gale & Davison, Queen's Bench, 729. 1842.

54. — It is no defense to an indictment under St. 1871, ch. 83, § 1, against a railway company for occupying a highway with its cars for more than five minutes, that the occupation was accidental and could not have been avoided, and was without intent to obstruct, and that reasonable diligence

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was used in removing the obstruction; and it is no defense that the greatest care was used by the corporation in the selection of its employes; that the employes were specially instructed not to permit such occupation, and that no officers of the corporation, except such employes, had knowledge of the occupation. *Commonwealth v. New York, New Haven and Hartford R. R. Co.*, 112 Mass., 412. 1873.

55. — The railway was made parallel and adjacent to an ancient highway, and in some places came within five yards of it. It did not appear whether or not the line could have been made, in these instances, to pass at a greater distance. The engines on the railway frightened the horses of persons using the highway. On indictment against the company for a nuisance, *held*, that this interference with the rights of the public must be taken to have been contemplated and sanctioned by the legislature, since the words of the statute authorizing the use of the engines were unqualified; and the public benefit derived from the railway (whether it would have excused the alleged nuisance at common law or not) showed at least that there was nothing unreasonable in a clause of an act of parliament giving such unqualified authority. *Re v. Pease*, 1 Eng. R. R. & Canal Cases, 551. 1832.

56. Injunction to protect from interference by a railway company. A railway company was empowered to cut through public or private roads, provided that if the same should be thereby rendered impassable or inconvenient for the persons entitled to the use thereof, the company should previously cause another sufficient road to be made instead thereof, and equally convenient, or as near thereto as might be. On the 1st of June the company, as it was alleged, had completely cut through a certain public road without having complied with the provisions of the act, by previously causing such a substituted road to be made, whereby the plaintiffs sustained special damage. On the 25th day of June the plaintiffs filed their bill, praying an injunction to restrain the company from continuing to cut through or stop up the road, and for other relief. *Held*, by the vice-chancellor on demurrer, that individuals who suffer a special damage

from a public nuisance may sustain a bill to be relieved therefrom, without the attorney-general being a party to the suit. *Held*, by the vice-chancellor, on motion for an injunction, that, in the case stated, the court will not only restrain the further cutting of the road, but enjoin the company from continuing to stop up the same, and thereby compel it to restore it to its original state. *Spencer v. London and Birmingham Ry Co.*, 1 Eng. R. R. & Canal Cases, 159. 1836.

57. Legality of highway. Under the Code of 1851 the disqualification or inability of the county judge to aid in a proceeding to establish a highway must have appeared upon the record, in order to enable the prosecuting attorney to act in his stead; and where the record failed to show such disqualification or inability, it was not competent evidence to show that the highway was legally established. *State v. Chicago, Rock Island and Pacific R. R. Co.*, 50 Ia., 692. 1879.

58. Municipal corporation. Where an obstruction is created in a state or county road, and the corporate limits of a municipal corporation are extended over a part of the road so obstructed, the county commissioners cannot maintain an action for the obstruction of that part of the highway which is within the limits of the corporation. *Lawrence R. R. Co. v. Commissioners of Mahoning County*, 35 Ohio St., 1. 1878.

59. Nuisance. A railway company occupying a portion of a highway not exceeding the extent allowed by law, and obstructing public travel on such portion, is not guilty of nuisance. *Danville, Hazleton and Wilkesbarre R. R. Co. v. Commonwealth*, 73 Pa. St., 29. 1873.

60. — A railway company may construct its track across any established road or way wherever it may be necessary to cross or intersect it, but it must so construct it that it will not impede the passage or transportation of persons or property over said road or way. If it so construct its railway as to be a serious inconvenience and dangerous obstruction to travel along the road or way, it may be indicted therefor. *Northern Central Ry Co. v. Commonwealth*, 90 Pa. St., 300, 1879; 5 Amer. & Eng. R. R. Cases, 318.

61. — An act gave to defendant the right

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to build and use a railway adjacent to an ancient highway. It was made in some places within five yards of the highway. A subsequent act authorized the use of locomotives upon the railway. The engines frightened horses upon the highway. *Held*, that this interference with the rights of travelers upon the highway was sanctioned by the statutes. *Rex v. Pease*, 4 Barnewall & Adolphus, 30; 24 E. C. L., 24. 1832.

62. Penalty. The intention of the statute, §§ 52 and 53, R. S. 1874, is to subject the engine-driver, conductor, and the corporation, indifferently, to the fine prescribed of not less than \$10 nor more than \$100, for obstructing highways, by stopping trains or leaving cars standing on the crossing, and not that the corporation shall be liable for the like sum for which the engine-driver or conductor shall have been convicted. *Toledo, Wabash and Western R'y Co. v. The People*, 81 Ill., 141. 1876.

63. Private railway. The defendants, being the owners of a private railway, with the consent of the W. M. R. R. Co., were used to run their cars and engines over a part of the track of that company, including a highway crossing. *Held*, that while thus in occupation of the track they were to be considered proprietors of the railway, so far as regards their rights and liabilities in obstructing the crossing, under Gen. Stats., ch. 148, § 7. *Hall v. Brown*, 54 N. H., 495, 1874; 11 Amer. R'y Rep., 281.

64. — That statute is directed to the object of protecting travelers against delay from the obstruction of cars, etc., at railway crossings; its violation, therefore, does not create an absolute liability for damage which is not caused directly by such delay. *Ib.*

65. Right to obstruct highway. Defendant, owner of a colliery, built a railroad from the colliery to a seaport town, four hundred yards distant. The railroad was laid on a turnpike, rendering it too narrow in some places for carriages to pass. Defendant allowed the public to use his railroad by paying toll. *Held*, that the facility of traffic in conveyance of coals, etc., to the seaport was not such a convenience as to justify the obstruction of the highway. *Rex v. Morris*, 1 Barnewall & Adolphus, 441; 20 E. C. L.,

551; 1 Eng. R. R. & Canal Cases, 545 (Appendix), 1880.

IV. CONSTRUCTION OF RAILWAYS.

66. Bridges; repair. Where permission is granted, by the commissioners of highways, to a railway company "to construct and maintain a bridge over a crossing," the acceptance thereof by the company and the construction of a bridge thereunder imposes upon it the duty of maintaining the same in good repair. The approaches to the bridge, which are necessary to connect the same with the highway, are a part thereof, and the same duty is imposed upon the company as to their repair and maintenance as exists in regard to the bridge itself. *Hayes v. New York Central and Hudson River R. R. Co.*, 9 Hun (N. Y.), 63. 1876. See, also, *People v. Same*, 74 N. Y., 302. 1878.

67. Charter. The act incorporating the Southampton R. R. Co. construed with reference to the manner of constructing its road over a turnpike. *Attorney-General v. Southampton R. R. Co.*, 9 Simons (Eng. Ch.), 78. 1837.

68. Contract with county by railway company. The provision in § 4 of the act further to prescribe the duties of county commissioners (S. & C., 250), declaring it to be essential to the validity of a contract entered into by the commissioners, that it shall be entered in the minutes of their proceedings by the auditor, is intended for the protection of the county from liability on such contract, unless evidenced or authenticated in the mode prescribed; but, where the contract has been fully performed on the part of the county, the other party to the contract cannot resist performance on his part, on the ground that it was not so entered. By accepting performance by the commissioners the defendant is precluded from raising the question. So held in an action to enforce a contract in relation to the occupancy of a highway for railway uses. *Commissioners of Athens County v. Baltimore Short Line R. R. Co.*, 37 Ohio St., 205. 1881.

69. Depot grounds. Secs. 1828, subd. 5, and 1886, R. S., were intended to give railway companies the right to use highways for passage with their cars and engines, but

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not for depot purposes of any kind. *Bussian v. Milwaukee, Lake Shore and Western R'y Co.*, 56 Wis., 325, 1882; 10 Amer. & Eng. R. R. Cases, 716.

70. Destruction by railway; liability to make new road. A railway was laid on a public highway, the company thereby becoming liable, under act of February 19, 1849, to construct a new road in its place. The township in which the road was, could not release the company from its liability to make the road. *Snow v. Deerfield Township*, 78 Pa. St., 181. 1875.

71. — injunction against railway company. In enjoining a railway company from using a highway, where it has been diverted by the company from its location, but left in such close proximity to the railway as to make it dangerous for public travel, it is proper for the court to prescribe what change in the location shall operate to supersede the injunction. *State ex rel. v. Dayton and South Eastern R. R. Co.*, 36 Ohio St., 434, 1881; 5 Amer. & Eng. R. R. Cases, 812.

72. Diversion ultra vires. Where a railway company had diverted a road *ultra vires*, but with a *bona fide* view to the convenience of the public, a court of equity will not compel it to replace the road so as to make its work *intra vires*, if the result will be to cause greater inconvenience to the public, or the complaining section of the public. *Attorney-General v. Ely, Haddenham and Sutton R'y Co.*, Law Reports, 6 Equity Cases, 106. 1868.

73. Occupation by railway. The public authorities who have the superintendence and control of the public roads may authorize travel on them by the means of a railroad, and possession by a railway company is a matter between the road authorities and the company; and the right cannot be questioned in an action of ejectment by the owner of the land over which the public road has been established. *Edwardsville R. R. Co. v. Sawyer*, 92 Ill., 377. 1879.

74. Right to construct railway. A railway constructed under the general railway law may lawfully occupy a public highway to the extent of a reasonable necessity. *Long Branch Commissioners v. West End R. R. Co.*, 29 N. J. Eq., 566. 1878.

75. Switches. If a railway company has the right to extend a switch track into the highway, it is bound to use such track in such a manner as not unnecessarily to interfere with public travel over such highway. *Bussian v. Milwaukee, Lake Shore and Western R'y Co.*, 56 Wis., 325, 1882; 10 Amer. & Eng. R. R. Cases, 716.

76. Use by railway company. Railway companies, under their charters, have the same right to use that portion of the public highways over which their tracks pass as other people have to use the same. Their rights and those of the people as to the use of the highways at such points of intersection are mutual, co-extensive and reciprocal, and in the exercise of such rights all parties will be held to a due regard to the safety of others, and to the use of every reasonable effort to avoid injury to others. *Indianapolis and St. Louis R. R. Co. v. Stables*, 62 Ill., 313, 1872; 7 Amer. R'y Rep., 365.

V. TAKING HIGHWAY FOR RAILWAY PURPOSES.

77. Use by railway. In this action, brought by owners of land fronting thereon, to restrain defendant from operating its road over and upon Gravesend avenue, laid out by special act of the legislature, running from the city line of Brooklyn through the towns of Gravesend, New Utrecht and Flatbush, the only question was whether, by the proceedings taken under that act, the fee of the land was taken for public use or only an easement. *Held*, that the fee of the land was not taken, but an easement only, for the purposes of the highway. The owners of the fee may, therefore, enjoin the use of the land for a railway. *Washington Cemetery v. Prospect Park and Coney Island R. R. Co.*, 7 Hun (N. Y.), 655. 1876. See, also, *Same v. Same*, 68 N. Y., 591. 1877.

VI. ADVERSE ENJOYMENT.

78. Change. A change of highway, made by a railway company, held to be binding after the expiration of the statutory period of limitation. *Campbell v. O'Brien*, 10 Amer. & Eng. R. R. Cases, 266; 75 Ind., 222. 1882.

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79. Crossing. Where a railway crossing, in connection with the street which it crosses, has been used as a highway for more than twenty years, the street, during that period, having been kept in repair by the town, and the crossing, during the same period, having been planked and kept in repair by the railway company, it is a question for the jury, upon all the evidence, whether such use was adverse and under a claim of right, or merely permissive. *Fitchburg R. R. Co. v. Page*, 131 Mass., 391, 1881; 7 Amer. & Eng. R. R. Cases, 86.

80. Dedication; location of railway. The use of a road as a highway by the public for more than ten years, with the knowledge, consent and permission of the owner, amounts to a dedication of it to that use, and a railroad company may lay its track over and along such highway. *Gear v. C. C. and D. R'y Co.*, 39 Ia., 23. 1874.

81. Evidence. The place where an injury had occurred held, on the evidence, to have become a highway by prescription. *McCarthy v. Lake Shore and Mich. Southern R'y Co.*, 76 N. Y., 592. 1879.

82. Obstruction. The defendant railway company held liable for injuries sustained by the plaintiff while traveling on a highway, which injuries were caused by its leaving obstructions on the margin of the highway, though it had never been surveyed, but had been used by the traveling public more than twenty years. A highway by dedication may have a margin. *Brownell v. Troy and Boston R. R. Co.*, 55 Vt., 218. 1882.

83. — The use of uninclosed timber or prairie land by the public as a highway will not raise a legal presumption that the owner had notice of the use of the land for such purpose. *State v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 45 Ia., 189. 1876.

84. — A railway company wrongfully laid its track in a public highway, and after it had continued the obstruction more than six years, an action was brought against it under the act of 1863. Held, that neither the limitation of four years, nor that of six years, was a bar to the action. *Lawrence R. R. Co. v. Commissioners of Mahoning County*, 35 Ohio St., 1. 1878.

85. — The limitation of two years within

which an action must be commenced as prescribed in § 12 of the general corporation act, as amended April 15, 1857 (54 Ohio L., 193), applies only in cases where a railway is constructed in a highway, or on other public ground, under an agreement with the public authorities, or after condemnation, as provided in said section. *Lawrence R. R. Co. v. Cobb*, 35 Ohio St., 91. 1878.

86. Possession by railway. The possession of a highway by a railway company, under a license given by statute, is presumed to be subordinate to the rights of the owner of the soil. A deed thereof, therefore, by such owner to a third person, is not void because of adverse possession. *Broiestedt v. South Side R. R. Co. of Long Island*, 55 N. Y., 220. 1878.

87. Restoration; statute of limitations. The obligation upon a railway company to restore the public highway at a crossing to such condition as not to impair its usefulness is a condition inseparable from the company's right to construct such crossing, and the statute of limitations is not an available defense to an action brought to secure the performance of such condition. *Little Miami R. R. Co. v. Commissioners of Green County*, 31 Ohio St., 338, 1877; 16 Amer. R'y Rep., 278.

VII. INJURIES TO PERSONS BY DEFECTS IN HIGHWAY.

88. Bridge. The charter of a railway company provided that, if the railway should cross any highway, it should be so constructed as not to impede or obstruct the safe and convenient use thereof; that the company should have the power to raise or lower such highway, and if it should do so, and should not so raise or lower the same as to be satisfactory to the selectmen, the latter might require such alteration or amendment as they might think necessary; and that, if the required amendment or alteration was reasonable and proper, and the company should unnecessarily and unreasonably neglect to make the same, the selectmen might proceed to make such alteration or amendment, and might recover the cost thereof from the corporation. Held, in an action for personal injuries, occasioned by the de-

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fective construction of a bridge built and maintained by the corporation over a highway at a place where the highway had not been raised or lowered, that, under its charter, the corporation was bound so to construct and keep its line as not to impede or obstruct the safe and convenient use of the highway; and that, even if the bridge was adequate for such use when built, and an increased use rendered it inadequate, the corporation must alter the bridge. *Cooke v. Boston and Lowell R. R. Co.*, 133 Mass., 185, 1882.

89. — As the plaintiff was passing along a highway under a railway bridge of the defendant, which was a girder bridge resting upon a perpendicular brick wall, with pilasters, a brick fell from the top of one of the piers, on which one of the girders rested, and injured the plaintiff; a train had passed just previously; on examination afterwards, other bricks were found to have fallen out. The bridge had been built and in use three years. The jury having found a verdict for the plaintiff, a rule was obtained, pursuant to leave, to enter a non-suit, on the ground that there was no evidence of negligence to leave to the jury. *Held*, affirming the judgment of the court of queen's bench, that the defendant was bound to use due care in keeping the bridge in proper repair, so as not to injure persons passing along the highway, and that there was evidence from which the jury might infer negligence. *Kearney v. London, Brighton and South Coast R'y Co.*, Law Reports, 6 Queen's Bench Cases, 759, 1871; *Same v. Same*, Law Reports, 5 Queen's Bench Cases, 411, 1870.

90. — A person injured by a defect in a bridge forming part of a highway, which a railway company is bound to keep in repair, cannot maintain an action against the company without giving the notice required by the statute of 1877, ch. 234, § 3, to be given to the "persons" obliged to keep the same in repair; and an omission in the declaration to allege the giving of such notice is good ground of demurrer. *Dickie v. Boston and Albany R. R. Co.*, 131 Mass., 516, 1881; 8 Amer. & Eng. R. R. Cases, 203.

91. Change of highway. Where a railway company, in constructing its railway,

changed the old highway and made an excavation therein, and W. with his team drove into the excavation in the night time and was injured, it was *held* that the burden was upon the company to show that the highway had been legally changed by competent authority. *Atlanta and Richmond Air Line R. R. Co. v. Wood*, 48 Ga., 565, 1873; 11 Amer. R'y Rep., 406.

92. Crossing; defect. If a railway company, by its employes, negligently construct a crossing over a public highway, and a person without fault is injured in his property while traveling on the crossing by reason of a defect in it, the company is liable in an action to such person. *Mann v. Central Vermont R. R. Co.*, 55 Vt., 484, 1883.

93. — In an action for injuries resulting from the alleged negligence of a railway company in neglecting to maintain in a safe condition a highway crossing, in not replacing a plank which had been removed, *held*, that it was proper to allow plaintiff to prove that after the injury defendant repaired the crossing by replacing the plank. *Kelly v. Southern Minnesota R'y Co.*, 28 Minn., 98, 1881; 6 Amer. & Eng. R. R. Cases, 264.

94. Crossing; where road has not been established as a highway. The statute provides that it shall be the duty of every railway company to construct and keep in repair at each crossing of any regularly laid out public highway a good and substantial crossing; but the act does not embrace a way generally traveled by the public for more than fifteen years as a road, if it has not been established or regularly laid out under the provisions of the statute, or set apart by dedication upon the public records as a highway or street. *Missouri, Kansas and Texas R'y Co. v. Long*, 27 Kans., 684, 1883; 6 Amer. & Eng. R. R. Cases, 254.

95. Ditches. In a suit against a corporation for personal injuries, caused by falling into a ditch dug by it in the public highway, its liability depends wholly on its having caused or continued the nuisance, and the plaintiff's suffering the injury without fault on his part; and hence evidence of the care used in selecting a watchman to warn persons approaching the ditch, or his general character and reputation as a watchman, at

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the time of his employment, are immaterial, and properly excluded. *South and North Ala. R. R. Co. v. Chappell*, 61 Ala., 527. 1878.

96. Excavation near highway. Where an excavation is made near to but not substantially adjoining a public highway, at common law no action lies against the owner of the land by a person who has strayed off the highway and fallen into such excavation. *Hardcastle v. South Yorkshire R'y Co.*, 4 Hurlstone & Norman (Exchequer), 67. 1859.

97. Fences. The provision of the general railway act, as amended in 1854 (ch. 282, Laws of 1850), imposing upon corporations formed under it the duty of erecting and maintaining fences on the sides of their roads, does not apply to fences for the protection of travelers upon a highway. *Ditchett v. Spuyten Duyvil and Port Morris R. R. Co.*, 67 N. Y., 425, 1876; 15 Amer. R'y Rep., 109; reversing *Same v. Same*, 5 Hun (N. Y.), 165, 1875.

98. Leased lines. A railway company cannot escape the performance of any duty or obligation, imposed upon it by its charter or the general laws of the state, by leasing its road, without the consent of the state. So, where such corporation, without such consent, leased its line to another corporation, which entered upon and controlled and managed the road, *held*, that the former corporation is liable for injuries to persons caused by negligent defects in its track at a highway crossing. *Freeman v. Minneapolis and St. Louis R'y Co.*, 28 Minn., 443, 1881; 7 Amer. & Eng. R. R. Cases, 410.

99. Negligence. It is error for the court to give an instruction to the jury which makes the conduct of the plaintiff the only condition upon which his right of recovery depends, and which virtually says that if the plaintiff was careful and prudent that he may recover, whether the defendant was negligent or not. *Atchison, Topeka and Santa Fe R. R. Co. v. Combs*, 25 Kans., 729. 1881.

100. Relative duties. A traveler upon a highway, and a railway company with its trains, are each bound to use their privilege with such reasonable care, prudence and actual diligence as may enable the one to

cross the other in safety. *Whitney v. Maine Central R. R. Co.*, 69 Me., 208. 1879.

101. Signalman. In an action against a railroad company to recover damages for an injury caused by negligence, evidence that there was usually a flagman at the crossing where the injury occurred, but that there was none there at the time of the injury, is incompetent as bearing on the question whether the plaintiff was chargeable with negligence. *McGrath v. N. Y. Central and Hudson River R. R. Co.*, 3 Thompson & Cook (N. Y. Supreme Ct.), 776, 1874; 68 N. Y., 522, 1876.

102. Turnpike. By a local act, 4 and 5 Will. 4, s. 71 (the London and Southampton Railway Act), it is enacted that in all cases where the railway shall cross any turnpike-road, such turnpike-road shall be raised or sunk by and at the expense of the company, so as the same shall pass over the said railway, or that the said railway shall pass over the said turnpike road. *Held*, that a road on which toll-gates are by law erected, and tolls taken thereat, is a turnpike-road within the meaning of that act. *Northam Bridge Co. v. London and Southampton R'y Co.*, 6 Meeson & Welsby (Exchequer), 428. 1840.

103. Unused road. A legal road, which is, in fact, unused and is unfit for travel and closed against the public, is not a "highway" within the meaning of the provision of the railway law which makes a company laying track across public highways liable for injuries resulting from neglect to restore them to a proper condition, even though the owners of land along the road had moved their fences back so as to open it as a highway, and had been paid for their lands by the township, and a bridge had been built upon it by the public authorities. *Flint and Pere Marquette R'y Co. v. Willey*, 47 Mich., 88, 1881; 5 Amer. & Eng. R. R. Cases, 905.

VIII. REPAIRS.

104. Chartered rights. The proviso to § 27 of the charter of the Wilmington and Weldon R. R. Co. does not require that company to make and repair bridges, made necessary by roads laid out subsequent to the construction of said railroad. *State v. Wil-*

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mington and Weldon R. R. Co., 74 N. C., 143. 1876.

105. Crossings. Sec. 47 of ch. 23, Gen. Stat. 1868 (subd. 4 of § 47, ch. 23, Comp. Laws 1879), devolves upon railroad companies the duty, whenever they cross a highway, to restore it to its former state, or to such a state as not to have impaired its usefulness; but no duty is imposed thereby upon the companies to keep the highway in repair. When the highway has been fully restored to its former condition, the railway company is under no obligation thereafter, under said section, to maintain a sufficient and safe crossing. *Missouri, Kansas and Texas R'y Co. v. Long*, 27 Kans., 684, 1882; 6 Amer. & Eng. R. R. Cases, 254.

106. — Under the statute (R. S., ch. 79, § 11), which requires a highway over which a railway is constructed to be restored "to its former usefulness," the railway company must so restore it that its use by the public shall not be materially interfered with, nor the highway be rendered less safe and convenient to persons and teams passing over it, except so far as diminished safety and convenience are inseparable from any crossing of the highway by a railway. *Roberts v. Chicago and Northwestern R'y Co.*, 35 Wis., 679. 1874.

107. Mandamus. A railway act provided that, in taking a part of a highway, the company should first make another road instead, as convenient for passengers, etc., as the former road, and that "the substituted road, if temporary, shall be set out and made, and the principal road shall be restored, within six calendar months after the commencement of the operation." And that, where a bridge should be erected, the road over the bridge should not be less than fifteen feet wide. On *mandamus* to compel the company to make and restore the highway, it was held that the company was bound to make the approaches as wide as the road had been. It was held no defense that the company could not condemn additional land to widen the highway. *Regina v. Birmingham R'y Co.*, 2 Adolphus & Ellis (N. S.), 47; 42 E. C. L., 565. 1841.

108. — Under a similar act, it was held a good defense that the company had been prevented by local commissioners from low-

ering the street so as to comply with the statute. *Regina v. Eastern Counties R'y Co.*, 2 Adolphus & Ellis (N. S.), 569; 42 E. C. L., 811, 1842.

109. — Where a highway was altered and lowered by a railway company, and it was not lowered the full width, but was more convenient by reason of not being lowered so as to include the footpaths, it was held that, as the statute did not, in express terms, require the lowering of the footpath, a *mandamus* ought not to issue to compel the lowering of the entire highway. *Regina v. Manchester R'y Co.*, 3 Adolphus & Ellis (N. S.), 528; 43 E. C. L., 851. 1842.

110. Restoration. An act gave a railway company power to build its line on a highway, and provided that if in its construction it should be necessary to change a public road, etc., it should "cause the same to be reconstructed in the most favorable location and in as perfect a manner as the original road." This does not require that the making of the new road shall precede the occupying of the old one. *Danville, Hazelton and Wilkesbarre R. R. Co. v. Commonwealth*, 73 Pa. St., 29. 1873.

111. — The duty of the railway company under its charter to restore a highway to its former usefulness was not discharged when it restored it to a proper condition at the time the line was constructed; but the duty was a continuing one, and embraced such alterations and improvements as should afterwards be made necessary by the growth of the city and the increased travel. *Burritt v. City of New Haven*, 42 Conn., 174. 1875.

112. — And it does not alter the case that the public convenience required the making of a bridge and embankments. It was the public convenience that was to be observed in the first instance by the restoration of the highway to its former usefulness, and the present was merely an enlargement of its former demands. *Id.*

113. — A railway company having in the construction of its road changed the location of a township road, and having erected a bridge over a creek for a new public road, and refused to repair and maintain it, the township rebuilt it. *Held*, that the company was liable to the township for the cost of the bridge. *Pennsylvania R. R. Co. v. Bor-*

Right of Way for Railway—Abatement—Damages.

ough of *Irwin*, 85 Pa. St., 336, 1877; 18 Amer. R'y Rep., 563.

HOMESTEAD.

1. Right of way for railway. The husband can convey a right of way over the homestead, without the concurrence and signature of the wife to the deed, when such conveyance will not defeat the substantial enjoyment of the homestead as such. *Chicago and Southwestern R. R. Co. v. Swinney*, 38 Ia., 182. 1874.

2. — The rights of a claimant to a homestead construed with reference to a contract for a conditional grant of land to a railway company. *Houston and Great Northern R'y Co. v. Winter*, 44 Tex., 597. 1876.

HORSE RAILWAY.

See EMINENT DOMAIN; STREET RAILWAYS.

HORSES.

See CARRIAGE OF LIVE STOCK; CONTAGIOUS DISEASES; INJURIES TO DOMESTIC ANIMALS.

HUSBAND AND WIFE.

See BAGGAGE; DAMAGES; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; INJURIES TO PERSONS.

1. Abatement. An action by a husband against a railway company to recover for the loss of services of the wife, and for expenses paid in consequence of injuries to her person, resulting from defendant's negligence while she was a passenger, is an action grounded in tort. *Cregin v. Brooklyn Crosstown R. R. Co.*, 75 N. Y., 192. 1878.

2. — Such action does not abate upon the death of the plaintiff, but may be revived in the name of his personal representatives. It is within the provisions of the statute (2 R. S., 447, § 1) preserving from abatement actions "for wrongs done to the property, rights or interests of another," and is not included in the exception in the provision following (§ 2), of "actions on the case for injuries to the person of the plaintiff." *Ib.*

3. — On the death of the plaintiff, in an action by a husband for an injury to the person of his wife, the right to damages for loss of the wife's services and the expenses necessarily incurred by reason of the injury survive to his personal representatives, as they are a pecuniary loss diminishing his estate; but the right of action for the loss of the society of his wife and the comforts of that society dies with him. *Cregin v. Brooklyn Crosstown R. R. Co.*, 83 N. Y., 595, 1881; reversing *Same v. Same*, 19 Hun (N. Y.), 841, 1879.

4. Carriage of household goods. Where household goods belonging to the wife were delivered to a railroad company for shipment by the husband, and were attached while in the defendant's depot, in a suit against the husband, and notice thereof was duly given to him while so acting as the agent of his wife, and in time to assert a right to the goods, *held*, that the law would recognize the husband as the wife's agent in transactions relating to the removal of their household goods; that she could not recover for failure to deliver the goods. *Furman v. Chicago, Rock Island and Pacific R. R. Co.*, 57 Ia., 42, 1881; 6 Amer. & Eng. R. R. Cases, 230.

5. Conveyances. The statutes of Tennessee, in relation to conveyances by married women, construed. *Murdock v. Memphis and Ohio R. R. Co.*, 7 Baxter (Tenn.), 557. 1874.

6. Conveyance to wife. Where a conveyance is made by a stranger to a married woman, the presumption, in the absence of proof, is, that the consideration was paid by her, and not by her husband. *McVey v. Green Bay and Minnesota R'y Co.*, 42 Wis., 532, 1877; 15 Amer. R'y Rep., 143; *Lyon v. Same*, 42 Wis., 548, 1877; 15 Amer. R'y Rep., 85.

7. Damages. In an action by a husband for the loss of the services of his wife by reason of injuries occasioned by the negligent acts of the defendant, a recovery may be had for expenses incurred by reason of such injury, as well as for the loss of her services directly resulting from the injury. *Neier v. Missouri Pacific R'y Co.*, 12 Mo. App., 35. 1882.

8. — A married woman can only recover

Dower — Pleading.

damages for her personal injury and suffering. The loss of income from her incapacity, and the expenses of her cure, must be recovered by her husband. *Klein v. Jewett, Receiver*, 26 N. J. Eq., 474. 1875.

9. — Where the wife has rendered no pecuniary assistance to her family, although she has separate property, the husband and family can only recover for the pecuniary loss, or the loss of a reasonable probability of pecuniary benefit. *Lett v. St. Lawrence and Ottawa R'y Co.*, 1 Ontario, 545. 1882.

10. — Plaintiff's wife was injured by the negligence of defendant. *Held*, that plaintiff was entitled to recover for the loss of her services. At the time of the injury the wife was thirty-two years of age. *Held*, that a verdict for plaintiff for \$10,500, though large, was not excessive. *Sloan v. New York Central R. R. Co.*, 4 Thompson & Cook (N. Y. Supreme Ct.), 135; 1 Hun (N. Y.), 540. 1874.

11. — In a suit brought by a husband to recover the damages caused by an injury to his wife, through the negligence of the defendant, the husband died before the trial and some two years after the accident. It appeared that before the accident the wife did all the house-work for her husband and three children, assisted in taking charge of a store, and earned by sewing sometimes as much as \$20 a week. All her earnings were used to support the family. *Held*, that the plaintiff, the administrator of the deceased husband, was properly allowed to recover for the loss of earnings of the wife, as well as for the loss of her services, and that a verdict of \$2,500 would not be set aside as excessive. *Cregin v. Brooklyn Crosstown R. R. Co.*, 18 Hun (N. Y.), 368. 1879.

12. **Dower.** A husband holding title to land under a contract upon which he has the absolute right to a conveyance has such a title as will give a dower right to his widow. *Clybourn v. Pittsburgh, Ft. Wayne and Chicago R'y Co.*, 4 Bradwell (Ill.), 463. 1879.

13. — A widow, who has received personal property under her father's will, admitted to probate in another state, is not barred from recovering her dower in land in Massachusetts, of which her husband was seized during coverture, from a tenant holding under a warranty deed from her father, to

whom her husband conveyed by a deed in which she did not join. *Julian v. Boston, Clinton, Fitchburg and New Bedford R. R. Co.*, 128 Mass., 555. 1880.

14. **Grant of right of way.** A husband cannot convey to a railway company a valid right of way across lands belonging to his wife. *Texas and Pacific R'y Co. v. Durrett*, 57 Tex., 48. 1882.

15. — A widow cannot maintain an action, before her interest in her deceased husband's realty has been set apart, to compel a railway company to purchase her alleged dower interest in a right of way granted by him. Whether or not a husband can grant a right of way to a railroad company free of any claim of his widow for dower in the land conveyed, query? *Tuttle v. Burlington and Mo. River R. R. Co.*, 49 Ia., 134. 1878.

16. **Personal injury.** Under the legislation of Illinois relating to married women, the husband and wife cannot sue for and recover damages for a personal injury to the latter, but she must sue alone. *Chicago, Burlington and Quincy R. R. Co. v. Dickson*, 67 Ill., 122, 1873; *Chicago and Northwestern R'y Co. v. Button*, 63 ib., 409, 1873.

17. — Under the statutes of Iowa the husband has no joint interest in an action for a tort committed against the wife, and cannot be joined therein. *Tuttle v. Chicago, Rock Island and Pacific R. R. Co.*, 42 Ia., 518. 1876.

18. — In such an action the wife cannot recover for loss of time caused by the injury, unless she is engaged in the prosecution of a separate, independent business, which thereby suffers detriment. *Ib.*

19. — Nor can she recover for money expended in procuring medical attendance and other expenses growing out of her injury, the husband alone having the right of action therefor. *Ib.*

20. **Pleading.** Section 2960 of the Code, which prescribes that the husband may recover for torts committed on the wife, does not repeal the common law rule of pleading that the wife should be joined in the action. In such suits the husband may join his wife. *East Tenn., Va. and Ga. R. R. Co. v. Cox*, 57 Ga., 252. 1876.

Miscellaneous.

21. Wearing apparel. A husband may recover for wearing apparel shipped by him in his own name, and lost by a carrier, although the title to the property was in his wife. *Harris v. Delaware, Lackawanna and Western R. R. Co.*, 61 N. Y., 656. 1875.

INDICTMENT.

See BRIDGES; CRIMINAL LAW; EMBEZZLEMENT; FERRIES; HIGHWAYS; MALICIOUS MISCHIEF; NUISANCE; OBSTRUCTING RAILWAY TRACKS.

INDIAN RESERVATIONS.

1. Land grants. In 1862, congress had the exclusive right and dominion over the Delaware reservation in Kansas, and had full power to permit the construction of a railway over such reservation by the Leavenworth, Pawnee and Western R. R. Co. of Kansas, either with or without compensation to be paid by the company. *Grinter v. Kansas Pacific R'y Co.*, 23 Kans., 642, 659. 1880.

2. — Under the provisions of the act of congress of July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes," congress granted to the Leavenworth, Pawnee and Western R. R. Co. in 1872, called the Kansas Pacific R'y Co., now the Union Pacific, Kansas division, the right of way through the public lands of the United States for its road, and agreed to extinguish as rapidly as might be the Indian title required for such right of way. This grant included a right of way through the Delaware reservation in Kansas, and under the grant the company had the authority, in November, 1863, without paying compensation to the Delaware allottees, to enter upon the reservation for the purpose of locating its line of road and laying out its right of way and, thereafter, of constructing and operating its road over and across said land. *Ib.*

INDIAN TERRITORY.

1. Injuries to employes. In an action by a brakeman to recover damages sustained while running a train, an objection to the introduction of any testimony was sustained on the ground that the petition averred that the injury was done in the Indian country south of Kansas and contained no allegation that either plaintiff or defendant had authority to enter that country or engage in the running of railroad trains through it, or that there was any law in force within its limits either giving a cause of action for such a wrong or prescribing a rule of damage. *Held*, error; that there is no presumption that a party is a wrong-doer because of entering into any state or territory of the United States or engaging therein in any ordinarily lawful occupation; the presumption is the reverse. That, if we take judicial notice of the laws and treaties of the United States designed to secure to the Indians the occupation of this country, we find special reservation of a right to license the construction of a railroad through it; and from the long continuance of the defendants in running this railroad, it is presumed that they have received such license. *Speer v. Missouri, Kansas and Texas R'y Co.*, 23 Kans., 571. 1880.

INFANT.

See INJURIES TO PASSENGERS; INJURIES CAUSING DEATH; INJURIES TO PERSONS ON THE TRACK; PARENT AND CHILD.

1. Guardian ad litem. The failure to appoint a *guardian ad litem* for an infant in proceedings against him will not render the decree against the infant invalid in a collateral proceeding. *McLemore v. Chicago, St. Louis and New Orleans R. R. Co.*, 58 Miss., 514. 1880.

2. Suit in forma pauperis. An infant cannot sue *in forma pauperis*, nor by a next friend *in forma pauperis*, for a personal injury, either by the common law of Tennessee or under the Code, § 2804. *Cargle v. Nashville, Chattanooga, etc., R. R. Co.*, 7 Lea (Tenn.), 717. 1881.

Bond — Dissolution. — Contempt.

INJUNCTION.

See BRIDGES; CONSTITUTIONAL LAW; ELECTION OF CORPORATE OFFICERS; EMINENT DOMAIN; EXPRESS COMPANIES; HIGHWAYS; JURISDICTION; LOCATION OF RAILWAYS; MORTGAGE; NUISANCE; PARTIES TO ACTIONS; PENALTIES; TAX SALE.

- I. BOND.
- II. DISSOLUTION.
- III. CONTEMPT.
- IV. SUBJECT AND GROUNDS OF INJUNCTION.
- V. DAMAGES.
- VI. APPEALS.
- VII. GENERAL MATTERS.

I. BOND.

1. **Failure to give bond.** The failure to give bond held to vacate the order for the writ. *City of Menasha v. Milwaukee and Northern R. R. Co.*, 52 Wis., 138. 1881.

2. **Forfeiture.** An injunction bond conditioned to pay the damages, if it shall be decided eventually that complainants were not equitably entitled to such restraining order, is forfeited by a decision of the chancellor, dissolving the order and dismissing the bill; provided it is not shown that such decision was based on some fact arising subsequently to the granting of such order. *New York and Long Branch R. R. Co. v. Dennis*, 40 N. J. Law, 340. 1878.

3. **Power to require bond.** A court of equity has, as an inherent power, independent of statute, the right to impose terms or require security for damages from the party applying for an injunction; and this power is inherent in the federal circuit courts, as courts of chancery, independent of statute. *Russell v. Farley, Receiver, etc.*, 7 Amer. & Eng. R. R. Cases (U. S. S. C.), 453. 1882.

4. **Sufficiency of bond.** Sufficiency of injunction bond determined. *Metropolitan Elevated R. R. Co. v. Manhattan R'y Co.*, 65 Howard's Practice (N. Y.), 319. 1883.

5. **Suit on bond.** An order granting leave to bring an action at law on an injunction bond may be rescinded, if the equities of the parties were not considered at the time of its allowance. *Easton v. New York and Long Branch R. R. Co.*, 30 N. J. Eq., 236. 1878.

6. — Whether the condition of the bond has been broken, or not must be left to the

judgment of the court in which the action on it is to be instituted. *Easton v. New York and Long Branch R. R. Co.*, 26 N. J. Eq., 359. 1875.

II. DISSOLUTION.

7. **Motion.** The right to the injunction which issued on filing the bill depending upon questions, some of which are new and eminently proper to be decided by a court of law, and are awaiting adjudication in such tribunal between the same parties, motion to dissolve denied. *Morris and Essex R. R. Co. v. Haskins*, 26 N. J. Eq., 295. 1875.

8. **Judgment.** Where an injunction had been issued (without requiring the bond or deposit required by the statute) restraining the defendant, who had recovered a judgment in New Jersey, not only from suing on the judgment in any court out of that state, but from taking any proceedings in the state, a deposit or bond according to the statute was required, unless the complainant should consent to modify the injunction so as only to restrain the defendants from proceeding on the judgment out of the state; in default thereof the injunction to be dissolved. *Cairo and Fulton R. R. v. Titus*, 26 N. J. Eq., 94. 1875.

9. **Preliminary.** It is a matter largely in the discretion of the court whether, on the coming in of an answer, a preliminary injunction previously granted shall be dissolved or modified. *Efford v. South Pacific Coast R. R. Co.*, 52 Cal., 277. 1877.

III. CONTEMPT.

10. **Appeal.** The violation of an injunction will be punished, notwithstanding the pendency of an appeal. *Troy and Boston R. R. Co. v. Boston, Hoosac Tunnel and Western R'y Co.*, 57 Howard's Practice (N. Y.), 181. 1879.

11. — Proceedings for contempt in violating an injunction, pending an appeal, by the building of an elevated railway, examined, and held, that the length of notice in the proceedings was a matter properly in the

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discretion of the general term. *Sixth Avenue R. R. Co. v. Gilbert Elevated R. R. Co.*, 71 N. Y., 430. 1877.

12. — An injunction order having been issued in this action, restraining defendant, its officers, etc., from doing certain acts, an order was subsequently made directing the issuance of an attachment as for contempt against G., its president, returnable at special term at a day named. *Held*, that the order affected no substantial right of defendant, and, therefore, was not reviewable upon appeal by it to the court of appeals. *Atlantic and Pacific Telegraph Co. v. Baltimore and Ohio R. R. Co.*, 87 N. Y., 355. 1882.

13. *Advice of counsel.* The officers and employees of a railroad are not liable for contempt in violating an injunction, where they have acted under the advice of able and reputable counsel, and where it was chiefly desired to obtain a construction of the injunction order. *Dinsmore v. Louisville, New Albany and Chicago R. R. Co.*, 8 Federal Reporter, 593. 1880.

14. *Corporate officers.* Where an injunction is issued against a corporation, the officers, who neither do anything in violation of it, nor, by concealment of the fact that it has been issued, conduce to such violation, cannot be held liable for a breach of it. *Trimmer v. Pennsylvania, Slatington and New England R. R. Co.*, 86 N. J. Eq., 411. 1883.

15. — Where an injunction is issued against a railway company, its assigns, agents, employees and any one acting by its authority or in its behalf, but not against the present defendant by name; and the present defendant is the president of the railway company, and owns a majority of its stock, and has, by contract with the railway company, full control of all the property, franchises and privileges of the railway company, and where the present defendant afterward, with notice of said injunction, does what the company is prohibited from doing, *held*, that he may be prosecuted for a violation of said injunction. *State v. Cutler*, 13 Kans., 181. 1874.

16. *Counter Injunction.* An order enjoining a party from interfering with the construction of a certain bridge construed,

and held not to be violated by the suing out of a counter injunction restraining the erection of the bridge. *Wisconsin Central R. R. Co. v. Smith*, 52 Wis., 140, 1881; 10 Amer. & Eng. R. R. Cases, 304.

17. *Fine of corporation.* Under the statutes of the United States a corporation may be fined for a breach of an injunction, and the court is not limited to proceedings against the individual directors or other responsible agents. And where a foreign corporation is doing business in another state, in which the courts of the United States acquire jurisdiction over it to issue an injunction, it is proper to punish a contempt of the court's authority by a fine, as well against the corporation itself as the subordinate agents found within the jurisdiction. *United States v. Memphis and Little Rock R. R. Co.*, 6 Federal Reporter, 237. 1881.

18. *Sale of property.* It is a violation of an injunction restraining a defendant from disposing of property to deliver the property, though sold previously to the service of the injunction. *Jewett, Receiver, v. Bowman*, 27 N. J. Eq., 171. 1876.

IV. SUBJECTS AND GROUNDS OF INJUNCTION.

19. *Abandoned road-bed.* The plaintiff, by a contract, became possessed of the rights and interests of the Albany and Vermont R. R. Co. in its road-bed, which ran generally in the same direction, but at places two or three miles distant from plaintiff's road. At the time of said contract, the plaintiff took up the tracks from a considerable portion of this route and ceased to use it for seventeen years, the road-bed being in most cases inclosed and used by the adjoining owners. Recently the defendant, having acquired the rights and titles of some of the adjacent owners in and to the said road-bed, entered upon the same and commenced to grade and lay tracks thereon, intending to operate the road when completed. An action was brought by the plaintiff to restrain the defendant from so doing. *Held*, that it was not a proper case in which to grant a temporary injunction. *Troy and Boston R. R. Co. v. Boston, Hoosac Tunnel*

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and *Western R. R. Co.*, 13 Hun (N. Y.), 60. 1878.

20. Bridges — height. A railway company bought land from the plaintiff, and in the purchase deed covenanted with him not to erect any building upon it to a greater height than eighteen feet within the distance of eighty feet from certain other property of his. At the time of the conveyance the railway had been carried through the purchased land with two lines of rails on a viaduct thirty-three feet high, part of which was within eighty feet from the protected property. The company afterwards determined to widen its railway, so as to have four lines of rails, and commenced building on the purchased land, for the purpose of widening the viaduct, piers more than eighteen feet high, and standing within eighty feet of the protected property and between it and the old viaduct. *Held*, by the Lord Justice Turner, affirming the decision of Vice-Chancellor Kindersley, the Lord Justice Knight Bruce dissenting, that it ought to be restrained from so doing. *Lloyd v. London, Chatham and Dover R'y Co.*, 2 De Gex, Jones & Smith, 568; 67 Eng. Ch., 568. 1865.

21. — landlord and tenant. A railway company having conveyed to A. a piece of land abutting on its viaduct, with a covenant not to build within six feet of the wall of the viaduct,— the court, in an action against A.'s widow (who took by assignment) for building against the wall in breach of the covenant, in which action she had suffered judgment by default, refused to grant an injunction against her commanding her to remove the building; it appearing that it had been erected by her under-tenant, and consequently that she could not obey the writ. *London and South Western R'y Co. v. Webb*, 15 Common Bench (N. S.), 450; 109 E. C. L., 449. 1863.

22. — repair. Courts of equity in Philadelphia, by act of April 8, 1846, cannot grant an injunction to restrain the city from repairing Girard avenue bridge. erected under act of March 27, 1852. *Philadelphia and Reading R. R. Co. v. Philadelphia*, 8 Philadelphia, 284. 1871.

23. Construction of railway. It is not imperative on the court to enforce by interlocutory injunction a statutory prohibition;

and where a railway company was about to violate a clause in its act expressly prohibiting a main line until a junction line was opened, but which appeared to have been introduced merely for the purpose of obliging the company to complete speedily the junction line, the court, on an undertaking being given to complete the junction line with all practicable diligence, suspended an interlocutory injunction granted by the court below to restrain the opening of the main line. *Cromford R'y Co. v. Stockport R'y Co.*, 1 De Gex & Jones, 326; 58 Eng. Ch., 325. 1837.

24. Construction of railway; dispute as to location of line under contract. Where, during the progress of the construction of a line of railway over a tract of land, a dispute arises between the land owner and railroad company as to the true location of the railway under a written grant of way, and the question of fact is disputable and depends upon parol testimony, the court will not arrest the construction of the road by preliminary injunction, but will reserve the determination of the question for final hearing, no injury being threatened the land owner which may not be compensated pecuniarily; but the court will require ample security to be given the land owner for all damages recoverable by him in case of a final decision adverse to the company. *Rainey v. Baltimore and Ohio R. R. Co.*, 15 Federal Reporter, 767, 1883; 10 Amer. & Eng. R. R. Cases, 368.

25. Contract. Injunction to restrain the defendants from entering into an agreement with another railroad company, which would be a violation of or inconsistent with a subsisting agreement between the plaintiffs and the defendants, refused, the inconvenience to arise from granting the injunction being greater than the inconvenience to arise from refusing it. *Shrewsbury and Chester R. R. Co. v. Shrewsbury and Birmingham R. R. Co.*, 1 Simons, N. S. (Eng. Ch.), 410, 1851; 4 Eng. Law & Equity, 171; 15 Jurist, 548.

26. — disagreement as to verbal contract; construction of railway. Before the amount to be paid by a railway company for land required by it for the purposes of its railway had been determined, a verbal

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consent, by one party stated to be qualified, by the other alleged to be general, was given, whereupon the railway company entered upon the land, and commenced work which would permanently affect it. *Held*, that the court will not interfere by injunction to stop the works, if perfect justice can be done by compelling the company to pay for the land, but will order the proximate value to be deposited until the amount be determined. *Langford v. Brighton, Lewes and Hastings R'y Co.*, 4 Eng. R. R. & Canal Cases, 69. 1845.

27. — for right of way ; unpaid purchase money. A railway company, by agreement with a land owner, was let into possession of land which it required for part of its line, and made its railway over it, giving a bond for payment of the purchase money on a future day. Default was made in payment of the bond. *Held*, that the land owner was not entitled to an injunction to restrain the company from continuing in possession until the purchase money was paid. *Pell v. Northampton and Banbury Junction R'y Co.*, Law Reports, 2 Chancery Appeal Cases, 100. 1866.

28. — illegal contract. A court of equity will enjoin the seizure of property and the ejectment of the possessor, although the same may have been acquired under an illegal contract, until an application has been made for the cancellation of such contract, and a full and fair settlement of all accounts growing out of its execution in the past. *Western Union Telegraph Co. v. St. Joseph and Western R'y Co.*, 3 Federal Reporter, 430; 1 McCrary (U. S. C. C.), 565. 1890.

29. — merger. It is a condition precedent to the right of a judge to act under the amendment of 1888 to § 629 of the Code of Civil Procedure, that he should be satisfied that the alleged wrong or injury is not irreparable and is capable of being adequately compensated for in money. Affidavits which are but expressions of opinion, not furnishing the court with any facts upon which it can determine for itself whether the alleged wrong or injury is not irreparable and whether it "is capable of being adequately compensated for in damages," are insufficient. Injunction restraining the carrying out of a "merger contract" sustained. *Metropolitan Elevated R. R. Co. v.*

Manhattan R'y Co., 65 Howard's Practice (N. Y.), 277. 1888.

30. — specific performance. Specific performance of a contract cannot be enjoined by a preliminary injunction. *Philadelphia and Reading R. R. Co. v. Philadelphia*, 8 Philadelphia, 112. 1870.

31. Crossing. On error in the supreme court to review a decree dissolving an injunction and dismissing the bill under which it was sought to restrain a railroad company from further prosecution of proceedings for condemnation of right of way, on motion that the writ of error be made to operate as a *supersedeas* and that an order be entered staying the condemnation proceedings until the determination of the cause on error, it was held that it would not exercise such a jurisdiction where the grounds of the motion were of such character as might be interposed as a defense at law in the proceeding sought to be stayed. *Lake Shore and Michigan Southern R'y Co. v. Chicago and Western Indiana R. R. Co.*, 96 Ill., 125, 1880; 2 Amer. & Eng. R. R. Cases, 437.

32. Embankment ; spring of water. An injunction should not be granted restraining a railway company from constructing an embankment on its own land, which is necessary to make its road-bed safe, because such embankment has already slipped and is liable to further slip on the plaintiff's land and ruin a spring. *Rider v. New York, West Shore and Buffalo R'y Co.*, 65 Howard's Practice (N. Y.), 419. 1883.

33. Eminent domain. Notwithstanding the decision in London and Northwestern R. R. Co. v. Smith, 1 Hall & Twelle, 161; 1 McN. & G., 216, it was *held* that a person who has served a railway company with notice, under § 68 of the Lands Clauses Act, claiming compensation on the ground that his land has been injuriously affected by the execution of the company's works, ought not to be restrained from proceeding pursuant to his notice. *South Staffordshire R. R. Co. v. Hall*, 1 Simons, N. S. (Eng. Ch.), 373. 1851.

34. — In case of a claim of consequential damages to land on account of the operating of a railway, where no part of the land claimed to be affected is taken for the use of the road, a bill in chancery will not be enter-

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tained to enjoin the use of the railway until such damages are paid or assessed. *Patterson v. Chicago, Danville and Vincennes R. R. Co.*, 75 Ill., 588, 1874; *Stetson v. Chicago and Evanston R. R. Co.*, 75 ib., 74, 1874.

35. — ejectment. Where the owner of real estate has brought an action of ejectment against a railway company for the possession of a part of its road-bed, and the real matter in dispute is the measure of damages when they shall be assessed, the corporation has a complete remedy at law, and an injunction will be refused. *North Eastern R. R. Co. v. Barrett*, 65 Ga., 601. 1880.

36. — fraudulent condemnation proceedings. Where one railroad company instituted proceedings to condemn and take for its road the road and track of another *de facto* railroad company, but concealed the object and purpose, and gave the latter company no notice, and the whole proceeding showed it was but the carrying out of a scheme for the fraudulent and inequitable purpose of getting possession of such company's right of way and road without making compensation, *held*, that a court of equity would restrain the taking of possession under such fraudulent proceedings. *Cincinnati, Lafayette and Chicago R. R. Co. v. Danville and Vincennes R'y Co.*, 75 Ill., 113. 1874.

37. — non-payment of damages for right of way. The charter of the Mo., Iowa and Nebr. R. R. Co. provides that, on tender or deposit of the amount found by the commissioners due the land owner on condemnation of his land for railroad purposes, the company might go on and complete the road. A land owner having excepted to the report of the commissioners, under such proceeding, it was held that, having exhausted his statutory remedies, his failure to ask for an injunction, or the appointment of a receiver or other equitable intervention, while the road was being constructed over his land, was not tantamount to an acquiescence in its construction, but that, after its construction, the company being insolvent, he was entitled, on proper steps taken, to payment of the amount awarded, or, in default thereof, to an order restraining the company from operating its

road over his property. *Evans v. Missouri, Iowa and Nebraska R'y Co.*, 64 Mo., 453. 1877.

38. — Where a railway company is about to take permanent possession of the land of another person, without a determination, in some lawful manner, of the sum to be paid the owner therefor, or without payment or tender of such sum, the owner is entitled to an injunction restraining the company therefrom. *Diedrichs v. Northwestern Union R'y Co.*, 33 Wis., 219. 1873.

39. — But a complaint for such an injunction is fatally defective if it does not allege positively that the company threatens or intends to take possession of plaintiff's land without making such payment. This essential averment cannot be supplied by inference. *Id.*

40. — A land owner, whose land had been taken by a railway company for several years, afterwards had his damages assessed. On an application for an injunction against the company, *held*, that the land owner had ample legal remedies by execution or by ejectment, and an injunction was refused. *Remshart v. Savannah and Charleston R. R. Co.*, 54 Ga., 579. 1875.

41. — An attempt to take permanent possession of land for public use, without the assent of the owner, express or implied, and without payment or tender of damages in advance, would, if consummated, be in the nature of an irreparable injury, to prevent which an injunction would ordinarily be granted. *Held*, in this case, that the equities of the bill were not fully denied by the answer, and a motion to dissolve the injunction could not therefore prevail. *Northern Pacific R. R. Co. v. Barnesville and Moorhead R. R. Co.*, 4 Federal Reporter, 298; 2 McCrary (U. S. C. C.), 203, 1880; 1 Amer. & Eng. R. R. Cases, 8.

42. — principal and surety. Where a surety, who was subrogated to the rights of a land owner to whom the former has been compelled to pay the debt of his principal for land taken by the principal (a railway company), under the exercise of the right of eminent domain, applied to the court to enjoin the use of the company's road over the land, *held*, that it was not necessary to his protection to prevent such use, there be-

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ing nothing to be gained by him through such injunction; the company being insolvent and its affairs in the hands of a receiver, and the road being operated for the accommodation of the public, merely by a trustee of holders of bonds of the company, with a view to a more advantageous sale of the property on foreclosure. *Hewitt, In re*, 25 N. J. Eq., 210. 1874.

43. — restraining proceedings for assessment of damages. A railway company, a short time before the expiration of the time limited by its act for the compulsory purchase or taking of lands, gave a notice to treat for the purchase of the right or easement of making and forever maintaining its railway by throwing a bridge over a yard belonging to a manufactory; the owner, after the expiration of the company's compulsory powers, gave a counter-notice requiring the company to take the whole of the manufactory; the company did nothing upon the notice and counter-notice for nearly twelve months; it then gave notice for the purchase of the whole manufactory and proceeded to take steps for summoning a jury to assess its value. *Held*, on an application by the owner for an injunction, that, whether the original notice to treat was valid or not, the court could not, after the counter-notice which had been given by the land owner, interfere with the proceedings of the company, this decision being, however, without prejudice to any steps which the owner might take at law to stay or quash those proceedings. *Pinchin v. London and Blackwall R'y Co.*, 5 De Gex, Macnaghten & Gordon, 851; 54 Eng. Ch., 850; 31 Eng. Law & Equity, 249. 1854.

44. — title; refusal of writ. The refusal of the injunction is not adjudication as to the title. *Dryden v. St. Joseph and Denver City R. Co.*, 23 Kans., 525. 1880.

45. Free passes. Where a stockholder in a railway company sought by an injunction to restrain the corporation from granting free passes to members of the general assembly and to state officers, and it was not found by the court that the company contemplated doing this, but only that it had given such passes to some former members of the general assembly and to some former state officers, and that the petitioner was apprehensive that it would grant such passes to

members of the general assembly and state officers then about to be elected, it was held that there was not sufficient ground for interference by injunction. The giving and accepting of such passes, and, especially in respect to judicial officers, strongly condemned. *Goodwin v. New York, New Haven and Hartford R. R. Co.*, 43 Conn., 494, 1876; 11 Amer. R'y Rep., 9.

46. Interference with footway to railway station. A bill was filed to restrain a railway company from placing an obstruction partly on a public footway and partly on land belonging to the plaintiff, a rival railway company, so as to block up the access to a station of the plaintiff, and alleged that the injury to the traffic by allowing the obstruction to remain would be irreparable, and that the act was done without color of title by the defendant. *Held*, that this was one of the exceptional cases in which this court would interfere to restrain a trespass by a stranger, and demurrer overruled. *London and North Western R'y Co. v. Lancashire and Yorkshire R'y Co.*, Law Reports, 4 Equity Cases, 174. 1867.

47. Levee. Where the right to an injunction turns wholly upon the validity of a statute granting to a railway company the exclusive right to certain property, which is claimed by the city as a public levee, and the use of the property is not materially in conflict with any use to which it is being put, but is of great advantage to the company, a preliminary injunction, restraining it from such use, will be modified, and the statute presumed valid. *Portland v. Oregonian R'y Co.*, 7 Sawyer (U. S. C. C.), 122. 1881.

48. License to build railway. Where a railway company had entered into a written agreement for its right of way with the person who was the ostensible owner, and also the owner of record, of the property over which the right of way was sought, and, by virtue of a license in such agreement, entered into possession and graded its road-bed and proceeded to lay its track, an injunction to restrain it from the use of the property at the suit of the wife of such ostensible owner, who claimed that at the time of making such agreement she was the real owner of the property by deed unrecorded, and that the agreement and license

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were made without authority, was refused; it appearing that she was cognizant of the entry of the company and of its work upon the property, and gave no notice of her ownership, nor repudiated the agreement or license, and the company was guilty of no negligence. *Pickert v. Ridgefield Park R. R. Co.*, 25 N. J. Eq., 316. 1874.

49. Location of railway. An injunction to restrain the location of a railway refused. *Boston and Me. R. R. Co. v. Portsmouth and Dover R. R. Co.*, 57 N. H., 200. 1876.

50. Municipal bonds. Upon proper application the issue of negotiable municipal bonds will be enjoined, when the statute authorizing their issue only upon certain terms has not been complied with in matters of substance. *Union Pacific R. R. Co. v. Lincoln County*, 3 Dillon (U. S. C. C.), 300. 1873.

51. Operation of writ beyond the state. A court will not grant an injunction operating outside of and beyond the state, although the parties are before it. This rule applies to a telegraph line. *Western Union Telegraph Co. v. Western and Atlantic R. R. Co.*, 8 Baxter (Tenn.), 54. 1874.

52. Plank-road. To justify an injunction to restrain the commission of a trespass upon real property, it is not essential that the threatened injury should be "irreparable," but under the statute of Indiana, it is sufficient to show that the remedy at law is not as practical and efficient to the ends of justice and its prompt administration as the remedy in equity; therefore, when, owing to the peculiar character of the property, the injury cannot be fully compensated in damages, an injunction will be granted. This principle applied to the construction of a railway over a plank-road. *Clark v. Jeffersonville, etc., R. R. Co.*, 44 Ind., 243. 1873.

53. Public convenience; specific performance. The plaintiff, a land owner, had withdrawn his opposition to a railway bill in consideration of the company agreeing to make a road and an approach in a particular manner. The company altered the level of its line, and varied the course and inclination of the road. The bill was filed pending the works, and a motion for injunction had been ordered to stand to the hearing, on the company undertaking to abide by the direction

of the court as to altering its works. The railway had since been opened for traffic; *held* (reversing the decree of the master of the rolls), that the plaintiff was entitled to specific performance, and that the company could not set up the inconvenience to the public by the interference with the traffic as a reason for not performing its agreement. *Raphael v. Thames Valley R'y Co.*, Law Reports, 2 Chancery Appeal Cases, 147. 1867.

54. Quieting title. Upon payment of the amount found against the railway company on account of its title under a bill filed to settle its rights to certain property in litigation, it was entitled to a perpetual injunction to prevent further disturbance thereof and to have the title confirmed. *Taylor v. Central R. R. Co.*, 67 Ga., 123. 1881.

55. Slaughter-house. A special injunction to restrain the erection of a proposed abattoir and slaughtering-house will not be granted where the affidavits do not establish the fact that they will be a nuisance. *Sellers v. Pa. R. R. Co.*, 10 Philadelphia, 319. 1875.

56. Stopping "operation" of railway. The "operations of a railway," as referred to in § 3391, Code, mean the operations of a constructed railway, and not the operations of a railway company in constructing a road. *Johnson v. Chicago, Milwaukee and St. Paul R'y Co.*, 58 Ia., 537. 1832.

57. Street railways. A preliminary injunction is never granted unless the act threatened to be done will inflict an irreparable injury on the complainant. This rule applied to the dissolution of an injunction against a coach company in a suit where the coach company was charged with interference with the operation of a street railway. *Citizens' Coach Co. v. Camden Horse R. R. Co.*, 29 N. J. Eq., 299. 1878.

58. — An injunction having been issued to restrain a street railway company from laying its track on a certain tract of land, and the right depended upon a dedication which gave color to the claim of complainant, *held*, that the injunction would not be dissolved upon answer, but would be retained until the final hearing. *Camden and Atlantic R. R. Co. v. Atlantic City Passenger R. R. Co.*, 26 N. J. Eq., 69. 1875.

59. — The city of Philadelphia is a competent party to a bill to restrain an illegal

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use of a public highway by an attempt to lay a passenger railway track thereon. *Philadelphia v. Thirteenth and Fifteenth Sts. R'y Co.*, 8 Philadelphia, 648. 1871.

60. Streets. A court of equity will not assume jurisdiction to enjoin the use of a railroad track upon a public street until the adjoining land owner's damages shall have been assessed and paid under the Eminent Domain Act, even though the railway company may be insolvent. *Peoria and Rock Island R'y Co. v. Schertz*, 84 Ill., 185, 1876; 16 Amer. R'y Rep., 484.

61. — The fee of streets being in the city where they are located, and the city having the power to control and regulate their use, a court of equity will not, at the suit of an individual, enjoin a railway company from operating its road laid in the street without the permission of the city, but will leave the redress to the public authorities. *Patterson v. Chicago, Danville and Vincennes R. R. Co.*, 75 Ill., 588. 1874.

62. — A complaint against a railway company alleging that the plaintiffs are owners of lots abutting on a certain street in a city, that the defendant has taken possession of said street in front of said lots, and has laid down its railway thereon and used the same, but not alleging that the defendant intends or threatens to *continue* such use, does not show a good ground for an injunction to prevent the defendant from continuing to maintain and use such railway. *Roelker v. St. Louis and Southeastern R'y Co.*, 50 Ind., 127. 1875.

63. Taxes; judgment. A judgment restraining the collection of certain taxes and for \$—— costs is valid. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Town of Ellwood*, 79 Ind., 806. 1881.

64. Telegraph line. Where there is no irreparable injury alleged beyond a general averment of a breach of contract, a court of equity will not interfere. *Western Union Tel. Co. v. Philadelphia and Reading R. R. Co.*, 9 Philadelphia, 494. 1872.

65. — An injunction was issued to restrain a railway company from removing telegraph wires from its premises until the right of the telegraph company under an agreement should be adjudicated. *Atlantic and Ohio Tel. Co. v. Philadelphia, Germantown and*

Norristown R. R. Co., 8 Philadelphia, 246. 1871.

66. To restrain application to parliament for a special act. A railway company, as the terms of being permitted to proceed with certain works, pending a trial at law of the question whether such works were in conformity with the act of parliament, undertook to deal with the works as the court should afterwards direct. Before the trial had taken place, the company, without notice to the other parties in the cause, petitioned the house of commons for leave to bring in a bill, one of the clauses of which proposed to provide that, in all proceedings at law and in equity, the works which had been done should be considered as a compliance with the act of parliament, and that there should be no power at law or in equity to compel the removal thereof. The petition was received, and the bill containing such clause was introduced into the house of commons. *Held*, by the lord chancellor, that, although the conduct of the company was a violation of the undertaking entered into by them, the court had no jurisdiction to restrain them from further soliciting the bill, which, having been entertained by the house of commons, had become the proceeding of the legislature, and not of the petitioners. *Attorney-General v. Manchester and Leeds R'y Co.*, 1 Eng. R. & Canal Cases, 430; 3 Jurist, 879. 1838.

67. To restrain conveyance of railway. The plaintiff, one of several bondholders, secured by a mortgage upon the franchises and other property of the Boston, H. and E. R. R. Co., sought to enjoin a part of the defendants from conveying to the New England R. R. Co., another defendant, so much of the property formerly belonging to the Boston, H. and E. R. R. Co. as was located within this state. The property consisted of the franchises, lands, buildings, road-bed and superstructure. The defendant H. claimed to be a trustee under the mortgage, and the complaint alleged that he was claiming and acting as such without legal authority, and was about to convey to the New England R. R. Co. the property described in the mortgage. *Held*, that there being nothing that could be carried out of the state, and no suggestion that the defend-

Damages.

ants intended to remove or injure the property in any manner, an injunction was not necessary in order to have the property remain secure to abide the event of the suit. *McHugh v. Boston, Harlem and Erie R. R. Co.*, 66 Barbour (N. Y.), 612. 1873.

68. To restrain interference with right of way; where no interference was threatened. Where an action is brought by a railway company in possession of the right of way through a tract of land, and using it for its track and telegraph line, to restrain the owner of the land from interfering with its possession and use of the right of way, and upon the trial the plaintiff offers no testimony tending to show that defendant ever had interfered, or threatened, or was likely to interfere therewith, a demurrer to the evidence is properly sustained. *St. Joseph and Denver R. R. Co. v. Dryden*, 17 Kans., 278. 1876.

69. — Proof that the defendant asserted that a railway company did not own a certain right of way, that he was going to have the right of way adjusted, and recover damages therefor, is not sufficient evidence of a threat or danger of violent interference to sustain an action of injunction against the defendant. *Ib.*

70. To restrain prosecution of works of improvement. The court, in exercising its jurisdiction to prevent companies, intrusted by the legislature with large powers, from acting in a manner prejudicial to the rights of individuals on the one hand, will, on the other, be careful not to assist persons in availing themselves of any omission in such powers, for the purpose of giving effect to exorbitant claims against the companies. *Bell v. Hull and Selby R'y Co.*, 1 Eng. R. R. & Canal Cases, 616. 1839.

71. To restrain sale of bonds, etc.; creditor holding unliquidated demand. A corporation will not be enjoined from issuing bonds or selling personal property on complaint of a creditor, not holding a lien or other legal claim against the property; much less upon a claim for unliquidated damages on a guaranty. *Erie R'y Co. v. Wilkesbarre Coal Co.*, 9 Philadelphia, 262. 1872.

72. Trespass. The jurisdiction of a court of equity to enjoin trespasses to real estate,

though of recent origin, is now firmly established; but the court will never exercise this power, unless the party complaining shows a clear title, legal or equitable, and an injury not capable of prevention otherwise. *Boulo v. New Orleans, Mobile and Texas R. R. Co.*, 55 Ala., 480. 1876.

73. — The Hudson Tunnel R. R. Co., claiming to be a corporation organized under the general railroad law, having entered upon land of complainants without their consent, and having made large excavations therein, were restrained from further prosecuting the work until compensation should be made. *Morris and Essex R. R. Co. v. Hudson Tunnel R. R. Co.*, 25 N. J. Eq., 384. 1874.

74. Vendor and vendee. The defendant entered into an agreement with a land holder for the purchase of lands on the line of the railway, and before acceptance of title or payment tendered, or deposit of the purchase money, entered upon the land. *Held*, by the vice-chancellor, that such entry was illegal. But *held* by the vice-chancellor, and by the lord chancellor, affirming his honor's decision, that this was not a case within its special act of incorporation; that, on payment of the purchase money into the court in which the bill was filed, the company was entitled to enter; and that an injunction, which had been obtained *ex parte*, should thereupon be dissolved. *Hyde v. Great Western R'y Co.*, 1 Eng. R. R. & Canal Cases, 277. 1836.

75. Waste; practice. An injunction to restrain the pulling down of houses granted on *ex parte* motion, although the defendant had appeared. *Petley v. Eastern Counties R. R. Co.*, 8 Simons (Eng. Ch.), 483. 1839.

V. DAMAGES.

76. Attorney's fees. In a suit on a bond, executed in an injunction suit in the circuit court of the United States, conditioned to pay all damages or costs that may be occasioned by the injunction, the word "damages" will be taken to include reasonable counsel fees actually paid. *Hannibal and St. Joseph R. R. Co. v. Shepley*, 1 Mo. App., 254. 1876.

Appeals.

VI. APPEALS.

77. — Where a petition asked that certain taxes upon the lands of plaintiff be declared illegal and void, and to constitute no lien upon the lands, and that an injunction issue restraining their collection, it was held that the injunction was only auxiliary to the other relief asked, and, no motion having been made to dissolve the injunction granted, which was dissolved only upon the final hearing, that the amount expended by the defendant for attorney's fees in defending the action could not be recovered in an action on the injunction bond. *Carroll County v. Iowa Railroad Land Co.*, 53 Ia., 685, 1890; 21 Amer. R'y Rep., 173.

78. Discontinuance of suit. Damages will not be allowed for the suing out of an injunction where the writ was properly allowed, although the petitioner has discontinued the action. *New York, West Shore and Buffalo R'y Co. v. Omerod*, 29 Hun (N. Y.), 274. 1883.

79. Judgment. On dissolution of an injunction judgment cannot be rendered on the bond under the Revised Statutes of Texas. *Texas and New Orleans R'y Co. v. White*, 57 Tex., 129. 1883.

80. Profits; street railway. Where a horse-railway company was enjoined from extending its track to a certain point, and the injunction was dissolved, the company claimed damages from a loss of profits that might have been realized. The evidence relied on was the increase of business after the extension. It also appeared that the company had another line, parallel with the extension and near the same, and that no accounts were kept of the profits as to the extension, the fare being five cents for any distance. It was held that no damages could be assessed for such profits, they being speculative and too remote and uncertain. *Chicago City R'y Co. v. Howison*, 86 Ill., 215. 1877.

81. — This case is to be distinguished from cases where a business is built up or established so as to furnish a basis for estimating damages. In such cases damages are recoverable for loss of profits where the party is prevented from exercising his business, but not where the business has not been established. Damages for profits of a railway never built are not recoverable. *Ib.*

82. Costs. The supreme court will not try an appeal when nothing is involved but the costs of the case. *State v. Richmond and Danville R. R. Co.*, 74 N. C., 237, 1876; *Gray v. Atlantic and North Carolina R. R. Co.*, 77 ib., 299, 1877.

83. Dissolution of injunction. A judgment dissolving a temporary injunction and for costs, but not otherwise disposing of the subject matter of litigation, is not a final judgment, and will not support an appeal. *International and Great Northern R. R. Co. v. Smith County*, 58 Tex., 74. 1882.

84. — Prior to the taking effect of the Code of 1873, an appeal did not lie from an order of a judge of the supreme court dissolving an injunction. Nor under § 3165 of the Code of 1873, would an appeal lie from an order made before said section took effect. The section is not retroactive. *Davenport v. D. and St. P. R'y Co.*, 37 Ia., 624. 1873.

85. Order refusing writ. The cases which hold that, on an appeal from an order refusing a preliminary injunction, the case must be heard, on the appeal, on the same facts that were before the court of chancery, do not deprive the appellate court, on the hearing of the appeal, of the right to exercise that discretion upon which the allowance or refusal of an injunction rests. *Terhune v. Midland R. R. Co.*, 33 N. J. Eq., 318. 1882.

86. Premature appeal. An appeal from the allowance of an injunction is premature before the amount of the injunction bond has been fixed. *Jefferson and Lake Pontchartrain R. R. Co. v. New Orleans*, 30 La. An., 211. 1878.

87. Right of appeal. An appeal cannot be taken from the court of common pleas upon an order granting or dissolving an injunction. *Patten v. N. Y. Elevated R. R. Co.*, 67 N. Y., 484. 1876.

88. Writ of error. A writ of error lies immediately to the granting or refusal of an injunction. *Sheibley v. Ga. Southern R. R. Co.*, 65 Ga., 107. 1880.

89. — A writ of error does not operate as a *supersedeas*. *Doyle v. Wisconsin*, 94 U. S., 50, 1876; *Dunmeyer v. Kansas Pacific R'y Co.*, 29 Kans., 185, 1888.

General Matters.

VII. GENERAL MATTERS.

90. Delay caused by injunction; rights of party delayed. Where a city granted a license to a railway company to build its road across the streets, upon an express condition that the tracks authorized should be constructed within one year from the time of the grant, and the company was prevented from completing its track within the year by reason of injunctions, and also by the police officers of the city, acting under the direction of the mayor, it was *held*, the right of the company, under the grant, was not lost, and the city might be enjoined from interfering with the laying of the track after the expiration of the year, when it is apparent that the same would have been completed within the time limited had it not been prevented by operation of law and the acts of the city authorities. *Chicago v. Chicago and Western Indiana R. R. Co.*, 105 Ill., 73, 1882; 10 Amer. & Eng. R. R. Cases, 306.

91. Delay in applying for writ. An injunction will not be granted to restrain a railroad company from the use of land taken by it some fifteen years before the filing of the bill, and used continuously afterward, even though the land belonged to a *feme covert* and the company had neither paid for it nor tendered a bond to secure the payment of the damages. *Seal v. Northern Central R'y Co.*, 1 Pearson (Pa.), 547. 1868.

92. Estoppel. A land owner who stands by and without objection sees a canal excavated on his land by the drainage commissioners, without making a claim for damages, is not entitled to an injunction to restrain the use of the canal. *Jefferson and Lake Pontchartrain R. R. Co. v. New Orleans*, 31 La. An., 478. 1879.

93. Federal court. Where the United States court acquires prior jurisdiction of a case by removal or otherwise, and afterwards parties institute proceedings in state courts that will, if successful, defeat the jurisdiction of the United States court, or deprive plaintiffs therein of all benefit of any decree or judgment rendered in their favor, the United States courts may by injunction lay hands on the parties and control their proceedings, although proceedings in a state

court may be thus indirectly stayed or ended; yet §720 of the United States Revised Statutes prohibits the granting of injunctions except in bankruptcy cases when the state court has regularly acquired jurisdiction of the case; and in this case the injunction was refused. *Missouri, Kansas and Texas R. R. Co. v. Scott*, 13 Federal Reporter, 793. 1882.

94. — Section 720 of the Revised Statutes of the United States, providing that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any state court, except in cases of bankruptcy, prohibits the federal courts from enjoining a suit in a state court because of the unconstitutionality of a statute upon which that suit is founded. The proper remedy is by writ of error. *Rensselaer and S. R. R. Co. v. Bennington and Rutland R. R. Co.*, 18 Federal Reporter, 617. 1883.

95. Future damages; jurisdiction. In determining the question of jurisdiction, where the amount is essential, damages that will accrue unless the injunction issues may be considered. *Gay v. New Orleans Pacific R. R. Co.*, 31 La. An., 274. 1879.

96. Jurisdiction. Under § 4, ch. 86, acts of the twelfth general assembly, the circuit court possessed no power to grant an injunction, or other chancery jurisdiction. *Cummings v. Des Moines, Winterset, etc., R. R. Co.*, 36 Ia., 173. 1872.

97. — *quo warranto.* Under the constitution of Wisconsin, no original equity jurisdiction (except to issue the writ of injunction) is conferred on the supreme court, or can be conferred upon it, by act of the legislature. But the court may issue a writ of *quo warranto* against a corporation. *State v. West Wisconsin R'y Co.*, 34 Wis., 197, 1874; 6 Amer. R'y Rep., 242.

98. Mandatory writ. A mandatory injunction, restraining a railway company from refusing to transport coal upon certain terms, refused till the final hearing. *Mocanagua Coal Co. v. Northern Central R'y Co.*, 9 Philadelphia, 250. 1872.

99. Notice by telegraph. A notice by telegraph of the granting of an injunction is sufficient to place the party disregarding such notification in contempt, provided such

Abatement.

notice proceed from a source entitled to credit, and inform the defendant clearly and plainly from what act he must abstain. *Cape May and Schellenger's Landing R. R. Co. v. Johnson*, 35 N. J. Eq., 422, 1882; 9 Amer. & Eng. R. R. Cases, 476.

100. Practice. Practice upon injunctions and discovery of evidence determined. *Central Cross Town R. R. Co. v. Bleecker St. R. R. Co.*, 49 Howard's Practice (N. Y.), 233, 1875; *Same v. Same*, 53 ib., 45, 1877; *Coffin v. Prospect Park and Coney Island R. R. Co.*, 61 ib., 105, 1881.

101. — Injunction refused under the facts of the case. *Central R. R. and Banking Co. v. Flanders*, 51 Ga., 553. 1874.

102. Preliminary. An order granting a preliminary injunction upon complaint and answer and affidavits of the parties will not be reversed where it does not appear that there was an abuse of discretion, even if most of the facts stated in the complaint and plaintiff's affidavits are denied in the defendant's answer and in his affidavits. *Coolot v. Central Pacific R. R. Co.*, 52 Cal., 65, 1877; 21 Amer. R'y Rep., 211.

103. — A wrong which is a mere technical invasion of complainant's rights, and does not threaten serious injury, will not lay a ground for a preliminary injunction. This principle applied to an application for an injunction to restrain the storing of cars upon complainant's land. *Wakeman v. New York, Lake Erie and Western R. R. Co.*, 35 N. J. Eq., 496, 1882; 10 Amer. & Eng. R. R. Cases, 342.

104. Procured by stockholder at instance of rival company. Where a plaintiff filed a bill on behalf of himself and all other shareholders in a railway company, and sought an injunction to restrain the company from running steam vessels in a manner which he alleged to be *ultra vires*, but admitted on cross-examination that he was a shareholder in a rival company, and instituted the suit by the direction of the latter company, who indemnified him against costs, *held*, that the bill was an imposition on the court, and was properly dismissed with costs. *Forrest v. Manchester R'y Co.*, 4 De Gex, Fisher & Jones, 126; 65 Eng. Ch., 125. 1861. See, also, *Rogers v. Oxford R'y Co.*, 2 De Gex & Jones, 662; 59 Eng. Ch., 660. 1861.

105. Res adjudicata. An injunction having been issued by a state court and perpetuated by the decree of the supreme court of the state, and a similar injunction having been granted as between the same parties with regard to the same subject matter in a new suit, by a court of the same state, and removed to the federal court, the matter will be treated by that court as a thing adjudged, and the injunction perpetuated. *New Orleans, etc., R. R. Co. v. New Orleans*, 14 Federal Reporter, 378, 1878.

106. Sunday. A writ of injunction may lawfully issue on a Sunday, in case of necessity. A writ may therefore issue to prevent the construction of a railway on Sunday upon a public street. *Langabier v. Fairbury, Pontiac and Northwestern R. R. Co.*, 64 Ill., 243. 1872.

107. Tax-payer. A bill to restrain the misapplication of public funds cannot be brought by two or more tax-paying complainants on their sole behalf, when they have no other interest in the question to be determined than that which arises from a liability to pay taxes. A bill for this purpose may be maintained if the complainants sue on behalf of themselves and all others in the same situation. *Packard v. Commrs of Jefferson County*, 2 Colo., 338. 1874.

INJURIES CAUSING DEATH.

See DEATH; EVIDENCE; INJURIES TO PASSENGERS; INJURIES TO PERSONS ON THE TRACK.

1. Abatement. Where, after commencing an action to recover for injuries sustained, the plaintiff dies, and his administrator is substituted, he may, as such, recover the amount due his decedent at the time suit was brought, including compensation for his bodily pain and suffering. *Muldowney v. Illinois Central R'y Co.*, 36 Ia., 462. 1878.

2. — The proviso to art. 1044, R. S., does not affect the rights of a personal representative of a deceased plaintiff, who, while living, had sued for a personal injury and recovered judgment therefor in the district court; his rights remain as they existed before the enactment. The cause of action is merged in the judgment of the district court,

Administration — Criminal Proceeding as a Foundation for Civil Action.

which survives, and is not vacated or opened by writ of error or appeal, but remains valid and subsisting until set aside, and constitutes, in favor of the administrator, a cause of action. *Galveston City R'y Co. v. Nolan*, 53 Tex., 139, 1880; 3 Amer. & Eng. R. R. Cases, 387.

3. Administration. A surrogate, in issuing letters of administration, has authority and discretion to limit the powers conferred upon the administrator. Where, therefore, such letters contained the clause, "These letters are issued with limited authority to prosecute only, and not with power to collect or compromise," held, that the surrogate had power to insert the limitation. *Martin v. Dry Dock, etc., R. R. Co.*, 92 N. Y., 70, 1883.

4. — foreign administrator. A foreign administrator may maintain an action in Illinois against a railway company to recover damages for causing the death of the intestate through negligence. *Wabash, St. Louis and Pacific R'y Co. v. Shacklet*, 105 Ill., 364, 1883; *Wabash, St. Louis and Pacific R'y Co. v. Shacklett*, 10 Bradwell (Ill.), 404, 1882.

5. — An administrator appointed in another state or territory can maintain an action in Kansas under § 422 of the Code of Civil Procedure. *Kansas Pacific R'y Co. v. Cutter*, 16 Kans., 568, 1876.

6. — An administrator may be appointed in New York to sue for damages resulting from the killing of his intestate in New Jersey. *Stallknecht v. Pennsylvania R. R. Co.*, 13 Hun (N. Y.), 451, 1878.

7. — The jurisdiction of the court appointing an administrator cannot be assailed in an action by such administrator for damages occasioned by the death of the intestate. *Holmes v. Oregon and California R. R. Co.*, 7 Sawyer (U. S. C. C.), 380; 5 Federal Reporter, 523, 1881; 9 ib., 229, 1881.

8. — A. died in New Jersey from injuries there received, for which, if death had not ensued, B., the party inflicting them would have been liable to an action for damages. The statute of that state provides that such an action may be brought against the party by the personal representative of the deceased. C., appointed under the laws of New York, administratrix of A., brought, in a court of the latter state, a suit against B., which, by reason of the citizenship of

the parties, was removed to the circuit court of the United States. Held, 1. That the suit can be maintained, the right of action not being limited by the statute to a personal representative of the deceased appointed in New Jersey and amenable to her jurisdiction. 2. That distribution of moneys recovered by C. from B. may be enforced by the courts of New York in the manner prescribed by that statute. *Dennick v. Railroad Co.*, 103 U. S., 11, 1880; 1 Amer. & Eng. R. R. Cases, 309.

9. Common law. In the absence of a statute, damages cannot be recovered by a father from a railroad company for causing the death of a minor son. *Sullivan v. Union Pacific R. R. Co.*, 2 Federal Reporter, 447; 1 McCrary (U. S. C. C.), 301, 1880.

10. — Although an action may not lie at common law to recover damages for the death of a person, it will at the civil law, and therefore, *semble*, that it will in admiralty. *Holmes v. Oregon and California R'y Co.*, 5 Federal Reporter, 75, 1890.

11. Constitutional law. The statute authorizing suit for an injury resulting in death was not abrogated by the provision of the constitution of Texas of 1869, upon the same subject. *Houston and Tex. Central R'y Co. v. Moore*, 49 Tex., 31, 1878; *Gohen v. Texas Pacific R'y Co.*, 2 Woods (U. S. C. C.), 346, 1876.

12. — change in statute. The statute gave a right of action to the administrator of the decedent. C. was killed in October, 1871. In December, 1871, an act was passed giving the right of action in such cases to the widow, who was authorized to prosecute the suit. Held, that this is a mere change of remedy, and is not unconstitutional, as impairing any vested right. *Collins v. East Tenn., Va. and Ga. R. R. Co.*, 9 Heiskell (Tenn.), 841, 1872; 20 Amer. R'y Rep., 46.

13. Criminal proceeding as a foundation for civil action. If the tort for which damages are claimed be felonious, the plaintiff must allege and prove a prosecution therefor, or a valid excuse for a failure to prosecute. Such prosecution may be before suit brought, at the time of the commencement of suit, or concurrent therewith. *Western and Atlantic R. R. Co. v. Sawtell*, 65 Ga., 235, 1880.

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14. — **Georgia statute.** The homicide of a railroad passenger by means of a collision of the trains is *prima facie* felonious. For the widow of the passenger to recover damages, she must either prosecute for the felony as prescribed by § 2970 of the Code, or make it appear that there is a good excuse for her failure to prosecute. In requiring the excuse to be alleged, the Code virtually requires it to be proved also, since it is a general rule of law that all material allegations must be established by evidence. The action for causing the death of a human being is statutory, and is given on terms. The terms must be complied with. The non-residence of the widow, her poverty, and her ignorance of who the real felon is, will not avail her as an excuse, unless she has used such active diligence to ascertain the perpetrator of the crime, and to put the public justice in motion, as she reasonably might have used under all circumstances. When she cannot afford to employ agents or attorneys, and has vainly sought the aid of friends, she should at least undertake inquiry by correspondence, and communicate to the solicitor-general of the circuit whatever relevant information she might acquire, making known to him her desire that a prosecution should be instituted. *Sawtell v. Western and Atlantic R. R. Co.*, 61 Ga., 567. 1878.

15. **Criminal proceeding — indictment.** The rule that, where the same offense is charged in different counts of an indictment, the whole indictment may be submitted to the jury, with instructions, if they find the defendant guilty upon any count, to return a general verdict of guilty, is not applicable in a case where one count of the indictment is bad, and the evidence applicable to such count is submitted to the jury with the rest, against the objection of the defendant. *Commonwealth v. Boston and Maine R. R. Co.*, 133 Mass., 383, 1882; 8 Amer. & Eng. R. R. Cases, 297.

16. — An indictment against a railway company, under the St. of 1874, ch. 372, § 163, alleged that at a certain place the track crossed a highway upon the same level; that one S. was traveling on the highway and in the exercise of due diligence; that an engine attached to a freight train was passing the crossing; that an engine was coming in

the opposite direction; that while the defendant was thus running the last-named locomotive, it was its duty when approaching such place of intersection, in view of the position of the first-named engine and train, to reduce its rate of speed and give proper signals and warnings; but that it neglected to do so, and with said last-named engine ran over and killed said S. *Held*, that the negligence alleged was that of the employes of the company, and not of the corporation itself, and that the indictment was insufficient. *Held*, also, that the objections to the indictment were not for formal defects apparent on the face thereof within the St. of 1864, ch. 250, § 2, and could be taken after the jury had been sworn. *Id.*

17. — **indictment; assignment of claim.** Where a statute provides that a railway company having negligently caused the death of a person shall be fined, and the fine "shall go" to the heirs of the deceased, the validity of an assignment by the heirs of their interest in the action, and the equitable rights of the assignee to control the collection of a judgment recovered therein, or to recover the money when collected, are matters which afford no exemption to the corporation from its liability to discharge the judgment. *State v. Boston and Maine R. R. Co.*, 58 N. H., 510. 1878.

18. — **indictment; contributory negligence.** It is no defense to an indictment against a railway company under the St. of 1874, ch. 372, § 163, for causing the death of a passenger, that the passenger was not in the exercise of due care. *Commonwealth v. Boston and Lowell R. R. Co.*, 134 Mass., 211. 1883.

19. — **indictment; evidence.** If an indictment against a railway company, under the Gen. Sts., ch. 63, § 98, and the St. of 1871, ch. 352, does not allege that the neglect on the part of the company to give the signals required by law contributed to the death of the person killed, evidence of such neglect is not admissible. *Commonwealth v. Fitchburg R. R. Co.*, 120 Mass., 372. 1876.

20. — In an indictment under sec. 14, ch. 264, Gen. St., the fact that the defendant was running its train in violation of Gen. St., ch. 148, § 4, when the deceased was killed, is

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competent evidence. *State v. Boston and Maine R. R. Co.*, 58 N. H., 408. 1878.

21. — indictment; fine. The fine in such a case is for the benefit of minor children; it will be in season if a guardian be appointed when the fine is imposed. *Ib.*

22. — Under the Gen. Sts., ch. 63, § 98, a fine is not recoverable for the use of the next of kin of a person, not a passenger, who is killed by the negligence of a railway company or its employes, and who leaves no widow or children. *Commonwealth v. Boston and Albany R. R. Co.*, 121 Mass., 36. 1876.

23. — indictment; form. The degree of negligence on the part of the employes of a railway company, required to be proved on an indictment under the Gen. Sts., ch. 63, § 98, is not changed by the St. of 1871, ch. 352, and, on an indictment under the latter statute, if negligence of the servants of the company is relied on, gross negligence must be averred and proved. *Commonwealth v. Fitchburg R. R. Co.*, 120 Mass., 372. 1876.

24. — indictment; rate of speed. An indictment against a railway company, on the Gen. Sts., ch. 63, § 98, charging the killing of a person by reason of the gross neglect and carelessness of its employes while engaged in its business, by running a locomotive with great, unusual, unreasonable and improper speed, is not sustained by proof that, at the time of the killing, the engine was run at a high rate of speed, in the absence of evidence that the employes in so doing were acting in violation of their duty. *Commonwealth v. Fitchburg R. R. Co.*, 126 Mass., 472. 1879.

25. — indictment; signal. If an indictment against a railway company, on the Gen. Sts., ch. 63, § 98, and the St. of 1871, ch. 352, alleges as the only act of negligence, that the employes of the company ran a locomotive "rashly and without watch, care or foresight, and with great, unusual, unreasonable and improper speed," evidence is inadmissible to show that the employes neglected to ring the bell on the engine or to sound the whistle. *Ib.*

26. — indictment; use of track not belonging to company. The statutes of 1874, ch. 372, § 163, imposing a penalty where, "by reason of the negligence or carelessness

of a railroad corporation, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business," a life is lost, applies to a case where such a company is using a railway track reasonably incident to the business in which it is lawfully engaged, although the track is not within the chartered limits of the corporation, or of a line then under its control, but is a private track which it is using by the mere sufferance and license of its owner. *Commonwealth v. Boston and Lowell R. R. Co.*, 126 Mass., 61. 1878.

27. Damages. In determining the amount of compensation, much must be left to the good sense and sound judgment of the jury upon all the facts and circumstances of the case. No uniform and precise rule can be laid down for estimating the value of the life of the deceased, for the elements which go to make up such value are personal to each case. A charge to a jury, that they are not to take into consideration the pain suffered by the deceased, or the wounded feelings of the surviving relatives, but may consider the relations between him and the next of kin, the amount of his property, the character of his business, and the prospective increase of wealth likely to accrue to a man of his age, with the business and means which he had, or the possibility of a decrease of the same, is held under the circumstances of the case to present no error. *Kansas Pacific Ry Co. v. Cutter*, 19 Kans., 83. 1877.

28. — The action in all respects should be treated as if brought by the injured person. *Haley v. Mobile and Ohio R. R. Co.*, 7 Baxter (Tenn.), 239, 1874; 8 Amer. & Eng. R. R. Cases, 541.

29. — The court instructed the jury that the measure of damage is the pecuniary loss suffered by the parties entitled to the sum recovered without any allowance for distress of mind; and that the loss is what the deceased would have probably earned by his labor in his business or calling during the remainder of his life, and which would have gone for the benefit of his heirs or personal representatives, taking into consideration his age, ability and disposition to labor, and his habits of living and expenditure. *Held*, as favorable to defendant as it could ask. *Mc-*

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Keever v. Market Street R. R. Co., 59 Cal., 294. 1881.

30. — An instruction that damages may be allowed by the jury in their good judgment, not exceeding the limits of the statute, held proper. *Etherington v. Prospect Park and Coney Island R. R. Co.*, 88 N. Y., 641, 1882; 4 Amer. & Eng. R. R. Cases, 617.

31. — The estimated accumulations of the deceased during the probable remainder of his life, having reference to his age, occupation, habits, bodily health and ability, furnish the true measure of compensatory damages under the statute. Laws 1872, p. 117. *Denver, South Park and Pacific R'y Co. v. Woodward*, 4 Colo., 1. 1877.

32. — Damages are to be allowed, not only for the pain and suffering of the deceased, but also for the loss and deprivation occasioned to the wife and children. *Nashville and Chattanooga R. R. Co. v. Smith*, 6 Heiskell (Tenn.), 174. 1871.

33. — But where in such case the jury disregarded the charge and assessed the damages at \$10,000, although the deceased had been guilty of very gross negligence, the judgment was reversed, the verdict indicating passion or prejudice. *Ib.*

34. — elements of damage. It was in proof that at the time of his death the deceased was administrator of an estate, and the judge told the jury that in estimating the damages they might consider the amount of assets and debts of the estate and the commissions usually allowed in administering the same. *Held*, error, in that the instruction was too general and contained no explanation of the consideration to be given to the whole evidence in fixing the worth of the life. This error or the reception of improper evidence was not cured by the judge's reducing the amount of damages assessed by the jury. *Burton v. Wilmington and Weldon R. R. Co.*, 82 N. C., 504. 1880.

35. — In an action of trespass by an administrator to recover for injury to property of his intestate, happening in his life-time from the gross negligence of the defendant, whereby the intestate was mortally injured, neither the personal injury to the deceased, nor the injury to his feelings, nor his death, can be considered on the question of dam-

ages. *Sawyer v. Concord R. R. Co.*, 58 N. H., 517. 1879.

36. — In an action under § 422 of the Code of Civil Procedure (Gen. Stat., p. 709) to recover damages for the death of a party, and outside of the question of exemplary damages, the recovery is to be of a pecuniary compensation for a pecuniary loss. *Kansas Pacific R'y Co. v. Cutter*, 19 Kans., 83. 1877.

37. — Where the jury find the pecuniary loss to be a certain sum (in this case \$1,320), and in answer to a specific question say that the loss consisted of notes and mining stocks, and there is testimony that the deceased had notes and mining stocks which were lost on account of his death, and the amount of the verdict seems to be but a reasonable compensation for such loss, the verdict will be upheld, although the amount named by the jury cannot be deduced from testimony by any mere addition of the items of an account, and although it is not made perfectly clear in what manner, whether by running of the statute of limitations or otherwise, the death of the deceased brought about the loss of the notes and stocks. *Ib.*

38. — The accumulations of the deceased during the remainder of his life, having reference to his age, occupation, habits, bodily health and ability, is the measure of compensatory damages under the statute in the case of the death of an adult male. *Kansas Pacific R'y Co. v. Lundin*, 3 Colo., 94. 1876.

39. — evidence. In an action against a railroad corporation for the killing of a person, evidence is admissible to show the condition and circumstances of the family of the deceased, his business qualifications, the condition of his health, the amount he was realizing annually from his employments, the value of his services to his family, and the damage suffered by them in the loss of his care, nurture and instruction. *Baltimore and Ohio R. R. Co. v. Wightman*, 29 Grattan (Va.), 431. 1877.

40. — In a suit to recover damages for a personal injury resulting in death through negligence, it is error to instruct the jury that if they find the defendant guilty they may assess the plaintiff's damages at any sum not exceeding \$5,000, the amount claimed in the declaration, without reference

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to any proofs of the amount of damages sustained. *Chicago, Burlington and Quincy R. R. Co. v. Sylkes*, 96 Ill., 162, 1880; 2 Amer. & Eng. R. R. Cases, 254.

41. — Under the statute (ch. 450, Laws of 1847, as amended by ch. 256, Laws of 1849), authorizing an action to recover damages for death caused by negligence, the pecuniary loss which a party named in the statute is entitled to recover may consist of special damages, viz., of actual definite loss, and also of prospective general damages. *Houghkirk v. Delaware and Hudson Canal Co.*, 92 N. Y., 219. 1883.

42. — The special damages being susceptible of proof with approximate accuracy, to entitle plaintiff thereto, evidence must be given not only that the damages were sustained, but also showing their character and amount. *Ib.*

43. — In the absence of any evidence of the pecuniary value of the life of the deceased, no damages can be allowed. *Ravary v. Grand Trunk R'y Co.*, 1 Lower Canada Jurist, 280. 1857. But reversed and contrary doctrine held on appeal. *Same v. Same*, 6 ib., 49. 1860.

44. — funeral expenses. In a suit under the statute (ch. 450, Laws of 1847, as amended by ch. 78, Laws of 1870) to recover damages for negligence causing death, the necessary funeral expenses of the deceased are proper items of damages where any of those for whose benefit the action is brought are legally bound to pay such expenses, and proof thereof is, therefore, competent. *Murphy v. New York Central and Hudson River R. R. Co.*, 88 N. Y., 445, 1882; 8 Amer. & Eng. R. R. Cases, 490.

45. — grief. The statute authorizes bodily and mental suffering of the deceased to be considered as an element of damages, but the grief of the survivors should not be considered. *Nashville and Chattanooga R. R. Co. v. Stevens*, 9 Heiskell (Tenn.), 12; 19 Amer. R'y Rep., 363. 1871. See, also, *Collins v. East Tenn., Va. and Ga. R. R. Co.*, 9 Heiskell (Tenn.), 841. 1874.

46. — infant. In an action by an administrator for damages on account of the death of an infant, substantial damages may be recovered by the plaintiff, notwithstanding such recovery must be based upon the prob-

able accumulation of an estate after the infant has reached the age of twenty-one years. *Walters v. Chicago, Rock Island and Pacific R. R. Co.*, 41 Ia., 71. 1875.

47. — In a suit by the administrator for the death of a boy nine years of age, it is proper for the jury, in estimating the damages, if the next of kin is the father of the boy, to take into consideration the value of the services of deceased from the time of his death until he would have attained the age of twenty-one years, deducting what it would be worth to feed and clothe him during that time. *Rockford, Rock Island and St. Louis R. R. Co. v. Delaney*, 83 Ill., 198. 1876.

48. — But where damages are claimed for the death of a child incapable of earning anything, or rendering service of any value, the value of the probable future services to the parents during its minority is a matter of conjecture, and may be determined by the jury without the testimony of witnesses. *Little Rock and Ft. Smith R'y Co. v. Barker*, 39 Ark., 491. 1882.

49. — instantaneous death. If a person who has been struck by an engine remains in a perfectly unconscious condition until his death, his administrator is not entitled, in an action against the corporation owning the engine, to recover substantial damages, in the absence of evidence of any considerable expense or loss incurred between the time of the injury and the death. *Tully v. Fitchburg R. R. Co.*, 134 Mass., 499. 1883.

50. — Where death results instantly from injuries caused by neglect of a railway company other than wilful neglect, the jury in estimating damages can only inquire as to the value of the decedent's power to earn money, which is the measure of damages; it is improper to instruct the jury that upon proof of simple negligence they may give "such damages as they deem just and proper by way of compensation, not exceeding the amount claimed in the petition." *Louisville, Cincinnati and Lexington R. R. Co. v. Case*, 9 Bush (Ky.), 728. 1873.

51. — interest. The statute in force at time of verdict will apply to the rate of interest on a claim for damages founded on the death of an individual. *Salter v. Utica and Black River R. R. Co.*, 86 N. Y., 401; 8 Amer. & Eng. R. R. Cases, 215. 1881.

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52. — In an action by a widow for the homicide of her husband, it was error to instruct the jury as a matter of law that they should add interest to whatever amount of damages they might find at the date of the homicide. The question of increasing damages in such a case was for the jury. *Central R. R. Co. v. Sears*, 66 Ga., 499. 1881.

53. — In actions brought under the act of 1847, as amended by the act of 1849, authorizing the maintenance of actions to recover damages occurring by the death of any person by means of the negligence of the defendant, the jury, in rendering the verdict, may take into account the time that has elapsed since the death as affecting the amount of the damages. But they cannot agree upon a certain sum as damages and add to it the interest thereon from the time of the death to the time of the rendition of the verdict. *Cook v. New York Central and Hudson River R. R. Co.*, 10 Hun (N. Y.), 426. 1877.

54. — Under the act of 1870, giving compensation for causing death by negligence, etc. (ch. 78, Laws of 1870), which directs that interest on the damages recovered shall be added to the verdict, the rate of interest is governed by the statute regulating it in force when the verdict is rendered. *Salter v. Utica and Black River R. R. Co.*, 86 N. Y., 401, 1881; 8 Amer. & Eng. R. R. Cases, 487.

55. — mental anguish. Mental anguish of the survivors may be considered in estimating the damages. The statute authorizes the jury to give "such damages as may seem fair and just." *Baltimore and Ohio R. R. Co. v. Noell*, 32 Grattan (Va.), 394. 1879.

56. — punitive. A corporation is liable for punitive damages the same as a natural person. *Haley v. Mobile and Ohio R. R. Co.*, 7 Baxter (Tenn.), 239, 1874; 8 Amer. & Eng. R. R. Cases, 541; *South and North Ala. R. R. Co. v. Sullivan*, 59 Ala., 272, 1877.

57. — The damages allowed by the statute which gives an action for a wrongful act causing death are punitive, and are not confined to the pecuniary loss sustained by the family of the deceased by reason of his death. *Savannah and Memphis R. R. Co. v. Shearer*, 58 Ala., 672, 1877; 20 Amer. R'y

Rep., 451; *South and North Ala. R. R. Co. v. Sullivan*, 59 Ala., 272, 1877.

58. — when excessive. Where it appeared that the deceased was twenty-four years of age, without family, of temperate and industrious habits, and whose annual net earnings were found to be \$263, a verdict of \$10,000 was held to be excessive, and the judgment was affirmed upon the condition of a remittitur of \$5,000. *Rose v. Des Moines Valley R. R. Co.*, 39 Ia., 246, 1874; 8 Amer. R'y Rep., 496; 9 Amer. R'y Rep., 7; 20 Amer. R'y Rep., 326.

59. — Damages in the sum of \$3,400 were awarded against a railway company for the killing of an employe of feeble intellect, hired at \$1.40 a day. Held, excessive, under a statute (Comp. L., § 2351), measuring the damages by the "pecuniary injuries" inflicted, inasmuch as the interest on this amount would realize a perpetual income amounting annually to more than three-fourths of his annual earnings. *Chicago and Northwestern R'y Co. v. Bayfield*, 37 Mich., 205. 1877.

60. — when not excessive. A verdict of \$4,500, deceased being about sixty years of age, and in the enjoyment of reasonable health and of industrious habits, was not excessive. *Walter v. C. D. and M. R'y Co.*, 39 Ia., 33, 1874; 9 Amer. R'y Rep., 78; 20 Amer. R'y Rep., 319.

61. — A verdict of 3,000*l.* held not excessive in case of a farmer who was killed by a railway accident. *Secord v. Great Western R'y Co.*, 15 Upper Canada, Queen's Bench, 631. 1858. A verdict of 5,000*l.* for death of a blacksmith, thirty-five years of age, set aside as excessive. *Morley v. Great Western R'y Co.*, 16 ib., 504. 1858.

62. Evidence — cancer. Held, under the facts in this case, that there was not sufficient evidence to show that the deceased died of his injuries, or that a cancer was developed by his injury. *Jewell v. Grand Trunk R'y Co.*, 55 N. H., 84, 1874; 11 Amer. R'y Rep., 496.

63. — annuity; Carlisle tables. At the trial of an action under 9 and 10 Vict., c. 93, brought for the benefit of the mother, widow and children of R., claiming damages from the defendant for having by negligence caused the death of R., it was proved

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that the deceased was under a covenant to pay his mother an annuity of 200*l.* during their joint lives. A witness was then called for the plaintiff, who stated that he was an "accountant," and that he had personal experience as to the mode in which insurance business was conducted. He gave evidence, after referring to the "Carlisle Tables," as to the average duration of life of two persons of the ages of the mother and son, respectively, and as to the price for which an annuity for the mother's life could be bought. The admissibility of this evidence was objected to by the defendant, and was ruled to be admissible. In summing up, the judge directed the jury that they might, if they thought proper, calculate the mother's damages by ascertaining what was the sum which would purchase an annuity of 200*l.* for a person of her age, according to the average duration of human life; and that in calculating the widow's and children's damages they might, if they thought proper, take as a guide the period of the probable duration of life of a person of the age of the deceased. On the argument of a bill of exceptions tendered to this ruling in admitting the evidence and to this direction to the jury, *held*, first (by Blackburn, Keating, Grove and Archibald, JJ.), that the witness was competent to give evidence as to the probable duration of life and the price of the annuity, although not an actuary; and (Brett, J., dissenting) that the evidence was relevant and properly admitted. Secondly, by the whole court, that the direction to the jury as to the calculation of the mother's damages was wrong. *Rowley v. London and North Western R'y Co.*, Law Reports, 8 Exchequer Cases, 221; 6 Eng. (Moak), 293. 1873.

64. — cause of death. In an action against a railway company for injuries to a child causing its death, the plaintiff's evidence tended to show that the child was twenty-two months old, and previously in good health; that defendant's engine struck the child, and threw it about fifteen feet from the track; that it was taken up senseless and with one leg broken; that the broken limb was adjusted and bandaged by physicians, who continued to treat the child, and whose directions and prescriptions were

strictly followed; that a cough set in directly after the injury, and the child manifested great pain and nervous irritability, with sleeplessness, lack of appetite, etc.; that in a few days it had an unnatural appearance of the eyes; that these symptoms continued and increased until its death; that about eight days before its death it grew much worse, and was alternately hot and cold, and its face frequently flushed and red; that a few days before death the physicians removed the splints and bandages from the broken limb; and that the death occurred about a month after the injury. *Held*, that upon this evidence the jury would have been justified in finding that the death was caused by the injury inflicted by defendant. *Jucker v. Chicago and Northwestern R'y Co.*, 52 Wis., 150, 1881; 2 Amer. & Eng. R. R. Cases, 41.

65. — competency of witnesses. In a suit against one for killing plaintiff's husband, defendant is a competent witness. *Ent-whistle v. Feighner*, 60 Mo., 214. 1875.

66. — declarations of decedent. In a suit against a railway company for the killing of plaintiff's husband, the declarations of the latter immediately after receiving the injuries, as to the cause of his death, are admissible as a part of the *res gestæ*. *Ib.*

67. — In an action against a railroad company, to recover damages for killing plaintiff's intestate, through a collision at a road crossing, the company sought to prove the declarations of a person who was riding with the deceased in his wagon at the time, made just after the accident, which the court refused. *Held*, that the evidence was inadmissible, the person injured being in a dying condition, and not capable of assenting to what was said. *Chicago, Rock Island and Pacific R. R. Co. v. Bell*, 70 Ill., 102. 1873.

68. — In an action by a father against a railway company for damages for the death of his son, the declaration of the son, immediately after the happening of the accident, that he had jumped from the car, was admissible, as an admission against interest, and as a part of the *res gestæ*. *Stein v. Railway Co.*, 10 Philadelphia, 440. 1875.

69. — instantaneous death. At the trial of an action against a railway company for

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personal injuries occasioned to the plaintiff's intestate by being struck by an engine, if the evidence is conflicting on the question whether the intestate survived his injuries, it should be submitted to the jury. *Tully v. Fitchburg R. R. Co.*, 134 Mass., 499. 1883.

70. — number of decedent's family. Evidence as to the number of intestate's family and the amount of his property, showing circumstances stimulating the deceased to industry and economy, whereby his life was rendered more valuable, was properly admitted. *Beems v. Chicago, Rock Island and Pacific R. R. Co.*, 58 Ia., 150, 1882; 10 Amer. & Eng. R. R. Cases, 658. Again reported, 6 Amer. & Eng. R. R. Cases, 223.

71. — health of survivors. Evidence as to the state of health of the mother of a minor killed on a railroad is not admissible in an action by her to recover damages from the railway company. *Benton v. Chicago, Rock Island and Pacific R. R. Co.*, 55 Ia., 496. 1881.

72. — residence of directors and officers. In an action against a railroad company, to recover damages for wrongfully causing the death of an employe it is not error to admit testimony which tends to show that the president and directors of such railway company reside in other states and give very little personal attention to the operating of the road. *Kansas Pacific R'y Co. v. Salmon*, 14 Kans., 512. 1875.

73. — wealth of parties. It is technically erroneous to admit evidence that the family of the deceased were entirely dependent on his labor for support, though in the particular case the admission of such evidence was not considered prejudicial. *Chicago, Burlington and Quincy R. R. Co. v. Johnson*, 103 Ill., 512, 1882; 8 Amer. & Eng. R. R. Cases, 225.

74. — Under a Michigan statute (Comp. L., §§ 2350-1), allowing the widow or next of kin of a person killed by the negligence of a railway company to recover damages measured by the "pecuniary injuries" resulting to them, *held*, that their actual pecuniary circumstances are not to be considered; nor is defendant's wealth a subject of consideration. *Chicago and Northwestern R'y Co. v. Bayfield*, 37 Mich., 205. 1877.

75. — It is proper to show the amount of

the usual earnings of the deceased, and that the plaintiff was his wife in life, and that they had minor children, whom he was, by law, bound to support, and who usually shared his income, but is wholly immaterial whether such next of kin has or has not other pecuniary resources after his death. It is error to admit proof that the plaintiff and her children had no other means of support save that arising from his daily earnings. *Chicago and Northwestern R. R. Co. v. Moranda*, 93 Ill., 302, 1879; *Chicago and Northwestern R'y Co. v. Howard*, 6 Bradwell (Ill.), 569, 1880.

76. — when cause should be taken from the jury. Where the evidence in favor of either party is so preponderating as to require that an adverse verdict, if rendered, should be set aside, the judge is not justified in submitting the case to the jury. *Davis v. Third Avenue R. R. Co.*, 41 N. Y. Superior Ct., 31. 1876.

77. Ferry-boat; passengers. When a passenger on the railway ferry-boat plying across the Wallamet river between East Portland and Portland was drowned by reason of the negligence of the owner of the boat or its servants, a marine tort was committed, for which a suit may be maintained in the district court by the administrator of the deceased to recover the damages given therefor by § 367, Oregon Civ. Code. *Holmes v. Oregon and California R'y Co.*, 5 Federal Reporter, 75. 1880.

78. Husband and wife. Under the provisions of the statutes allowing a recovery of damages for a personal injury where death ensues, the husband is entitled to the damages which may be recovered for an injury to the wife resulting in death. *Trafford v. Adams Express Co.*, 8 Lea (Tenn.), 96. 1881.

79. — damages. Where the deceased has left a wife and children, the jury, in ascertaining the damages, may properly assess the same with reference to the pecuniary loss sustained by the wife and children; first, by fixing the same at such sum as would be equal to the probable earnings of the deceased during the probable period of his life, if he had not been killed, taking into consideration his age, business capacity, experience, habits, health, energy and perse-

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verance; and second, by adding thereto the value of his services in the attention to and superintendence and care of his family, and in the education of his children, whereof they are deprived by his death. *Baltimore and Ohio R. R. Co. v. Wightman*, 29 Grattan (Va.), 431. 1877.

80. — In a suit by the wife of an engineer against a railroad company for his homicide, the jury should consider the age of the deceased, and if old, his consequent incapacity to labor long. *Central R. R. Co. v. Roach*, 64 Ga., 635, 1880; 8 Amer. & Eng. R. R. Cases, 79.

81. — In an action by the widow against a railroad company for killing her husband, it is error to charge the jury that, in addition to damages which deceased himself ought to have received if he had lived, damages might also be allowed for deprivation resulting to the parties for whose use the suit is brought. *East Tenn., Va. and Ga. R. R. Co. v. Toppins*, 10 Lea (Tenn.), 58, 1882; 11 Amer. & Eng. R. R. Cases, 222. But no allowance should be made for assistance in educating, maintaining and caring for the family. *Louisville and Nashville R. R. Co., v. Conley*, 10 Lea (Tenn.), 531. 1882.

82. — In an action to recover damages in respect of the death of a person caused by the wrongful act or neglect of another, if the widow survive the deceased, the damages sustained by her alone are all that can be recovered under the statute. *Schadewald v. Milwaukee, Lake Shore and Western R'y Co.*, 55 Wis., 569. 1882.

83. — In an action by a husband for the death of his wife, the husband died while the suit was pending; upon the trial the court charged that the administrator of the husband might recover for the loss up to the time of his death, which would include "services and comfort of his wife's society." *Held*, no error. *Queen v. Brooklyn Cross Town R. R. Co.*, 19 Hun (N. Y.), 341. 1879.

84. — The plaintiff, who was husband of the intestate, proved no special damage. *Held*, that if defendant was liable at all, only nominal damages could be recovered. *Mitchell v. N. Y. Central and Hudson River R. R. Co.*, 5 Thompson & Cook (N. Y. Supreme Ct.), 122, 1874; 2 Hun (N. Y.), 535, 1874; affirmed, 64 N. Y., 655, 1876.

85. — In an action against a railway company by a widow, to recover damages for the killing of her husband by a collision of trains of the defendant, he being at the time in the employ of the defendant, the jury in assessing the damages, if they find for the plaintiff, must estimate the reasonable probabilities of the life of the deceased, when injured, and give the plaintiff such damages as will compensate her for losses already suffered as the direct consequence of her husband's death; and also for the prospective losses she will suffer as the direct consequence of such death during the period the jury, under all circumstances, shall deem to be the probable duration of her life. *Baltimore and Ohio R. R. Co. v. State*, 41 Md., 268. 1874.

86. — death of both in same accident. Where two persons, husband and wife, are shown to have perished in the same casualty (the wrecking of a railway train by the giving way of a bridge), nothing appearing to the contrary, it is a presumption of law that they died at the same moment. *Kansas Pacific R'y Co. v. Miller*, 2 Colo., 442, 1874; 20 Amer. R'y Rep., 245.

87. — evidence of marriage. Where a party suing to recover damages for wrongfully causing the death of another claims to have been his wife at the time of the death, and there is no question as to the deceased having any other wife, the fact of the plaintiff's marriage with the deceased is material. Where the suit is brought by the personal representative, and two claim as widow, and the marriage to one or the other is not disputed, then the question of the marriage is not material, as the court, in ordering a distribution, must determine who is entitled to the damages recovered. *Toledo, Wabash and Western R'y Co. v. Brooks*, 81 Ill., 245. 1876.

88. — legal representatives. The damages given must be recovered by the personal representatives of the decedent; and when the person killed was a married woman, the law does not require the suit to be brought by the husband. *South and North Ala. R. R. Co. v. Sullivan*, 59 Ala., 272. 1877.

89. — parties to suit. Where the statute gives the right of action to the representative of the deceased, for the use of the wife

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and children, the wife cannot sue alone in her own name. *Western and Atlantic R. R. Co. v. Strong*, 52 Ga., 461, 1874; 8 Amer. R'y Rep., 13.

90. — remarriage of widow. The right to sue for the homicide of the husband vests in the widow at the death of her husband, and is not divested by the subsequent marriage of the widow. The subsequent marriage of the widow will not change the measure of damages to which she was entitled when her right of action accrued. *Georgia R. R. and Banking Co. v. Garr*, 57 Ga., 277. 1876.

91. — widow's power to dismiss suit. A suit brought by a widow under the act of 1871, ch. 78, for injuries causing the death of her husband, may be dismissed by her over the objection of the children of the deceased. *Greenlee v. East Tenn., Va. and Ga. R. R. Co.*, 5 Lea (Tenn.), 418, 1880; 4 Amer. & Eng. R. R. Cases, 351.

92. Insurance. Evidence on the part of the defendant that the life of the deceased was insured is incompetent. *Kellogg v. New York Central and Hudson River R. R. Co.*, 79 N. Y., 72. 1879.

93. Limitations. Under the "act requiring compensation" for causing death by wrongful act, neglect or default (S. & C., 1139, 1140), which gave a right of action, provided such action should be commenced within two years after the death of such deceased person, the proviso is a condition qualifying the right of action, and not a mere limitation on the remedy. Such limitation need not be pleaded by defendant. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Hine*, 25 Ohio St., 629, 1874; 10 Amer. R'y Rep., 157.

94. Malpractice as a defense. The plaintiff's intestate, while leaving a train at P., was, by a sudden backward movement of the train, thrown against the iron railing of the platform and ruptured. An operation was performed to reduce the hernia; instead of returning the intestine to the abdominal cavity, it was by mistake placed in an abnormal cavity. Whether death was occasioned from this mistake, or from another hernia also caused by the accident, was in dispute. The court charged that if death was occasioned by the neglect or maltreatment of the physi-

cian, that the plaintiff could not recover; that if the jury should find that this hernia received the best professional skill, and that such skill was accompanied by liability to accident and mistake, and that such error was one of the concomitants of the disease to which those who suffered from it were exposed, that then such mistake would not relieve the defendant from liability for having caused the disease. *Held*, that this was correct. *Sauter v. New York Central and Hudson River R. R. Co.*, 6 Hun (N. Y.), 446. 1876.

95. — Where a person who, through the negligence of another, has received an injury which, without a surgical operation, would cause his death, employs a competent and skilful surgeon, by whose mistake the operation is not successful, and the patient dies, the wrong-doer is not shielded from liability by the surgeon's error, and this, although the operation is the immediate cause of the death. *Sauter v. New York Central and Hudson River R. R. Co.*, 66 N. Y., 50. 1876. See, also, *Nagel v. Missouri Pacific R'y Co.*, 75 Mo., 653, 1882; 10 Amer. & Eng. R. R. Cases, 702.

96. Mortgagees operating railway. A railway company is not liable to the forfeiture imposed by statute for the benefit of the widow and children of a person whose life is lost by the negligence of servants or agents employed in operating the road, if, at the time of the accident, the mortgagees of the corporation were in possession of the road and had its exclusive management and control. *State v. European and North American R'y Co.*, 67 Me., 479, 1878; 16 Amer. R'y Rep., 371.

97. Negligence — corporation. Where a party killed was guilty of contributory negligence, his personal representative cannot recover unless the negligence of the defendant contributing to cause the death was gross, in comparison with which the negligence of the intestate was slight. *Chicago, Burlington and Quincy R. R. Co. v. Van Patten*, 74 Ill., 91. 1874.

98. — contributory negligence; burden of proof. In an action by an administrator against a railroad company for causing the death of a person, the plaintiff must prove that the decedent was not guilty of negli-

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gence contributing to his death. *Murphy v. Chicago, Rock Island and Pacific R. R. Co.*, 45 Ia., 661. 1877.

99. — contributory negligence of deceased. In an action against a railway company for the negligent killing of plaintiff's intestate, no evidence was introduced showing that the deceased exercised ordinary care, and the circumstances made it affirmatively appear that he did not. *Held*, that the court was justified in directing a verdict for defendant. *Starry v. Dubuque and South Western R. R. Co.*, 51 Ia., 419. 1879.

100. — In suit against a railway company by the wife for the killing of her husband, under the Damage Act (Wagn. Stat., 519), if deceased was guilty of any negligence which contributed directly to cause his death, plaintiff cannot recover. *Karle v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 55 Mo., 476. 1874.

101. — contributory negligence of next of kin. In a suit under the act of March 25, 1851 (S. & C., 1139), by the personal representative, for damages resulting from the death of his intestate, caused by the wrongful act or neglect of the defendant, it is not competent for the defendant to prove that some of the next of kin of the intestate for whose benefit the action is prosecuted were guilty of negligence which contributed to the injury that resulted in the death. *Cleveland, Columbus and Cincinnati R. R. Co. v. Crawford*, 24 Ohio St., 631, 1874; 7 Amer. R'y Rep., 172.

102. — contributory negligence of parents. The parents of a child of too tender age to exercise care, having its custody, are chargeable with the duty of exercising reasonable care for its personal safety, and if for the want of such care it is killed by a passing train of cars, no recovery can be had on behalf of the next of kin. *Toledo, Wabash and Western R'y Co. v. Grable*, 88 Ill., 441, 1878; 21 Amer. R'y Rep., 336; *Pennsylvania Co. v. James*, 81½ Pa. St., 194, 1874.

103. — contributory negligence; pleading. A complaint for the death of a person, caused by the wrongful act of the defendant, is bad on demurrer, if it is not alleged that the person killed was not guilty of negligence contributing to his injury, unless the

facts alleged show that he was not guilty of such negligence, and unless it is alleged that the defendant caused the injury wilfully or purposely, though it be averred that the defendant inflicted the injury recklessly and with gross negligence. *Cincinnati and Martinsville R. R. Co. v. Eaton*, 53 Ind., 307. 1876.

104. — error of judgment of decedent. In a suit to recover damages for the death of a person, caused by the wrongful act of the defendant, it was held that the failure of such person to be cool and collected, and to act with perfect prudence and in the exercise of a deliberate judgment, in the presence of an unexpected danger, constituted no defense to the action. *Indianapolis and St. Louis R. R. Co. v. Stout*, 53 Ind., 143. 1876.

105. Parent and child — action by child. Section 2971 of the Code provides as follows: "A widow, or, if no widow, a child or children, may recover for the homicide of the husband or parent; and, if suit be brought by the widow or children, and the former or one of the latter dies pending the action, the same shall survive in the first case to the children, and in the latter case to the surviving child or children." *Held*, that this section gives a right of action against a railway company, by the minor children, for the homicide of the mother, and does not restrict their right to the homicide of the father. *Atlanta and West Point R. R. Co. v. Venable*, 65 Ga., 55, 1880; 7 Amer. & Eng. R. R. Cases, 35.

106. — One H., a yard switchman, was, while attempting to make a coupling, so injured that death ensued. His administrator brought suit, under the statute, to recover damages for the next of kin. It appeared that the deceased was a single man, leaving neither widow nor child surviving him; that his nearest relative was a mother, possessed of some means; and, from the history of the young man, that his past life had not been, and his future life probably would not be, of any great pecuniary value to his mother. The jury awarded the full statutory limit, \$10,000. The district court set aside the verdict as excessive. *Held*, that such ruling must be sustained. It was not the intention of the statute to make death a

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pecuniary speculation to the next of kin, but to make good to the next of kin the actual loss sustained by such death; and, in determining such loss, many things should be considered by a jury, among them whether the next of kin was legally or in fact dependent upon deceased for support, whether the relative pecuniary situation of the deceased and the next of kin was such as to show that probably the next of kin would receive any portion of the deceased's earnings, and also whether the past history of the deceased tends to show that the next of kin would be likely to receive any benefit from the continuance of his life. *Atchison, Topeka and Santa Fe R. R. Co. v. Brown*, 26 Kans., 443, 1881; 6 Amer. & Eng. R. R. Cases, 228.

107. — common law. A father cannot, at common law, recover damages for the death of his child. *Thomas v. Union Pacific R. R. Co.*, 1 Utah, 232. 1875.

108. — damages. In a suit by a parent against a railway company for negligently causing the death of his infant child he is entitled to recover only for the pecuniary injury he has sustained. The proper measure of damages is the value of the child's services from the time of the injury till he would have attained his majority, taken in connection with his prospects in life, less his support and maintenance. To this may be added, in proper cases, the expense of care and attention to the child made necessary by the injury, funeral expenses and medical services. *St. Louis, Iron Mountain and Southern R'y Co. v. Freeman*, 36 Ark., 41, 1880; 4 Amer. & Eng. R. R. Cases, 608; *Pennsylvania Co. v. Lilly*, 73 Ind., 252, 1881; 4 Amer. & Eng. R. R. Cases, 540.

109. — The measure of damages to which a parent is entitled for the negligent killing of his son by a railway company is such a sum as would purchase an annuity equal to the value of the pecuniary aid which the parent would have derived from the deceased, calculated upon the basis of all the facts and circumstances of the particular case reasonably accessible in evidence, and including the probable duration of life. In such a case the plaintiff should give evidence of such facts as would furnish the basis for a verdict, such as the circumstances of the

deceased, his occupation, age, health, habits of industry, his sobriety and economy, his skill and capacity for business, his annual earnings and the probable duration of his life. In the absence of such evidence there is no standard by which to test the correctness of a verdict in such a case. *Houston and Texas Central R'y Co. v. Cowser*, 57 Tex., 293. 1882.

110. — The jury are not limited in damages to the present value of an annuity for the probable duration of life of the plaintiff, for the amount shown to have been actually furnished the plaintiff per annum during her life by the deceased son. *International and Great Northern R. R. Co. v. Kindred*, 57 Tex., 491, 1882; 11 Amer. & Eng. R. R. Cases, 649.

111. — A father cannot recover for the homicide of his minor daughter, but may recover for the loss of her services to the time of her majority. *McDowell v. Ga. R. R. Co.*, 60 Ga., 320. 1878.

112. — The measure of damages to a mother for the negligent killing by a railway train of her infant child is, under the statute, the expense necessarily incurred by her for medical attendance, nursing and burial of the child, and reasonable compensation for the loss of the probable services of the child during its minority. For the loss of companionship and association of the child, and the grief of the mother at its death, the statute gives no compensation. *Little Rock and Ft. Smith R'y Co. v. Barker*, 33 Ark., 350. 1878.

113. — In an action by the administrator of an infant to recover for his death, caused by injuries received, the recovery of damages is limited to those accruing to the estate after the infant would have attained his majority. For the damages accruing before that period, the father, if living, if not, the mother, might, under the Iowa statute (Rev., § 2792), maintain an action. *Walters v. Chicago, Rock Island and Pacific R. R. Co.*, 36 Ia., 458. 1873.

114. — The plaintiff, in an action for the death of a child of tender years, need not show any direct pecuniary loss; when the circumstances and condition in life of the next of kin, and the age, sex, and physical and mental characteristics of the deceased

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are shown, it is for the jury to estimate the pecuniary injuries, present and prospective, of the next of kin, such evidence being necessarily speculative and hypothetical. *Hooghkirk v. Delaware and Hudson Canal Co.*, 11 Abbott, New Cases (N. Y.), 72. 1881.

115. — The measure of actual damages in a suit by a parent for the killing of his son by a railway company is the actual pecuniary injury which resulted from the act complained of, and this is not necessarily confined to the period of the son's minority. *Houston and Texas Central R'y Co. v. Cowser*, 57 Tex., 293. 1882.

116. — A parent sued the defendant for negligently injuring and causing the death of his son, eight years of age, by running a street car over him. *Held*, that the plaintiff can only recover damages for the expenses he has incurred for medical attendance, his care in nursing, etc., and for the loss of service from the date of the injury to the time of the child's death. The action is maintainable upon the ground alone that the parent is entitled to his child's services. No damages can be awarded by reason of the injured feelings of the parent. *Covington Street R'y Co. v. Packer*, 9 Bush (Ky.), 455. 1872.

117. — The father cannot maintain an action for damages on account of the homicide of his infant child, who was, at the time of his death, incapable of rendering him any service. *Allen v. Atlanta Street R. R. Co.*, 54 Ga., 503. 1875.

118. — In an action brought by a father, as the administrator of his deceased child, a healthy boy of about six years of age, to recover damages occasioned by his having been killed through the defendant's negligence, the absence of proof of any special pecuniary damage resulting from his death will not justify the court in non-suiting the plaintiff, or in directing the jury to find a verdict for nominal damages only. *Gorham v. New York Central and Hudson River R. Co.*, 23 Hun (N. Y.), 449. 1881.

119. — Where a child is killed on the spot by the wrongful act of the defendant, the father may recover for the loss of service. Where the death does not immediately ensue, but afterwards takes place, the father is not limited in the estimate of his damages

to the period of the son's death. *Sullivan v. Union Pacific R. R. Co.*, 3 Dillon (U. S. C. C.), 384. 1874.

120. — In allowing damages for the killing of a child, the jury cannot allow anything for the suffering or wounded feelings of the parents; they can only allow for actual pecuniary loss. If the family is poor, the fact that the boy would probably have early commenced to assist in supporting the family may be taken into consideration. *Barley v. Chicago and Alton R. R. Co.*, 4 Bissell (U. S. C. C.), 430. 1865. See, also, *Nehrbas v. Central Pacific R. R. Co.*, 62 Cal., 320. 1882.

121. — In an action founded on Lord Campbell's Act, 9 and 10 Vict., c. 93, for injury resulting from death, legal liability alone is not the test of injury in respect of which damages may be recovered; but the reasonable expectation of pecuniary advantage by the relation remaining alive may be taken into account by the jury; and damages may be given in respect of that expectation being disappointed, and the probable pecuniary loss thereby occasioned. Therefore, in an action by a father for injury resulting from the death of his son through the negligence of the servants of a railway company, it appeared that the son, who was twenty-seven years of age, and unmarried, but living away from his parents, had for the last seven or eight years been in the habit of visiting them once a fortnight, and of taking them on those occasions presents of tea, sugar and other provisions, besides money, amounting in the whole to about 20l. a year. *Held*, that the jury were warranted in inferring that the father had such a reasonable expectation of pecuniary benefit from the continuance of his son's life as to entitle him to recover damages under the statute. *Dalton v. South Eastern R'y Co.*, 4 Common Bench (N. S.), 296; 93 E. C. L., 296. 1858.

122. — A son was twenty-eight years of age when killed. He had been away from home, at intervals, after he attained his majority, and been in business on his own account. He had returned, however, to his father's house and was engaged in his father's business, for which no compensation was paid him. It appeared that he intended

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to remain with his father, and that his services were valuable to him in his business. *Held*, that it was for the jury to decide whether there was a reasonable expectation of pecuniary advantage accruing to plaintiff which was destroyed by the loss of his son. *North Pennsylvania R. R. Co. v. Kirk*, 90 Pa. St., 15, 1879; 1 Amer. & Eng. R. R. Cases, 45.

123. — In an action by a father for injury resulting from the death of his son, it appeared that the father was old and infirm; that the son, who was young and earning good wages, assisted him in some work for which the father was paid 8s. 6d. a week. The jury having found that the father had a reasonable expectation of benefit from the continuance of his son's life, *held*, that the action was maintainable. *Franklin v. South Eastern R'y Co.*, 3 Hurlstone & Norman (Exchequer), 211. 1858.

124. — In an action brought under 9 and 10 Vict., c. 93, for the benefit of the father of the deceased, evidence was given that the father, who was fifty-nine years of age, was nearly blind and injured in his leg and hands, and was not so able to work as he had been, but worked when he could; that the son used to contribute to his support; that five or six years previously, the father being out of work for six months, the son had assisted him pecuniarily out of his earnings, but had not done so since; *held*, that there was evidence for the jury of pecuniary injury to the father from the son's death. *Hetherington v. North Eastern R'y Co.*, Law Reports, 9 Queen's Bench Division, 160, 1882; 6 Amer. & Eng. R. R. Cases, 490.

125. — In an action under Lord Campbell's Act (9 and 10 Vict., c. 93) by a mother for damages upon the death of her son, aged fourteen, who had never earned any wages, but whose capabilities were valued at sixpence per day, the probability that he would have enabled his mother to earn more, or would have devoted part of his earnings to her support, is evidence to go to the jury upon the question of damages. The probability is increased by the past filial conduct of the deceased. *Condon v. Great Southern and Western R'y Co.*, 16 Irish Common Law, 415. 1865.

126. — In an action brought by a father

as administrator, under the statute (ch. 450, Laws of 1847; ch. 256, Laws of 1849), to recover damages for the death of his infant son, where the recovery is for his exclusive benefit, he may proceed for and recover his whole damages, including the loss of services of his son during minority. The recovery will be a bar to another action by the father, as such, assuming that he has a right of action independent of the statute. *McGovern v. New York Central and Hudson River R. R. Co.*, 67 N. Y., 417, 1876; 15 Amer. R'y Rep., 119.

127. — evidence. In an action by an administrator for damages sustained on account of the death of an infant, it was held not to be error to admit testimony respecting the general nature of the employment of decedent's father; that the jury might consider its probable effect in determining the pursuits of decedent. *Walters v. Chicago, Rock Island and Pacific R. R. Co.*, 41 Ia., 71. 1875.

128. — illegitimate child. A bastard is not a "child" within § 2 of the 9 and 10 Vict., c. 93, and can therefore maintain no action under that statute. *Dickinson v. North Eastern R'y Co.*, 2 Hurlstone & Colman (Exchequer) 735. 1868.

129. — minor; suit by mother. For damages for the death of a minor, killed by the running of a railroad train, the father, if living, must sue. If the mother sues she must show affirmatively and positively that the father is dead. The allegation that she is a widow is not sufficient. *St. Louis, Iron Mt. and Southern R'y Co. v. Yocum*, 34 Ark., 493. 1879.

130. — payment of compensation to father; Indiana statute. Under the statute of Indiana in force in 1859, in case of the death of a minor from the negligence of a railway company, the right to recover and to receive compensation for such wrong was placed in the father of such minor, if he were living. So, when the administrator of such minor permitted the father to receive the money arising from that cause, he was held to have performed his whole duty in respect to the fund. *Perry v. Carmichael*, 1 Amer. & Eng. R. R. Cases (Ill.), 174. 1880.

131. — pecuniary condition of parent. In an action for damages by the surviving

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parent (mother) for the death of her adult son, her pecuniary condition may properly be alleged to show the reasonable expectation of pecuniary assistance from the deceased, but not for the purpose of increasing the amount of damages. *International and Great Northern R. R. Co. v. Kindred*, 57 Tex., 491, 1882; 11 Amer. & Eng. R. R. Cases, 649.

132. — slave parents. An adult freedman, born of parents who were slaves in Georgia, was accidentally killed on the H. and T. C. R. R. in 1873. The father, who was still a resident of Georgia, sued the company for damages. *Held*, that, in the absence of evidence showing that the laws of Georgia differ from those of Texas, the legal relation of father and son existed between the two, and the father was competent to sue as such. *Houston and Texas Central R'y Co. v. Baker*, 57 Tex., 419, 1882; 11 Amer. & Eng. R. R. Cases, 637.

133. Pleading. An action by the father to recover damages for the death of his minor child, caused by the neglect of another, is statutory, and cannot be joined with an action by him to recover for personal injuries received by himself, though caused by the same transaction. *Cincinnati, Hamilton and Dayton R. R. Co. v. Chester*, 57 Ind., 297, 1877.

134. — Only one suit can be brought for an injury resulting in death. Such suit, whether brought by one or by all the parties interested, is for the benefit of all. *Houston and Tex. Central R'y Co. v. Moore*, 49 Tex., 31, 1878; *Galveston, Harrisburg and San Antonio R. R. Co. v. Le Gierse*, 51 ib., 189, 1879.

135. — It is not necessary to aver that the intestate left a widow, child or next of kin. *Ala. and Fla. R. R. Co. v. Waller*, 48 Ala., 459, 1872.

136. — It is sufficient, in a suit for negligence resulting in death, to aver in the declaration that the deceased left a widow or children, without naming them. It is proper, though perhaps not indispensable, to allege that such widow or next of kin has sustained some pecuniary loss. *McGlone v. New Jersey R. R. and Transportation Co.*, 37 N. J. Law, 304, 1875.

137. — In an action under Gen. St. 1878,

ch. 77, § 2, the complaint, where it states the names of the next of kin and how they were related to the deceased, with an allegation of damage to them, is sufficient, so far as pleading the damages is concerned. *Barnum v. Chicago, Milwaukee and St. Paul R'y Co.*, 30 Minn., 461, 1883.

138. — In an action by an administrator, the averment that the deceased, at the time of the accident, was exercising due care and diligence, whether necessary or not, when traversed by the general issue cannot be treated as an immaterial allegation, and must be sustained by the evidence. *Wabash, St. Louis and Pacific R'y Co. v. Shacklet*, 105 Ill., 364, 1883.

139. — Where the want of negligence on the part of one killed by a collision of two trains is averred and put in issue, it is error for the court, in instructions, to ignore this issue, where none others are given on the other side to cure such omission. *Id.*

140. — In instructing the jury in an action for fatal negligence, it is improper for the court to abandon the grounds alleged in the declaration and direct their attention to other considerations as tending to support the action. *Marquette, Houghton and Ontonagon R. R. Co. v. Marcott*, 41 Mich., 433, 1879.

141. — A complaint by an administrator, who is also a child of the intestate, for injuries to his intestate causing his death, which alleges that, by means of such wrong, the plaintiff has sustained damages in a certain sum, but states no facts to show pecuniary loss, present or prospective, resulting from the death, to the widow or relatives of the deceased, does not state a cause of action under the statute of Wisconsin. *Regan v. Chicago, Milwaukee and St. Paul R'y Co.*, 51 Wis., 599, 1881.

142. — The pleading, in actions on account of death, under the statutes of Maryland, examined. *Philadelphia, Wilmington and Baltimore R. R. Co. v. State*, 10 Amer. & Eng. R. R. Cases, 792; 58 Md., 372, 1882.

143. — amendment. A plaintiff may restate his cause of action by way of amendment without its being obnoxious to the objection of introducing new causes of action. So, where plaintiff, within the time limited by the statute, declared against a railway

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company for damages for causing the death of his intestate, an amendment afterwards made, setting up that the deceased left surviving him a widow and children, is not a setting up of a new cause of action. *Haynie v. Chicago and Alton R. R. Co.*, 9 Bradwell (Ill.), 105. 1881.

144. — Where, in a suit brought in Georgia under a South Carolina statute which allowed the administrator of a decedent who left a parent or wife or children to sue for his homicide, the declaration failed to allege that he left such parent, wife or child, it could be amended. *South Carolina R. R. Co. v. Nix*, 68 Ga., 572. 1882.

145. — In an action against a railway company for negligently causing the death of a person not an employe of the company, an amended petition was filed, alleging that said death was caused by the wilful neglect of said company. *Held*, that the amendment did not set up a new cause of action, but was simply an amendment bringing the original cause of action within § 3 of the act of 1854, which authorizes the giving of punitive damages. *Louisville, Cincinnati and Lexington R. R. Co. v. Case*, 9 Bush (Ky.), 728. 1873.

146. Statute—Alabama. The act approved February 21, 1860, entitled "An act to prevent homicides," which repealed sections 1938 and 1939 of the Code of 1852, having been omitted from the Revised Code of 1867, in which the repealed sections were inserted; and the act of the same title, approved February 21, 1872, having been passed to remedy the omission, section 1941 (Rev. Code, § 2300), which gives against corporations the same remedy for wrongful acts causing death which said sections 1938 and 1939 gave against individuals, now gives the same remedy as by the amending act of 1872. *Savannah and Memphis R. R. Co. v. Shearer*, 58 Ala., 672, 1877, 20 Amer. R'y Rep., 451.

147. — The compensation given by statute does not go to the husband, wife or child of the deceased, as such, but becomes assets of the estate, not subject to the payment of debts, and must be distributed as the personality of an intestate is now distributed. *South and North Ala. R. R. Co. v. Sullivan*, 59 Ala., 272. 1877.

148. — Where, by the law of Alabama, the personal representative of a party who is killed by the wrongful act or negligence of another is entitled to an action for damages therefor, no other person but such personal representative can bring such action in the courts of this state, when the killing occurred within the state of Alabama. The widow of the party killed cannot, in her own name, as such widow, maintain such action. *Selma, Rome and Dalton R. R. Co. v. Lacey*, 49 Ga., 106. 1873.

149. — descendants of injured party. In case, under the statute, for injuries occasioned by negligence and resulting in the death of the party injured, the existence of any of the descendants or kin named in the statute suffices to maintain the action. *Kansas Pacific R'y Co. v. Miller*, 2 Colo., 442, 1874; 20 Amer. R'y Rep., 245.

150. — federal courts. The Oregon statute, giving a right of action for an injury causing death, will be enforced in the federal courts. *Holmes v. Oregon and California R'y Co.*, 6 Sawyer (U. S. C. C.), 262. 1890.

151. — former recovery. A recovery in a former action for medical attendance, expenses, loss of service and time before his death, does not affect the damages recoverable under the statute for death. *Barley v. Chicago and Alton R. R. Co.*, 4 Bissell (U. S. C. C.), 430. 1865.

152. — Georgia. Where an action is brought by a father against a railroad company for damages sustained by reason of the homicide of his child, and the tort complained of, *prima facie*, amounts to a felony, he must allege in his declaration that he has prosecuted the agent of the company on the criminal side of the court, or set forth a good excuse for his failure to do so. Code, § 2970; *Allen v. Atlanta Street R. R. Co.*, 54 Ga., 503. 1875.

153. — In a suit by a widow against a railroad company for the homicide of her husband, a request to charge that no recovery could be had unless the employes who caused the death had first been prosecuted was properly refused. Such request assumed the killing to have been a felony, which was a question for the jury. *Southwestern R. R. Co. v. Johnson*, 60 Ga., 667. 1878.

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154. — The Code limits the right to recover for the homicide of another to the widow or children of the deceased, omitting the words, contained in the act of 1856, "if no child or children, it shall vest in his legal representative." This court is bound to presume that such words were intentionally omitted, and the right of action thereby given no longer exists. *Miller v. Southwestern R. R. Co.*, 55 Ga., 143: 1875.

155. — **injury in another state.** An administrator in one state cannot recover damages for the benefit of the widow and next of kin in the courts and under the authority of a statute of another state. *MacKay v. Central R. R. Co.*, 4 Federal Reporter, 617, 1880; *McCarthy v. Chicago, Rock Island and Pacific R. R. Co.*, 18 Kans., 46, 1877; 9 Amer. R'y Rep., 301.

156. — Where M. is an inhabitant of Kansas, and is injured in the state of Missouri by the wrongful acts of a railway company operating a railroad in the latter state, and thereupon is brought to Kansas and dies there from the effects of such wrongful acts, the personal representative of the intestate, appointed under the laws of Kansas, cannot maintain an action therefor in Kansas against such railway company under section 422 of the Civil Code. *Same v. Same*, 18 Kans., 46. 1877.

157. — The suit may be instituted in another state by the administrator. *Dennick v. Railroad Co.*, 103 U. S., 11. 1880.

158. — A personal representative has no rights nor powers beyond the jurisdiction of the state under whose laws he received his appointment. He cannot receive his appointment in Kentucky and rely upon the statutes of Indiana to recover damages for injuries to a decedent caused by a railway company in that state. *Taylor v. Pennsylvania Co.*, 78 Ky., 348, 1880; 7 Amer. & Eng. R. R. Cases, 23.

159. — An administrator appointed in Kentucky, and suing in that state, must be able to show that the laws thereof entitle him to recover the thing sued for. *Ib.*

160. — The rule seems to be that causes of action for damages, such as are given by the statutes (Laws of 1847 and 1849) to the personal representative of a deceased person, whose death was caused by culpable

negligence, are not recognized by the common law, and that statutes of any particular state giving such rights of action have no extraterritorial jurisdiction. But causes of action of this character, arising under statutes of one state, may be enforced in another state, provided it is made to appear that the maintenance of such causes of action is in conformity with the policy of the state in which the action is brought, and are recognized by the laws of that state. *Stallknecht v. Pennsylvania R. R. Co.*, 53 Howard's Practice (N. Y.), 305, 1877; 13 Hun (N. Y.), 451, 1878.

161. — The statute of Ohio, allowing an action for a wrongful act causing death, has no application where the act complained of occurred beyond the state. *Hover v. Pennsylvania Co.*, 25 Ohio St., 667. 1874.

162. — The Code, art. 65, §§ 1 and 2, gives a right of action whenever the death of a person shall be caused by the wrongful act, neglect or default of another, "and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof." In an action under this statute against a corporation operating a railroad lying partly in Maryland and partly in Pennsylvania, chartered by the laws of both states, brought in this state for the use of the widow and infant child of a deceased person, who was killed while in the employment of the defendant, by an accident occurring in Pennsylvania, it was held that this statute did not apply to the case of a wrongful act or neglect occurring in another state, whereby death had been caused, although the injured person was a citizen of Maryland. *State v. Pittsburgh and Connellsville R. R. Co.*, 45 Md., 41. 1876.

163. — In the absence of proof to the contrary, it will be presumed that the common law prevails in another state. *Ib.*

164. — The law of Tennessee giving a right of action for injuries resulting in death may be enforced in Mississippi, as the laws of the two states coincide. *Chicago, St. Louis and New Orleans R. R. Co. v. Doyle*, 60 Miss., 977; 8 Amer. & Eng. R. R. Cases (Miss.), 171. 1883.

165. — Where the injury has occurred in another state whose laws give a right of ac-

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tion for death, an action may be brought in Tennessee for such injury. *Nashville and Chattanooga R. R. Co. v. Sprayberry*, 8 Baxter (Tenn.), 341. 1874.

166. — In an action by a widow and her minor children to recover damages for the death of her husband, who, while in the employ of a railway company, was killed in West Virginia, the court instructed the jury that the action could be maintained if the statute in force in West Virginia, relating to cases of death caused by negligence, was similar to or substantially the same as the statute on the same subject in Pennsylvania, and at the close of the charge said: "The question of law as to the effect of the statute of West Virginia we will reserve for future consideration." The jury found for plaintiffs, "subject to the opinion of the court on a question of law reserved." Subsequently in an opinion the court stated two questions of law as reserved. 1. "Can the plaintiffs recover under the West Virginia statute?" and 2. "Is there sufficient evidence of negligence to justify a verdict against the defendant?" On these questions so stated as reserved judgment was entered for defendant. *Held*, that if it was material to determine whether the statutes were substantially alike, it was for the court; that there was no reservation of either the fact or the question of law set forth in the instruction; that every reservation of a question should place distinctly upon the record what the point is which is reserved and state the facts out of which it arises. *Patton v. Pittsburgh, Cincinnati and St. Louis R'y Co.*, 96 Pa. St., 169, 1880; 11 Amer. & Eng. R. R. Cases, 658.

167. — **Kansas.** A claim for damages for causing death, under § 422 of the Code, is prosecuted by the administrator for the benefit of the widow and children or next of kin of the deceased, and is not an estate of the deceased to be administered within the state of Kansas within the meaning of the act respecting executors and administrators. (Comp. Laws 1879, ch. 37.) *Perry v. St. Joseph and Western R. R. Co.*, 29 Kans., 420, 1883; 11 Amer. & Eng. R. R. Cases, 663.

168. — **Kentucky.** The rule of the common law has to some extent been changed in Kentucky by various statutory enact-

ments. *Covington Street R'y Co. v. Packer*, 9 Bush (Ky.), 455. 1872.

169. — **Maryland.** The statute gives the right to recover for the death of an injured party, regardless of the age of the decedent. *Maryland v. Baltimore and Ohio R. R. Co.*, 1 Hughes (U. S. C. C.), 337. 1877.

170. — **previous death.** The act of the legislature of March 26, 1883, which provides that § 2291 *et seq.* of the Code be so amended that damages resulting to parties for whose use and benefit the right of action survives, from the death consequent upon the injuries received, shall be recoverable in such action, does not apply to suits where the cause of action arose prior to the passage of the act. *Chicago, St. Louis and New Orleans R. R. Co. v. Pounds*, 11 Lea (Tenn.), 127. 1883.

171. — **repeal of act.** The statute (1872, p. 117) upon which this action was based is not to be regarded in any proper sense as a penal statute. Under this act, when an injury was done by the default of a railroad company, resulting in the death of the party injured, the personal representative was entitled to recover damages, not as a penalty, but as a compensation for the loss sustained; and neither an affirmative enactment nor a repealing statute can be so construed under our constitution as to retroact and impair or take away any accrued right which by the authority of law, and in the manner pointed out by the statute, had been previously asserted. *Denver, South Park and Pacific R'y Co. v. Woodward*, 4 Colo., 162. 1878.

172. — Section 11 of the Bill of Rights, prohibiting retrospective legislation, operates, as to pending causes under the statute, as a saving clause incorporated into the repealing statute. *Lundin, Adm'r, v. Kansas Pacific R'y Co.*, 4 Colo., 433. 1878.

173. — **Tennessee.** The statutes of Tennessee, in such cases, construed. The killing being shown, the burden is on the defendant. *Louisville and Nashville R. R. Co. v. Connor*, 9 Heiskell (Tenn.), 19, 1871; 19 Amer. R'y Rep., 363.

174. — An action lies for an injury causing instant death. *Louisville and Nashville R. R. Co. v. Connor*, 2 Baxter (Tenn.), 332. 1872.

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175. — **Texas.** The guardian of the estate of the minor children of the deceased may maintain an action. It may be brought in the name of the guardian, or in the name of the ward by the guardian. The widow who has compromised her cause of action is not a necessary party. *Houston and Tex. Central R'y Co. v. Bradley*, 45 Tex., 171, 1876; 13 Amer. R'y Rep., 213.

176. — **Wisconsin.** In an action under the statute for injuries to the person of plaintiff's intestate, causing his death (R. S., ch. 135, §§ 12, 13), although the recovery must be confined to pecuniary damages, yet the jury are not held to any fixed and precise rules in estimating their amount (within the statutory limit on that subject), but may compensate all pecuniary injuries from whatever source they may proceed. *Ewen v. Chicago and Northwestern R'y Co.*, 38 Wis., 613. 1875.

177. **Suicide.** By reason of a collision of railway trains in Virginia a passenger was injured, and becoming thereby disordered in mind and body he some eight months thereafter committed suicide. *Held*, in a suit by his personal representatives against the railway company, that as his own act was the proximate cause of his death, they are not entitled to recover. *Scheffer v. Railroad Co.*, 105 U. S., 249, 1881; 8 Amer. & Eng. R. R. Cases, 59.

178. **Trespasser on train.** Where the plaintiff's intestate was a trespasser in a car of the defendant, where he was discovered and ordered out by the conductor of the train, and in attempting to obey the order he fell under the cars and was run over and killed, it was held that the fact of his being a trespasser was not material in an action to recover for his death on the ground of the defendant's negligence. *Benton v. Chicago, Rock Island and Pacific R. R. Co.*, 55 Ia., 496. 1881.

INJURIES TO DOMESTIC ANIMALS.

See APPEAL; CERTIORARI; DAMAGES; LIMITATIONS; NEGLIGENCE; PLEADING; PROCESS; RECEIVER.

I. COMMON LAW RULES.

1. *Negligence.*
2. *Stock running at large.*
3. *Trespassing animals.*

II. DAMAGES.

III. HIGHWAYS.

IV. CITIES AND TOWNS.

V. DEPOT GROUNDS.

VI. PLEADING AND PRACTICE.

VII. ROADS OPERATED JOINTLY OR BY LESSEES, RECEIVERS OR CONTRACTORS.

VIII. FENCES AND CATTLE GUARDS.

1. *Generally.*2. *Contract.*

IX. EVIDENCE.

X. SIGNALS.

XI. PRIVATE WAYS AND FARM CROSSINGS.

XII. STATUTORY LIABILITY, AND DECISIONS UNDER VARIOUS STATUTES.

XIII. GENERAL MATTERS.

I. COMMON LAW RULES.

1. *Negligence.*

1. **Common law liability.** Where a railway company is under no statutory liability for injury to stock by its trains by reason of its road not having been fenced, as, when the road has not been open for use six months, the only ground of liability will be that the injury might have been avoided by the exercise of ordinary care. *Gilman, Clinton and Springfield R. R. Co. v. Spencer*, 76 Ill., 192. 1875.

2. — An action for damages sustained by the plaintiff from the killing of his animals on the defendant's track, through the alleged careless, negligent and wilful acts of the defendant's employes, is governed by the rules of the common law; and the fact as to whether or not the defendant's track was fenced does not enter into the case. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Stuart*, 71 Ind., 500. 1880.

3. — Where stock is killed by a railway company which has neglected to fence its track in the time prescribed, the owner of such stock may elect, according to the facts of the case, to base his action upon the statute of 1855, or upon the common law grounds of negligence. *Rockford, Rock Island and St. Louis R. R. Co. v. Phillips*, 66 Ill., 548. 1873.

4. — In the absence of any proof of negligence on the part of a railway company, it is not liable for an injury to an animal run-

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ning in a field through which the railway runs. *Macon and Augusta R. R. Co. v. Vaughn*, 48 Ga., 464, 1873; 11 Amer. R'y Rep., 387.

5. Comparative negligence. Slight negligence will not defeat a recovery, if the negligence complained of has been gross. *Holstine v. Oregon and California R. R. Co.*, 8 Oreg., 163. 1879.

6. Contributory negligence. Negligence cannot be imputed to a person simply from the fact that his animals have escaped from his well fenced field on to a railway track. *Spinner v. New York Central and Hudson River R. R. Co.*, 67 N. Y., 153, 1876; 15 Amer. R'y Rep., 126.

7. — The owner of horses left them in a pasture adjoining a railway which was securely fenced, and went to another state, not leaving any person to look after the horses, which went upon the track through a gate which had been recently left open by trespassers, and the horses were negligently injured by a passing train. *Held*, that the owner of the horses was not guilty of contributory negligence. *Toledo, Wabash and Western R'y Co. v. Milligan*, 52 Ind., 505. 1876.

8. — The plaintiff must allege and prove that he was guilty of no contributory negligence; and, in the absence of such evidence, a demurrer to his evidence should be sustained. *Indianapolis, Peru and Chicago R'y Co. v. Caudle*, 60 Ind., 112. 1877.

9. — An instruction in the following language: "If the plaintiff knowingly allowed his horse to be upon and to frequent the depot and station grounds of defendant, where it was not required to fence, and where there was danger of the horse being struck by the trains of defendant, he is guilty of contributory negligence, and cannot recover in this action," *held*, properly refused. *Miller v. Chicago and Northwestern R'y Co.*, 59 Ia., 707. 1882.

10. — The plaintiff, working upon a bridge across defendant's track, with knowledge of an approaching train, called to his little boy, eleven years old, to lead his horse across the track. In doing so the horse, through fright, escaped and got upon the track and was killed by the train. The proof failed to show negligence in the company. *Held*,

that a verdict against the company for the value of the horse could not be sustained. *Toledo, Peoria and Warsaw R'y Co. v. Head*, 62 Ill., 233, 1871; 6 Amer. R'y Rep., 232.

11. — The negligence of a party must be the immediate, proximate cause of an injury to render him liable therefor; and the same rule applies to the contributory negligence which would relieve him from liability. An instruction which stated that the negligence of plaintiff must have contributed "directly" to the injury, to excuse defendant, was held to come within the rule. *Gates v. B., C. R. and M. R'y Co.*, 39 Ia., 45, 1874; 9 Amer. R'y Rep., 75.

12. — In an action against a railway company for damages for loss caused by the latter's negligence, an instruction to the effect that plaintiff could recover if he showed by a preponderance of evidence that the loss resulted from the negligence of defendant was defective in failing to instruct the jury that plaintiff could not recover if his own negligence contributed to the loss. *McCormick v. Chicago, Rock Island and Pacific R. R. Co.*, 47 Ia., 345. 1877.

13. — In an action for the value of plaintiff's horse, which escaped upon defendant's railway from an adjoining field and was killed by a train, in consequence, as is alleged, of a defect in defendant's fence at that place, *held*, that if it had appeared that the horse was breachy, and accustomed to jump or break lawful fences, and that plaintiff, knowing these facts, turned him loose in the field adjoining the track, the jury might have found upon this evidence that plaintiff was guilty of contributory negligence, though the court could not so hold as a matter of law. *Jones v. Sheboygan and Fond du Lac R. R. Co.*, 43 Wis., 306, 1877; 15 Amer. R'y Rep., 229.

14. — In an action against a railway company for killing stock, the court instructed the jury that, to constitute contributory negligence on the part of the plaintiff, in allowing his stock to run at large, he must have knowingly suffered such stock to *habitually* run at large in the immediate vicinity of the place where it was killed; and that the plaintiff "cannot recover, although he may have been guilty of *less* negligence" than the employees of the defendant.

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Held, that the instruction was erroneous. *Jeffersonville, etc., R. R. Co. v. Foster*, 63 Ind., 342. 1878.

15. — The farm of S. was bisected by the line of a railway. The company fenced its line, as required by the act of June 22, 1867. S. used the railway fence on the south side of the track as the north fence of his inclosed pasture and corral. The corral consisted of about three acres, into which in the evening of the night in question he turned his cattle. At the same time he looked along the line of the railway fence part of the inclosure and it was all apparently in good condition. In the morning a board was found broken off of this part of the fence, by means of which three of the cattle had escaped and had gone on to the track, where two of them had been killed and the other crippled by a passing train. The testimony as to the condition of the fence, as to its soundness, was conflicting, some witnesses swearing that it was rotten, others that it was sound. Verdict and judgment for S. On error, *held*, that S. was not guilty of contributory negligence, and the finding and judgment upheld. *Union Pacific R. R. Co. v. Schwenck*, 13 Neb., 478. 1882.

16. — Shortly before sundown, in February, plaintiff's two colts accidentally escaped from his barnyard. A few minutes after, the colts being out of sight, plaintiff went a mile in the direction he supposed they had taken, and, not finding them, returned home. Before daylight the next morning the colts were killed on defendant's track. *Held*, that, upon proof of these facts, the court did not err in assuming that plaintiff was not guilty of contributory negligence in failing to seek for the colts with due diligence. *Laude v. Chicago and Northwestern Ry Co.*, 33 Wis., 640. 1873.

17. — In an action for damages for killing stock on a railroad track, where it appears that the stock was killed through the negligence of the train men on a passing train; that the stock was running at large, and strayed on the track; that the night preceding the injury it had been shut up in the plaintiff's barn, but without his knowledge had escaped from the barn into the barn lot, and thence through a gate into the road, and thus strayed away to the place of in-

jury, *held*, that the fact that the plaintiff had another horse which was in the habit of opening the gate of the barn-lot, and did in fact open the gate at that time, did not amount to such contributory negligence as to defeat the plaintiff's recovery. *Pacific R. R. Co. v. Brown*, 14 Kans., 469. 1875.

18. — If a person wantonly or carelessly drive stock upon the track of a railroad he is guilty of contributory negligence, and if the stock is injured he cannot recover. *Forbes v. Atlantic and North Carolina R. R. Co.*, 76 N. C., 454, 1877; 14 Amer. R'y Rep., 313.

19. — Where a horse escaped from its owner's land upon an adjoining railway and was killed by an engine, *held*, that the mere fact of his turning his horse upon his land where there was no fence between it and the railway, when it was the legal duty of the company to build it, was not proof of contributive negligence on his part. *Wilder v. Maine Central R. R. Co.*, 65 Me., 332, 1876; 9 Amer. R'y Rep., 289.

20. — If a horse escapes from the control of the owner's agent through his negligence, and, after running six hundred and fifty feet, enters upon the tracks of a railway company at a point where there are no barriers, and, after going on the tracks a distance of five hundred and seventy feet, is injured, if the jury find that the injury was likely to happen as a natural and probable consequence of such negligence, so that the negligence might, in their judgment, fairly be considered to be a contributory cause of the injury, the owner of the horse is not entitled to recover. *Amstein v. Gardner*, 134 Mass., 4. 1883.

21. — Where the plaintiff was present and saw the horses on the track and gave no signal to the approaching train, and failed to drive the horses from the track, but the engine-driver saw them in time to avoid the injury and failed to do so, the company was held liable. *Washington v. Baltimore and Ohio R. R. Co.*, 17 West Va., 190, 1880; 10 Amer. & Eng. R. R. Cases, 749.

22. — Where evidence which was conflicting fairly presented the question of contributory negligence, it was error for the court, in an instruction, to ignore that defense, and the error is not corrected by other

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instructions presenting an accurate statement of the law. *Chicago, Burlington and Quincy R. R. Co. v. Housh*, 12 Bradwell (Ill.), 88, 1882.

23. Evidence. In a common law action against a railroad company for injury to cattle, the plaintiff cannot recover without showing negligence on the part of the defendant. *Turner v. St. Louis and San Francisco R'y Co.*, 76 Mo., 261, 1882; *Railroad Co. v. McMillan*, 37 Ohio St., 554, 1882; *Railway Co. v. Heiskell*, 33 ib., 666, 1893; *Cincinnati, Hamilton and Indianapolis R. R. Co. v. Bartlett*, 58 Ind., 572, 1877; 19 Amer. R'y Rep., 17.

24. — Where evidence on the part of the plaintiff in a common law action against a railway company, for negligently killing plaintiff's bull, was very slight — barely sufficient to justify the court in submitting the case to the jury, — and the court, at the request of the plaintiff, had instructed the jury that negligence need not be proved by positive and direct evidence, but that it would be sufficient, if the jury were satisfied of its existence from all the facts and circumstances of the case, *held*, that it was error to refuse the defendant an instruction to the effect that negligence on its part could not be inferred from the mere fact that the train struck and killed the animal. *McKissock v. St. Louis, Kansas City and Northern R'y Co.*, 73 Mo., 456, 1881; 7 Amer. & Eng. R. R. Cases, 590.

25. Negligence. A railway company is liable for killing stock when its employees, by exercising the necessary vigilance, might have seen the animal on the track, and, with due regard to the safety of the passengers, have stopped the train before striking it. *Fossier v. Morgan's La. and Tex. R. R. Co.*, 1 McGloin (La.), 349.

26. — It is not necessary that the killing should be wantonly or wilfully done. *Shuman v. Indianapolis and St. Louis R. R. Co.*, 11 Bradwell (Ill.), 472, 1882.

27. — A railway company is not chargeable with negligence in injuring live stock on its track, unless it be shown that, after the stock was discovered, the company could, without imperiling the persons or property intrusted to it for transportation, have avoided the injury. Failure to ring the bell or sound the whistle does not constitute neg-

ligence *per se*; there must appear to be some necessary connection between the failure and the injury. *Wallace v. St. Louis, Iron Mountain and Southern R'y Co.*, 74 Mo., 594, 1881.

28. — Where it appeared that a railway ran through plaintiff's land, and that his horses, without any fault on his part, got upon the track and were killed, the engine-driver not taking proper care to avoid the accident, it was held that the company was liable. *Trout v. Va. and Tenn. R. R. Co.*, 23 Grattan (Va.), 619, 1873.

29. — When animals are standing on the track of a railway, and can be seen by the persons running the train by the use of ordinary care, it is their duty to slacken speed or stop the train, if necessary, to avoid injuring them. *Shuman v. Indianapolis and St. Louis R. R. Co.*, 11 Bradwell (Ill.), 472, 1882; *Rockford, Rock Island and St. Louis R. R. Co. v. Rafferty*, 73 Ill., 58, 1874; *Paris and Decatur R. R. Co. v. Mullins*, 66 ib., 526, 1873; *South and North Ala. R. R. Co. v. Jones*, 56 Ala., 507, 1876; *Missouri Pacific R'y Co. v. Wilson*, 28 Kans., 637, 1882; 11 Amer. & Eng. R. R. Cases, 447.

30. — An engine-driver, in charge of a running train, should always be on the lookout for obstructions, and when an obstruction is discovered, no matter when or where, should promptly resort to all means within his power, known to skilful engine-drivers, to avert the threatened injury or danger. *South and North Alabama R. R. Co. v. Williams*, 65 Ala., 74, 1889.

31. — The observance of the statutory requirements will not excuse from liability, if, in other respects, the company or its employees neglected those precautions which ordinary prudence suggests as necessary to avoid casualties. *South and North Ala. R. R. Co. v. Thompson*, 62 Ala., 594, 1878.

32. — To run a train composed of six or eight cars without a brakeman is gross negligence; and where such a train is in motion and there is apparent danger, such as to induce the engine-driver to whistle for putting on the brakes, and there is a brakeman on the train and he fails to apply the brakes, this implies gross negligence. *Toledo, Wabash and Western R'y Co. v. McGinnis*, 71 Ill., 346, 1874.

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33. — It is the duty of an engine-driver to keep a constant and careful lookout for stock upon the track; and, although stock be wrongfully there, yet he must use ordinary care and diligence to discover it and avoid injury to it, or the company will be liable for the injury done to it. *Little Rock and Ft. Smith R'y Co. v. Finley*, 37 Ark., 562, 1881; 11 Amer. & Eng. R. R. Cases, 469.

34. — It is not always necessary that the engine-driver on a train should stop it or slacken its speed, on discovering stock on the track. Ordinary prudence requires him to promptly endeavor to drive them off by sounding the whistle, but does not require him to stop or slacken the speed of the train when he may reasonably believe that they will leave the track in time, and there is no cause or reason to suppose there is any risk or danger. *Little Rock and Ft. Smith R'y Co. v. Trotter*, 37 Ark., 593, 1881; 11 Amer. & Eng. R. R. Cases, 475.

35. — The statute approved February 3, 1877, imposing an absolute liability upon railway companies for stock killed or injured by their trains (Code, § 1710), which has been declared by this court to be unconstitutional; was not intended to apply to injuries caused by negligence, nor to intentional injuries resulting from direct force; for which injuries, without the aid of the statute, a liability and remedy already existed. *Simpson v. Memphis and Charleston R. R. Co.*, 66 Ala., 85. 1880.

36. Operation of train. The operation of a train with the engine behind held not to be negligent, where a man was stationed on the front end to keep watch, and the train was moved slowly. *Falconer v. European and North American R'y Co.*, 1 Pugsey (New Brunswick), 179. 1872.

37. — Where the distance to which the light was thrown by the head-light, which was in proper order and of the best kind in use, is not shown, but only that the engineer could not perceive by its light, at thirty yards distance, a young mule of the color of the earth about a culvert in which it was fastened, and could not stop in forty yards distance, and there is no evidence as to how much of the mule was above the track, it is error to charge the jury that it

was negligence to run the train at a rate of speed at which the engine-driver could not stop before reaching the mule after seeing it was on the track. Whether or not this was negligence was a question for the jury, in view of all the facts, under appropriate instructions from the court. *Memphis and Charleston R. R. Co. v. Lyon*, 62 Ala., 71. 1878.

38. — Imperfect light and fog at the time of killing stock by a railroad train are circumstances that the jury may take into consideration in determining negligence. *St. Louis, Iron Mountain and Southern R'y Co. v. Vincent*, 36 Ark., 451. 1880.

39. — The fact that the person in charge of defendant's locomotive was a fireman, not a skilled engine-driver, is entirely immaterial in an action where the evidence shows the collision was not occasioned by any lack of skill on his part. *Culhane v. New York Central and Hudson River R. R. Co.*, 60 N. Y., 133, 1875; 10 Amer. R'y Rep., 142.

40. — It is the duty of a railway company to provide a sufficient number of brakes upon a train to stop it within a reasonable time and distance, and a failure to do so is negligence. *Forbes v. Atlantic and North Carolina R. R. Co.*, 76 N. C., 454, 1877; 14 Amer. R'y Rep., 313.

41. Rate of speed. In the absence of any statute limiting the rate of speed of railway trains, no conceivable rate is evidence of negligence *per se*. *McKonkey v. Chicago, Burlington and Quincy R. R. Co.*, 40 Ia., 205, 1875; 8 Amer. R'y Rep., 406.

42. — It is negligence in a railway company to run its trains on a straight track in the night time at such a rate of speed that the train cannot be stopped in the distance at which the engine-driver can see cattle or other obstructions on the track, by the aid of the head-light. *Memphis and Charleston R. R. Co. v. Lyon*, 62 Ala., 71. 1878.

43. — A railway company is liable for damage resulting from injury or killing of stock by its train on the railway track, when the train is moving at a greater rate of speed than allowed by law. *Houston and Texas Central R'y Co. v. Terry*, 42 Tex., 451. 1875.

44. — A railway company is not authorized to diminish the speed of a train for the sake of avoiding injury to stock, if by so

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doing it augments the danger to passengers. There is no such thing as a *reasonable* increase of danger to passengers. *Sandham v. Chicago, Rock Island and Pacific R. R. Co.*, 88 Ia., 88. 1874.

45. — The rate of speed and the absence of signals may be shown as establishing negligence in the operation of the train. *Edson v. Central R. R. Co. of Ia.*, 40 Ia., 47, 1874; 8 Amer. R'y Rep., 412.

46. — The evidence does not show that the train of appellant was being driven at an unusual rate of speed when the killing complained of occurred. The rate of speed should depend upon the circumstances and locality. *Peoria, Decatur and Evansville R'y Co. v. Miller*, 11 Bradwell (Ill.), 375. 1882.

47. — It was error to charge that if the train was running at such a speed that it could not be stopped within the distance the head-light would discover objects upon the road, the jury might find the company guilty of recklessness, notwithstanding all the prescribed precautions were observed. There is no law prescribing the rate of speed at which trains should run. The question of recklessness or excessive speed is one to be determined by all the facts and circumstances at the time, and not by the arbitrary rule suggested as to the distance an obstruction could be seen by aid of the head-light. *Louisville and Nashville R. R. Co. v. Milam*, 9 Lea (Tenn.), 223. 1882.

2. Stock running at large.

48. **Animals escaping from inclosure.** The "act of 1869, to prevent domestic animals from running at large in certain counties," is not so far inconsistent with and repugnant to the general railway law requiring railroad companies to fence their roads as by necessary implication to repeal the latter; and where animals escape from their inclosure within such counties, without the fault or knowledge of the owner, and stray upon a railroad track at a point where the company has failed to comply with the law requiring it to fence, and are killed by collision with trains, the company is responsible for the damage. *Ohio and Mississippi*

R'y Co. v. Jones, 63 Ill., 472, 1872; 7 Amer. R'y Rep., 477.

49. — An owner may recover for his stock killed while running at large, if they were so at large without his fault. *Railway Co. v. Howard*, 11 Amer. & Eng. R. R. Cases (Ohio), 489. 1883.

50. — Contributory negligence is not chargeable to the owner in letting the stock run at large when it breaks out of its pasture without his fault. *Toledo, Peoria and Warsaw R'y Co. v. Johnston*, 74 Ill., 83. 1874.

51. **Common law liability.** The evidence showed that the plaintiff's animal had strayed upon the defendant's track, and, despite the slackening of the speed of the train and the sounding of the whistle, the animal, instead of stepping off the track, had run ahead of the train until it had jumped into a bridge on the track and broken its leg. There was no evidence of any order of the board of commissioners directing that animals might be permitted to run at large. *Held*, that the defendant was not liable. *Pittsburg, Cincinnati and St. Louis R'y Co. v. Stuart*, 71 Ind., 500. 1880.

52. — The fact that the cattle injured were permitted to run at large will not shield the company from the consequences of the failure of its agents to observe proper care and vigilance. *Kentucky Central R. R. Co. v. Lebus*, 14 Bush (Ky.), 518. 1879.

53. **Contributory negligence.** The permission of stock to run at large is not such negligence on the part of the owner as will defeat his action against a railway company for negligently killing the same. *Washington v. Baltimore and Ohio R. R. Co.*, 17 West Va., 190, 1880; 10 Amer. & Eng. R. R. Cases, 749; *Kuhn v. Chicago, Rock Island and Pacific R. R. Co.*, 42 Ia., 420, 1876; *Mobile and Ohio R. R. Co. v. Williams*, 53 Ala., 595, 1875; 13 Amer. R'y Rep., 153.

54. — If a person suffers his stock to run loose in a field through which an unfenced railroad track passes, he can only require such company to exercise ordinary care and prudence in respect to protection for such stock. *Peoria, Decatur and Evansville R. R. Co. v. Dugan*, 10 Bradwell (Ill.), 233. 1881.

55. — The fact that the owner of an animal "knowingly permitted" it to run at

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large is not such contributory negligence on his part as will defeat an action by him against a railway company for the "wilful" killing of such animal. *Detroit, Eel River and Illinois R. R. Co. v. Barton*, 61 Ill., 293, 1878; *Louisville, New Albany and Chicago R'y Co. v. Whitesell*, 68 Ind., 297, 1879.

56. — If the owner of a cow knowingly permits her to run at large in the vicinity of a railway, where it is not required by law to be fenced, and she strays upon the track and is killed, it not appearing that the killing is wilfully done, the company will not be liable, though the owner may not have known that the railway was completed. *Jeffersonville, etc., R. R. Co. v. Adams*, 43 Ind., 402, 1873.

57. — It is not conclusive evidence of contributory negligence to allow cattle to run at large in a pasture next to a railway where the railway fence is out of repair. *Evans v. St. Paul and Sioux City R. R. Co.*, 30 Minn., 489, 1883.

58. — Whether, in exercising his right to use his land, the land owner has been guilty of negligence, contributing to an injury to his cattle, is ordinarily a question of fact for a jury, to be determined with reference to all the circumstances of the case. Merely suffering his cattle to graze upon his land, or to go to a spring thereon, in broad daylight, is not such negligence on the part of the land owner, in law, notwithstanding the company's road is unfenced, and notwithstanding there is another railroad within a few hundred feet. *Schubert v. Minneapolis and St. Louis R'y Co.*, 27 Minn., 360, 1880.

59. — Whether or not the owner of a blind horse was guilty of negligence in turning out the horse to graze where he might be exposed to danger from passing railroad trains, was properly submitted to the jury. *Hammond v. Sioux City and Pacific R. R. Co.*, 49 Ia., 450, 1878.

60. — Plaintiff, living about three-fourths of a mile from defendant's line, which he knew to be unfenced, permitted his cow to pasture in summer on a large tract of unclosed land, extending from the neighborhood of his residence to the track; and she passed upon the track and was injured. *Held*, that upon these facts the question of contributory negligence, being open to doubt

and debate, was for the jury. *Curry v. Chicago and Northwestern R'y Co.*, 43 Wis., 665, 1878; 16 Amer. R'y Rep., 219.

61. — The court cannot say to the jury, as a matter of law, that permitting cattle to run at large is negligence which contributed to their injury, as it depends upon all the circumstances whether it was negligence and whether it contributed to the injury. *Cincinnati, Lafayette and Chicago R. R. Co. v. Ducharme*, 4 Bradwell (Ill.), 178, 1879.

62. — Where a railway company fails, to fence its road, and stock is killed by its trains in a county where it is lawful for stock to run at large, the question of contributory negligence, in the owner permitting his stock to run at large, cannot arise. *Ohio and Mississippi R. R. Co. v. Fowler*, 85 Ill., 21, 1877.

63. — Where cattle are killed by a locomotive on a railroad running along unclosed lands, but not at a railroad crossing, the fact that the cattle got upon the track from land adjoining that of the owner of the cattle, and upon which they had strayed, is no defense to an action for damages against the railroad. *Kaes v. Mo. Pacific R'y Co.*, 6 Mo. App., 397, 1879.

64. — The owner of animals, in allowing them to be at large on the range of unclosed lands, is not chargeable with an unlawful act or an omission of ordinary care in keeping his stock, subject to the qualification, however, that animals which are unruly or dangerous are required to be restrained. The bare fact that the railway is unfenced will not render it liable for killing stock. *Blaine v. Chesapeake and Ohio R. R. Co.*, 9 West Va., 252, 1876.

65. — If an animal is allowed to run at large in the vicinity of a railroad at a point where it was not fenced, and could not legally be fenced, the owner cannot recover for its injury. *Cincinnati, Hamilton and Dayton R. R. Co. v. Street*, 50 Ind., 225, 1875.

66. — Where cattle are running at large in an extra hazardous place near a railway, the railway company is only liable for wanton and reckless neglect in their injury. *Williams v. Northern Pacific R'y Co.*, 11 Amer. & Eng. R. R. Cases (Dak.), 421, 1882.

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67. Stock illegally running at large.

Under the act of June 20, 1867, a railway company is liable for stock killed upon its track while running at large in the night-time at a point where the company was required, but failed to fence its track, notwithstanding stock is prohibited by statute from running at large in the night-time. *Burlington and Missouri River R. R. Co. v. Brinkman*, 14 Neb., 70, 1883; 11 Amer. & Eng. R. R. Cases, 438.

68. — A railway company is released from the duty of exercising ordinary care toward a stallion required to be kept in an inclosure, which may have strayed upon its track, only when the animal is at large by the sufferance of the owner. *Pearson v. Milwaukee and St. Paul R'y Co.*, 45 Ia., 497. 1877.

69. — Where it appears that the injured stock was permitted to run at large in violation of law, the question whether the owner of the stock has been guilty of contributory negligence is one of fact, to be determined by the jury from the circumstances of the case. *Ewing v. Chicago and Alton R. R. Co.*, 72 Ill., 25, 1874; *Rockford, Rock Island and St. Louis R. R. Co. v. Irish*, 72 ib., 404, 1874.

70. — Whether permitting male animals to run at large, which are subsequently injured by locomotives or trains, is contributory negligence depends upon whether permitting them to run at large was a proximate, or only a remote, cause of the injury. *Rockford, Rock Island and St. Louis R. R. Co. v. Irish*, 72 Ill., 404. 1874.

71. — Where a railway company is not guilty of negligence in failing to protect its track from swine in a township where they are not permitted to run at large, and it appears, from an agreed statement of facts, that a hog was killed by the negligence of the railroad company in such township, and it further appears that the negligence of the owner in permitting the animal to run at large in violation of § 46, ch. 105. Comp. Laws 1879, contributed directly to the injury, held, the negligence of the defendant was offset by the negligence of the plaintiff, and the owner of the animal could not recover. *Kansas City, Fort Scott and Gulf R. R. Co. v. McHenry*, 24 Kans., 501. 1880.

72. — Though animals are wrongfully

running at large, a railway company is liable for their injury if the injury could have been avoided by its employes by the use of ordinary care. *Baltimore and Ohio R. R. Co. v. Mulligan*, 45 Md., 486. 1876.

73. — L., the owner of a cow, in a township and county in which, by the orders of the board of county commissioners, duly made and published, the night herd law of 1868, and the general herd law of 1872, were in force, permitted said cow to run at large in the night time, and while so running at large the cow strayed upon the track of a railroad and was run over and killed by a passing train without any negligence on the part of those in charge of the train. The railroad track was unfenced, though it ought to have been fenced, under ch. 94 of the Laws of 1874. Held, that L. was equally at fault with the railroad company, and acting equally in disregard of the statutes, and could not therefore recover. *Central Branch Union Pacific R. R. Co. v. Lea*, 20 Kans., 353, 1878; 19 Amer. R'y Rep., 76.

3. Trespassing animals.

74. Contributory negligence. If domestic animals are on the track of a railroad by the fault of the owner, such owner takes all reasonable risks of injury to them from passing trains; and while the railroad company is not bound to presume that such animals will be upon the track, they are not authorized to injure them wilfully or carelessly, but are bound to use reasonable care to avoid injuring them. But considering further the relative value and importance of a train, and of the lives of the persons upon it, as compared with the value of domestic animals, a proper regard for both train and cattle would make the duty to avoid injury to the train, and to those upon it, primary and paramount to the duty of avoiding injury to the cattle. *Witherell v. Milwaukee and St. Paul R'y Co.*, 24 Minn., 410, 1878; *O'Connor v. Chicago, Milwaukee and St. Paul R'y Co.*, 27 Minn., 166, 1880.

75. — If a horse is put into a proper pasture by its owner, and escapes thence into a highway, and goes upon a railway at a point at which, although the corporation is bound

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to maintain cattle-guards, there are none, and is there killed by a train, it is a trespasser, and the company is not liable to the owner of the horse, unless there was reckless and wanton misconduct on the part of those employed in the operation of the train. *Darling v. Boston and Albany R. R. Co.*, 121 Mass., 118. 1876.

76. — The mere fact that the animal was a trespasser on defendant's railway, or that it passed thereon from land not belonging to the plaintiff, will not defeat a recovery. *Curry v. Chicago and Northwestern R'y Co.*, 43 Wis., 665, 1878; 16 Amer. R'y Rep., 219.

77. Negligence. If a horse, while trespassing upon a railway track, is killed by an engine, the company is not liable unless the injury was caused by the wanton and reckless misconduct of its employes; and it is not sufficient to show that they carelessly ran over the horse, and did not use reasonable care to avoid the accident. *Maynard v. Boston and Maine R. R. Co.*, 115 Mass., 458, 1874; 8 Amer. R'y Rep., 42; *McDonnell v. Pittsfield and North Adams R. R. Co.*, 115 Mass., 564, 1874.

78. — company not liable where due care is used. Where in an action against a railway company, brought within six months, to recover damages for an injury to plaintiff's cow, it was proved that the cow jumped on the track at the opening of a cut some two hundred yards in front of the defendant's engine, which was running at the rate of twenty-three miles an hour; and it was further proved, that as soon as the cow was discovered the engine-driver blew the alarm whistle and reversed the engine and the brakes were applied, and that the engine running at that rate of speed could not be stopped under four hundred yards, *held*, that the defendant's agents were not guilty of any neglect, and that the company was not responsible for the injury. *Proctor v. W. and W. R. R. Co.*, 72 N. C., 579. 1875.

79. Question for jury. *Held*, under the facts of a particular case, that the question as to whether a horse was trespassing or not was a question for the jury. *Towne v. Nashua and Lowell R. R. Co.*, 124 Mass., 101. 1878.

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80. Caring for injured stock. Where stock has been injured through the negligence of a railway company, it is the duty of the company to take proper care of the injured animals, and, failing to do so, the owner is justified in taking proper care of them, for which he may recover a reasonable compensation from the company. *Finch v. Central R. R. Co. of Iowa*, 43 Ia., 304. 1875.

81. Constitutional law. The double damages authorized to be recovered by § 1239 of the Code are not in the nature of a fine or penalty, but are simply the measure of damages fixed by the statute for a private wrong, and as such do not render the provision unconstitutional. *Mackie v. Central R. R. of Iowa*, 54 Ia., 540, 1890; *Welsh v. Chicago, Burlington and Quincy R. R. Co.*, 53 ib., 632, 1880.

82. — The statute imposing upon railroad companies double damages for the killing of stock at points where they have the right to fence, and fail to do so, is not in conflict with the fourteenth amendment to the constitution of the United States, guarantying to all the equal protection of the laws. *Tredway v. Sioux City and St. Paul R. R. Co.*, 43 Ia., 527. 1876.

83. — The act of February 3, 1875, making railroad companies liable for double damages on failure to post notice of stock killed by their trains, is not unconstitutional. *Memphis and Little Rock R. R. Co. v. Horsfall*, 36 Ark., 651, 1890; *Little Rock and Ft. Smith R. R. Co. v. Payne*, 33 ib., 816, 1878.

84. — The double damage law is constitutional. *Cummings v. St. Louis, Iron Mountain and Southern R'y Co.*, 70 Mo., 570, 1879; *Kaes v. Mo. Pacific R'y Co.*, 6 Mo. App., 397, 1879.

85. — Section 37 of ch. 114, Rev. Stat. 1874, p. 807, which provides that if any railroad corporation shall fail to erect and maintain suitable fences on either side of the road, etc., sufficient to prevent stock from getting on the track, such company shall be "liable for double the amount of all damages," is not obnoxious to that clause of the constitution of 1870 which provides, that "no person shall be deprived of life, liberty

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or property, without due process of law." The act provides a compensation to the owner, and inflicts a penalty upon the company for neglect of duty, both of which are recoverable by the owner. *Cairo and St. Louis R. R. Co. v. Peoples*, 92 Ill., 97, 1879; *Same v. Warrington*, 92 ib., 157, 1879.

86. — An act which fixes absolute liability on a corporation to make compensation for injuries done to property in the prosecution of its lawful business, without any wrong, fault or neglect on its part, when, under the general law of the land, no one else is so liable under such circumstances, does not provide the "due process of law," under § 7 of the Bill of Rights, and is, therefore, void. *Zeigler v. South and North Ala. R. R. Co.*, 58 Ala., 594, 1877; 20 Amer. R'y Rep., 463.

87. — That part of the statute of June 22, 1867, which gives to the owner of live stock "double the value" of his property accidentally injured or destroyed on a railroad track is void and unconstitutional. *Atchison and Nebraska R. R. Co. v. Baty*, 6 Neb., 37, 1877; 15 Amer. R'y Rep., 62.

88. **Crippled animal.** The owner of an animal maimed by a train may recover of the company without surrendering the animal to the company, but he will be entitled to recover only to the extent of the injury sustained. *Jackson v. St. Louis, Iron Mountain and Southern R'y Co.*, 74 Mo., 526. 1881.

89. **Disposition of carcass.** Where a railway company, by its trains, killed cattle of the plaintiff which had strayed upon its unfenced track, and they were mangled, bruised and swollen when discovered, it was held that the plaintiff was not required to use diligence to dispose of their dead bodies to entitle him to recover their full value. *Rockford, Rock Island and St. Louis R. R. Co. v. Lynch*, 67 Ill., 149. 1873.

90. — If the owner of an animal killed upon a railroad track uses or gives away the carcass, the company will be entitled to have its value deducted in estimating the damages. *Case v. St. Louis and San Francisco R. R. Co.*, 75 Mo., 668. 1882.

91. — In assessing damages for an injury to an animal which necessitated its killing, only the net amount which should have been realized from a sale of it, after reasonable

allowance made for time and trouble required in effecting the sale, should be deducted from the value of the stock. *Dean v. Chicago and Northwestern R'y Co.*, 43 Wis., 305. 1877.

92. **Double damages.** In proceedings for double damages for the killing of stock under § 43, Wagn. Stat., 310, the proper practice is for the jury to find a verdict for single damages only, and the court may then render judgment for double damages. *Wood v. St. Louis, Kansas City and Northern R. R. Co.*, 58 Mo., 109, 1874; 9 Amer. R'y Rep., 84; *Hollyman v. Hannibal and St. Joseph R. R. Co.*, 58 Mo., 480, 1874.

93. — Suit against a railway company to recover double damages for injuries to stock need not be brought in the name of the state under § 42 of the Railroad Statute (Wagn. Stat., p. 310), but may be instituted under § 43 thereof in the name of the owner. Double damages, although looked upon as punitive, may be also treated as compensatory. *Seaton v. Chicago, Rock Island and Pacific R. R. Co.*, 55 Mo., 416. 1874.

94. — A statute ought not to be so construed as to authorize the recovery of a penalty unless the intention to do so is clear. Consequently, the latter part of § 1289 of the Code, making railroad companies liable for running trains on depot grounds at a greater rate of speed than eight miles an hour, being susceptible of a different construction, will not be construed so as to authorize the recovery of double damages for injuries to stock caused by a violation of said statute. *Miller v. Chicago and Northwestern R'y Co.*, 59 Ia., 707. 1882.

95. — The true construction of the act of February 3, 1875, for the recovery of damages for injuries by railroads, is, that the killing being shown or admitted, the presumption is that it was done by the train and resulted from want of due care; but this presumption may be repelled by proof. And in case the company may be liable at all, that liability is doubled by the failure to advertise the injury as required by the statute; but the failure to give notice does not create a liability for an innocent act. The statute is not unconstitutional. *Little Rock and Ft. Smith R. R. Co. v. Payne*, 33 Ark., 816. 1878.

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96. Exemplary damages. Exemplary damages for killing stock can only be allowed in case of recklessness. *Chicago, St. Louis and New Orleans R. R. Co. v. Jarrett*, 11 Amer. & Eng. R. R. Cases, 455; 59 Miss., 470. 1882.

97. Evidence. In an action against a railway company for injury to a horse which had got upon the track, it was error, while admitting evidence of his reduced value, to allow testimony of what his use would have been worth during a certain period after the injury, if he were sound, especially if the declaration made no claim for the value of his services, and the plaintiff sought to show that he was absolutely worthless. *Davidson v. Michigan Central R. R. Co.*, 49 Mich., 428. 1882.

98. Interest. Though interest may not by name be added to the amounts of recovery, yet such interest may be allowed as damages. *Western and Atlantic R. R. Co. v. McCauley*, 68 Ga., 818. 1882.

99. — Interest is recoverable upon damages for injury to cattle by a railway company. *Lackin v. Delaware and Hudson Canal Co.*, 22 Hun (N. Y.), 309. 1880.

100. — For injuries to property, interest may be recovered from the commencement of the action, on the immediate damages; but whether an allowance of interest from the date of the injury would be upheld in any case, and, if not, whether such allowance of interest upon a sum less than \$45 for a few months would justify reversal of a judgment, query? *Dean v. Chicago and Northwestern R'y Co.*, 43 Wis., 305. 1877.

101. — Interest is not allowed on the damages from the date of the injury. *Meyer v. Atlantic and Pacific R. R. Co.*, 64 Mo., 542, 1877; *Houston and Texas Central R. R. Co. v. Muldrow*, 54 Tex., 233, 1881; *Toledo, Peoria and Warsaw R'y Co v. Johnston*, 74 Ill., 83. 1874.

102. Loss of hire of horse. Diminution in market value and temporary loss of hire of a horse are proper elements of damages. *Atlanta and West Point R. R. Co. v. Hudson*, 62 Ga., 679. 1879.

103. Value. In an action for killing a heifer the court instructed the jury that if they found for the plaintiff they might find for the full value of the animal. There was

no evidence tending to show that the heifer was worth anything after she was killed. The jury found in favor of the plaintiff, and assessed his damages at \$18, which from the evidence was the full value of the heifer. The court rendered judgment in favor of the plaintiff for this amount. *Held*, that the court did not err. *Atchison, Topeka and Santa Fe R. R. Co. v. Ireland*, 19 Kans., 405. 1877.

104. — In an action for the recovery of damages under the stock law of 1874, for the killing of a cow, the plaintiff is entitled to recover the market value of the animal. The jury, in estimating this value, may consider all the qualities of the animal which affect her market value, and are not limited in their inquiry to the value of the cow for beef or milking purposes. *Central Branch Union Pacific R. R. Co. v. Nichols*, 24 Kans., 242. 1880.

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105. Contributory negligence. Turning cattle upon a highway, and voluntarily permitting them to go upon a railway, is such negligence as will defeat an action by the owner for their injury. *Fitch v. Buffalo, N. Y. and Philadelphia R. R. Co.*, 13 Hun (N. Y.), 668. 1878.

106. Crossing. It is negligence in a railway company to permit or suffer weeds or anything else to grow upon its right of way to such a height as to materially obstruct the view of a highway crossing, and if injury results to stock at such crossing, that might have been avoided but for such obstruction, the company will be liable. *Indianapolis and St. Louis R. R. Co. v. Smith*, 78 Ill., 112. 1875.

107. — In an action against a railway company for killing stock at a public crossing, evidence that the engineer failed to give any signals, as the ringing of the bell or sounding the whistle, does not, in itself, establish negligence on the part of the company, nor render it liable. *Jackson v. Chicago and Northwestern R'y Co.*, 36 Ia., 451. 1873.

108. — The testimony in this case shows, without conflict, that the stock was injured upon the highway crossing; the verdict for

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damages was not therefore sustained by the evidence, and should have been set aside. *Sullivan v. Wabash, St. Louis and Pacific R'y Co.*, 58 Ia., 602. 1882.

109. — Where animals get upon a railroad track at a public crossing or other place where the railroad company is not allowed to fence, and then, without fault of the railroad company, stray along its track and are killed by a passing train, the company is not liable under ch. 94, Laws of 1874, although at the immediate place of injury the company could have fenced and yet had not fenced its track. *Missouri Pacific R. R. Co. v. Leggett*, 27 Kans., 323. 1893. See, also, *Atchison and Nebraska R. R. Co. v. Cash*, 27 ib., 587. 1893.

110. — A railroad company is not liable under the statute for stock killed at the crossing of a road used and traveled by the public as a highway, though the crossing and route thus traveled is in fact not a regularly laid out and established highway. *Atchison, Topeka and Santa Fe R. R. Co. v. Griffiths*, 28 Kans., 539. 1892.

111. — Where a domestic animal, running at large by the sufferance of the owner, gets upon a railroad track at the crossing of a highway where the company is not required to fence, and is injured by a passing train, the company is not, in general, liable, unless its servants, after they discover the animal, might, by the exercise of proper care and prudence, have prevented the injury. *Toledo, Wabash and Western R'y Co. v. Barlow*, 71 Ill., 640. 1874.

112. — Where the evidence disclosed that the plaintiff's cow was killed between the signal post erected under § 708 of the Code and the crossing, it was not error to charge in regard to the provisions of that section as to checking the speed of the train, adding thereto that the company would not be liable simply because at the time the injury happened the train might be running in a manner forbidden by law, but the failure to comply with the law must operate as a cause of the injury. *Western and Atlantic R. R. Co. v. Main*, 64 Ga., 649. 1830.

113. — In an action to recover for the killing of a horse by the defendant's train, brought under the act of 1855, concerning the fencing of railroads, where the evidence

showed the entire sufficiency of the fences, and that the horse was killed at the crossing of a public road where the company had constructed and maintained suitable cattle-guards, and that he got upon the track from the road, *held*, that under such a state of facts the company could not be held liable, except upon the ground that the act was wilful or the result of negligence. *Chicago and Alton R. R. Co. v. McMorro*, 67 Ill., 218. 1873.

114. — In an action for negligence, the question whether a bell was in fact rung, at a street crossing, at the time of a collision with a locomotive, was the chief and material question at the trial, and the only one submitted to the jury. In behalf of the defendant five witnesses testified positively that the bell was rung; that they both heard and saw it ringing. For the plaintiff, two witnesses testified that, although present and listening, they heard no bell. *Held*, that the burden of proof was with the plaintiff, and he was bound to make out his case, by a preponderance in the testimony, upon the whole issue. *Held*, also, that he had failed to do so. That the weight of the testimony was decidedly with the defendant, and the verdict of the jury should have been rendered accordingly. *Culhane v. New York Central and Hudson River R. R. Co.*, 67 Barbour (N. Y.), 562. 1876.

115. — Where a locomotive ran against and injured the plaintiff's mare upon a bridge in a public highway, and it appeared that no bell was rung or whistle sounded and the speed of the train not slackened, it was held that the company was guilty of such negligence as made it liable for the damages. *Springfield and Illinois Southeastern R'y Co. v. Andrews*, 68 Ill., 56. 1873.

116. — The defendant was the owner of a railway and also of a tramway, which for some distance ran by the side of the railway, and was separated from it by a hedge or fence, also belonging to the defendant, down to a point where the tramway crossed the railway. At this point the company had placed swing-gates to separate the tramway from the railway; but these were seldom, if ever, closed. The tramway was used by the public for drawing coals and other goods in trucks along it by means of horses, a toll be-

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ing paid to the defendant for its use. The plaintiff's servant was proceeding along the tramway with certain horses and trucks, when one of the horses, alarmed by the noise of an approaching train, swerved on to the railway, and was knocked down and killed. In an action against the company, charging it with negligence in omitting to use reasonable or proper means to prevent its engines and carriages from doing damage or injury to persons lawfully being upon and using the tramway,—the jury having found that the company was guilty of negligence,—*held*, by Williams, J., and Byles, J. (Erle, C. J., dissenting), that the plaintiff was entitled to recover. *Marfell v. South Wales R'y Co.*, 8 Common Bench (N. S.), 525; 98 E. C. L., 524. 1860.

117. — Where a railway crosses a highway on a level at a place where there is considerable traffic, *held*, that the fact of the engine-driver blowing off the steam from the mud-cocks at that spot, so as to frighten horses waiting to pass over the line, was sufficient to warrant the conclusion that the company had been guilty of actionable negligence. *Manchester, South Junction and Altrincham R'y Co. v. Fullarton*, 14 Common Bench (N. S.), 54; 108 E. C. L., 53. 1863.

118. — Whether a person was in the lawful use of a highway as a "traveler," and whether he was in the exercise of due care at the time of an injury to his horse, are questions for the jury. It is error to take such questions from the jury. *Sleeper v. Worcester and Nashua R. R. Co.*, 58 N. H., 520. 1879.

119. Fences. The obligation of a railway company, under 8 and 9 Vict., c. 20. s. 68, to fence against the owners and occupiers of lands adjoining the railway is co-extensive only with the common law prescriptive obligation to repair fences; and therefore, assuming a highway, running parallel with the railway, to be "adjoining land" within the meaning of the statute, the company is not responsible for injury done to cattle straying thereon, in consequence of their getting through an open gate into the station yard and thence on to the railway; though it would be otherwise if the cattle were using the highway according to the dedication of the owner of the soil. *Man-*

chester R'y Co. v. Wallis, 14 Common Bench, 213; 78 E. C. L., 212. 1854.

120. — Instructions, in effect, that if animals went on the track at a highway crossing and were killed some distance from the highway, the company would not be liable, upon the ground of the want of a fence, were properly refused. *Evansville and Crawfordsville R. R. Co. v. Barbee*, 74 Ind., 169. 1881.

121. — Where a railway company has failed to construct and maintain suitable and sufficient cattle-guards near the outer line of the highway, they being thirty-five feet from each outer line, it is not relieved from liability for a cow killed by one of its trains, by the fact that the cow was running at large and strayed upon the track at the highway crossing. *White v. Utica and Black River R. R. Co.*, 15 Hun (N. Y.), 333. 1878.

122. — Where, with the permission of the proper board of county commissioners, a railway is located upon part of a public highway, the remainder of which is still used by the public as a highway, the company is not bound to fence its right of way, and is not liable under the statute for stock killed thereon. *Louisville, New Albany and Chicago R'y Co. v. Francis*, 58 Ind., 339, 1877; *Same v. Wysong*, ib., 597, 1877.

123. — In counties where no order has been made by the board of county commissioners regulating or prohibiting the running at large of animals, individuals may permit their stock to run on the public highways, and in so doing they are not necessarily guilty of negligence. *Missouri Pacific R'y Co. v. Wilson*, 28 Kans., 637, 1882; 11 Amer. & Eng. R. R. Cases, 447.

124. Indian reservation. A railway company is liable for an injury to domestic animals upon a highway in the Cattaraugus Indian Reservation. The state had the power to construct a highway in the reservation. *France v. Erie R'y Co.*, 2 Hun (N. Y.), 513, 1874; *France v. Erie R'y Co.*, 5 Thompson & Cook (N. Y. Supreme Ct.), 12, 1874.

125. Neglect of employe. Where an engine-driver sees a lot of cattle crossing the railroad track upon a highway, but does not slacken its speed, although he could do so, and kills an animal which has escaped from

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the owner's inclosure, this will show negligence on his part of a high degree, and the railroad company will be liable for the value of the animal so killed. *Chicago and Alton R. R. Co. v. Kellam*, 92 Ill., 245. 1879.

126. Rate of speed. It is not negligence *per se* to run a train at the rate of twenty-five miles an hour across a public road in the country. *Goodwin v. Chicago, Rock Island and Pacific R. R. Co.*, 75 Mo., 73, 1881; 11 Amer. & Eng. R. R. Cases, 460.

127. — A railroad train approaching a public crossing must not only give the warnings and observe the other precautions required by statute, but its speed must be so slackened that the train may be more manageable in passing the crossing; and hence, a charge that the company "had a right to run its train at any speed it pleased, so that it did not endanger freight or persons on board," asked in a suit to recover damages for injury to persons or property at a public crossing, is properly refused. *South and North Ala. R. R. Co. v. Thompson*, 62 Ala., 494. 1878.

128. — Where a cow is lawfully running at large upon the streets and she is struck by a train running at a rate of speed forbidden by the ordinances of the city, the jury may find that the negligence of operation of the train caused the injury. So held in a case of conflict in the evidence as to the manner of the operation of the train. *Fritz v. St. Paul and Pacific R. R. Co.*, 22 Minn., 404, 1876; 19 Amer. R'y Rep., 404.

IV. CITIES AND TOWNS.

129. Animals prohibited from running at large. When a railway company in the exercise of its lawful business in running a train through the street of an incorporated city (which prohibited by ordinance certain animals running at large), killed an animal within the city limits, the animal coming within the prohibition of the ordinance, held, that the company was liable only if the animal's death was the result of gross negligence on the part of the company's servants. *Denver and Rio Grande R'y Co. v. Olsen*, 4 Colo., 239. 1878.

130. — Where the owner of horses in a

city allowed them to run at large at night, and to lie down and sleep on a railroad track, and the horses were injured by a train, his conduct was a circumstance tending to show him guilty of contributory negligence, unless he had a legal right to let them run at large; and when an ordinance of the city was offered in evidence to show that he had no such legal right, it was error to exclude it. *Van Horn v. Burlington, Cedar Rapids and Northern R'y Co.*, 59 Ia., 33, 1882; 7 Amer. & Eng. R. R. Cases, 591.

131. Comparative negligence. In an action to recover for the killing of plaintiff's cow by a train of cars in an incorporated town, it appeared that no bell was rung or whistle sounded, and that the train was running at a greater rate of speed than allowed by ordinance of the town. It also appeared that the plaintiff's cow was running at large, contrary to ordinance. Held, that a verdict in favor of the plaintiff was authorized; the negligence of the plaintiff in allowing his cow to run at large being slight as compared with that of the company, which was gross, and in violation of a statute law as well as of an ordinance. *Indianapolis and St. Louis R. R. Co. v. Peyton*, 76 Ill., 340. 1875.

132. Contributory negligence. It is not negligence for the owner of stock to permit it to run at large in a village through which a railway runs, if it is not prohibited by law. *Chicago and Alton R. R. Co. v. Engle*, 84 Ill., 397, 1877; 16 Amer. R'y Rep., 490.

133. — It is negligence in the owner of cattle to allow them to run at large in a city, where a railway is not required to be fenced. Where the cattle are wilfully killed, however, the company would be liable. *Jeffersonville, etc., R. R. Co. v. Underhill*, 49 Ind., 339. 1874.

134. — Plaintiff's premises, in a city, were so nearly surrounded by railways running within a few feet of them, that his cow, if suffered to run at large, would be likely to get upon the tracks. She was accustomed to go for water to a canal on one side of his premises, and might go to a river on the other side, but, to reach either, must cross a railroad. Late in the fall, when grass was scarce, she was turned into the street without any one to look after her; and not long after, being near, but not upon the track of

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defendant's road, a few rods from plaintiff's premises and near the river, she started, on the approach of a train, and after running a short distance was struck upon the track and killed. In an action for the damages, the above facts appearing from plaintiff's evidence, *held*, as matter of law, that plaintiff was guilty of contributory negligence, and could not recover in the absence of malice or wilfulness on defendant's part. *McCandless v. Chicago and Northwestern R'y Co.*, 45 Wis., 365, 1878; 19 Amer. R'y Rep., 374.

135. — An answer that the plaintiff had negligently, or in violation of a city ordinance, allowed the stock killed to run at large within the limits of an incorporated city, and in the vicinity of the defendant's track, amounts only to an answer of contributory negligence, and is insufficient on demurrer. *Louisville, New Albany and Chicago R'y Co. v. Cahill*, 63 Ind., 340, 1878.

136. Degree of care required. Whilst railway companies are not required or permitted to fence their tracks in an incorporated town, still they are bound to use all due and proper diligence to avoid injury to property. *Toledo, Wabash and Western R'y Co. v. McGinnis*, 71 Ill., 346, 1874.

137. Fences. A railway company is not bound to fence its track or make cattle-guards within the limits of a village; and a place where there is a station house, a warehouse, a store, a blacksmith shop, a postoffice and five or six dwelling-houses, whether they are situated upon regularly laid out streets and alleys or not, comes fully up to the requirements of a village, for the purpose of excusing it from fencing its track within the limits thereof. *Toledo, Wabash and Western R'y Co. v. Spangler*, 71 Ill., 568, 1874.

138. — Where stock is killed by a railway company at a place where the law does not require the company to fence its road, the party seeking a recovery must prove that the killing of the stock was caused through the negligence of the company; and where the proof shows that the stock was killed within the limits of a city, and there is no evidence of negligence on the part of the company, no recovery can be had against it.

Illinois Central R. R. Co. v. Bull, 72 Ill., 537, 1874.

139. — If an animal suddenly leap upon the track, so near in front of an engine that it is impossible to stop, within a village, where fencing the track is not required, and where cattle are accustomed to graze, it is not negligence on the part of the engine-driver to omit to sound the alarm whistle or "slow" the train, although he may in fact have seen the animals grazing near the track from a distance of sixty rods. *Chicago, Burlington and Quincy R. R. Co. v. Bradfield*, 63 Ill., 220, 1872.

140. — A railway company will not be liable, without proof of negligence, for the killing of stock along the line of its road where it passes through a town which has been properly platted and recorded and laid out into lots and blocks, and streets crossing the track which have been dedicated as public highways, notwithstanding that the road, at the point of the disaster, is unfenced. And it would make no difference in such case whether the town is incorporated or not. But the rule would be otherwise where the town exists only on paper and has no streets which are opened and used. *Gerren v. Hannibal and St. Joseph R. R. Co.*, 60 Mo., 405, 1875; 9 Amer. R'y Rep., 247. See, also, *Cousins v. Hannibal and St. Joseph R. R. Co.*, 66 Mo., 572, 1877; *Edwards v. Same*, ib., 567, 1877.

141. — Where the evidence shows that the stock was killed between two streets of a city, on the track of the defendant's railway, not fenced, where a fence might have been built without interfering with any street or alley, or with the customary operations of the road, the company is liable. *Indianapolis, Peru and Chicago R. R. Co. v. Lindley*, 75 Ind., 426, 1881; 11 Amer. & Eng. R. R. Cases, 495.

142. — That a place on a railway where an animal is killed is within a city is not sufficient to excuse the company from fencing its line. *Toledo, Wabash and Western R'y Co. v. Owen*, 43 Ind., 405, 1873.

143. Kansas statute. Where stock are killed by a railroad train, the company is not absolved from liability under ch. 94 of the Laws of 1874 by proof that the place of injury was within the territorial limits of

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an incorporated city, or even that it is within such portion of those limits as is regularly laid off into blocks and lots, surrounded by streets and alleys. *Union Pacific R'y Co. v. Dyche*, 28 Kans., 200, 1882; 41 Amer. & Eng. R. R. Cases, 427.

144. Rate of speed. The running of a railroad train within city limits at a prohibited rate of speed constitutes negligence *per se*. *Correll v. B., C. R. and M. R. R. Co.*, 38 Ia., 120. 1874.

145. — The train of appellant ran over and killed appellee's cow near a public crossing in the village. The train was running much faster than was allowed by the village ordinance, and no bell was rung or whistle sounded. *Held*, that as the train was running in total disregard of the law, to overcome the liability created by the statute under such circumstances, the preponderance of the evidence should show that the injury was not the result of the wrongful act of the railroad company. *St. Louis, Vandalia and Terre Haute R. R. Co. v. Morgan*, 12 Bradwell (Ill.), 256. 1882.

146. — If an engine is running through a city at less than six miles an hour, when animals jump into a trestle and render a collision inevitable, the speed may be increased, notwithstanding Code 1880, § 1047, in order to strike them with such momentum as to knock them off the track and avoid throwing the train from the bridge. *Chicago, St. Louis and New Orleans R. R. Co. v. Jones*, 59 Miss., 465, 1882; 11 Amer. & Eng. R. R. Cases, 450.

147. — An incorporated town may regulate the speed of trains within its limits. *Chicago, Burlington and Quincy R. R. Co. v. Haggerty*, 67 Ill., 113. 1873.

148. — In an action against a railway company for injuries caused by its alleged negligence in the manner of running a train within city limits, a special ordinance limiting the rate of speed at which another company should run its trains was held not admissible to charge the defendant with negligence. *Fell v. B., C. R. and M. R. R. Co.*, 43 Ia., 177, 1876; 14 Amer. R'y Rep., 419.

149. — Where a railway company runs its trains through the limits of an incorporated city or village at a greater rate of speed than is permitted by the ordinances of such

city or village, if any live stock is killed by such train, the killing, by the statute, will be presumed to have been done through the negligence of the company. *Toledo, Peoria and Warsaw R'y Co. v. Deacon*, 63 Ill., 91. 1872.

150. — An instruction that "The running of a train past, or through, the streets of a city at a speed of eighteen miles an hour, would be gross negligence," there being no evidence as to the character of the particular locality distinguishing it as an inhabited or business portion of the city, *held*, erroneous. *Burlington and Missouri River R. R. Co. v. Wendt*, 12 Neb., 76. 1881.

151. — Under Code 1880, § 1047, a railway company is liable for damages for a horse killed by its locomotive running through a city at greater speed than six miles an hour, although the engine is checked when the animal is seen, and collides with less momentum. *New Orleans, Mobile and Texas R. R. Co. v. Toulme*, 59 Miss., 284. 1881.

152. — The act of 1865, which makes railway companies liable for all damage done to any individual and for stock killed by any train or engine in any incorporated city or town, where their trains are permitted to run at a greater rate of speed through such city or town than is permitted by the ordinances thereof, is not unconstitutional. *Chicago, Rock Island and Pacific R. R. Co. v. Reidy*, 66 Ill., 43. 1872.

153. — In a suit to recover for the killing of an animal within the limits of an incorporated town, on the ground of an alleged violation of an ordinance of the town by the company, in running its train at a prohibited rate of speed, it is indispensable to a recovery that the plaintiff should prove that the ordinance was in force at the time of the alleged accident. *Chicago and Alton R. R. Co. v. Engle*, 76 Ill., 317. 1875.

154. Stock running at large. An owner of domestic animals has the right to pasture them on the commons of incorporated towns, in the absence of local regulations to the contrary, and such conduct, though dangerous and reprehensible, does not diminish his right to compensation from those who injure them. *Chicago, St. Louis and New Orleans R. R. Co. v. Jones*, 59 Miss., 465, 1882; 11 Amer. & Eng. R. R. Cases, 450.

Depot Grounds.

155. Team upon streets. Where a team is injured by a train within the limits of a city, and upon one of its streets, and on the trial of an action to recover damages therefor there is testimony that the train was running at an unusual speed, that no effort was made to stop it, or to warn the party in charge of the team of the approaching danger, and that no whistle was sounded or bell rung, it cannot be held that there was no evidence of negligence. *Pacific R. R. Co. v. Houts*, 12 Kans., 328. 1873.

V. DEPOT GROUNDS.

156. Animals attracted by waste. A railroad company is not responsible for cattle attracted to a depot by hay loaded on its cars and killed there by a train, provided the cars are not allowed to stand on the track an unreasonable length of time. *Schooling v. St. Louis, Kansas City and Northern R'y Co.*, 75 Mo., 518. 1882.

157. — Where the hogs of the plaintiff were attracted to the warehouse of the defendant by the drippings of molasses from defendant's cars, and were killed by the train suddenly starting or approaching without the usual alarm, it was such negligence as entitled the plaintiff to damages. *Page v. North Carolina R. R. Co.*, 71 N. C., 222. 1874.

158. Fence. The failure to erect cattle-guards and fences in depot grounds will not render a railway company liable for killing stock on such grounds. *Robertson v. Atlantic and Pacific R. R. Co.*, 64 Mo., 412, 1877; *Indianapolis and St. Louis R. R. Co. v. Christy*, 43 Ind., 143, 1873.

159. — The statute has no application to station grounds and their approaches. *Chicago and Grand Trunk R'y Co. v. Campbell*, 47 Mich., 265, 1882; 7 Amer. & Eng. R. R. Cases, 545.

160. Iowa statute. Where, in an action against a railway company to recover the value of stock killed on its station grounds, the evidence fails to show negligence of the company or those in charge of the train, a verdict of the jury against it will be set aside. *Flattes v. Chicago, Rock Island and Pacific R. R. Co.*, 35 Ia., 191, 1872; 5 Amer.

R'y Rep., 518; *Cleveland v. Chicago and Northwestern R. R. Co.*, 35 Ia., 220, 1872; 5 Amer. R'y Rep., 522.

161. — Under § 1289 of the Code, railway companies are liable for all stock killed on depot grounds by trains running at a rate of speed greater than eight miles an hour. *Monahan v. Keokuk and Des Moines R'y Co.*, 45 Ia., 523. 1877.

162. — That statute imposes no restriction upon the rate of speed of trains outside of the limits of depot grounds, and the liability of a railway company for stock killed just beyond the limits is not affected by the fact that its train was running faster than eight miles an hour. *Ib.*

163. — It appeared from the evidence that the accident to plaintiff's horse, for which he sought to recover, may have been caused by the train entering upon the depot grounds at the unlawful speed of more than eight miles per hour, notwithstanding the fact that the train had slowed down to a speed of less than eight miles per hour before the animal came upon the track, and the evidence being thus susceptible of a construction consistent with the verdict, the verdict was not disturbed. *Miller v. Chicago and Northwestern R'y Co.*, 59 Ia., 707. 1882.

164. — A railway company is not liable in damages, under the statute, for stock killed by its trains on depot grounds. *Kyser v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 56 Ia., 207. 1881.

165. — Railroads are required to be fenced where it is fit, proper and suitable in view of the public convenience, and depot grounds may be uninclosed where the interest of the road and public require it. The duty to fence is not determined by its practicability. *Latty v. B., C. R. and M. R. R. Co.*, 38 Ia., 250. 1874.

166. — The failure to keep a watchman at a station passed without stopping, and a rate of speed six miles or more per hour, are not negligence *per se*, though they may be evidence of negligence. *Ib.*

167. — Where a party seeks to recover against a railroad company for stock killed on its depot grounds, the burden is upon him to establish negligence on the part of the company, and if he fails to do this the verdict will be set aside. That the train was

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running at a rate faster than usual is not sufficient to establish negligence. *Plaster v. Illinois Central R. R. Co.*, 35 Ia., 449, 1872; 5 Amer. R'y Rep., 528.

168. Missouri statute. To hold a railway company liable for injuries to live stock inflicted within the corporate limits of a city and near its depot, the plaintiff must prove actual negligence on the part of the company. *Wallace v. St. Louis, Iron Mountain and Southern R'y Co.*, 74 Mo., 594. 1881.

169. — But where stock is killed on a railroad switch at a point where it is unnecessary to keep the road open in order to transact business, the company will be liable without proof of negligence. *Morris v. St. Louis, Kansas City and Northern R. R. Co.*, 58 Mo., 73, 1874; *Swearingen v. Mo., Kans. and Tex. R. R. Co.*, 64 Mo., 73, 1876.

170. Public way. It is competent for the defendant to prove that the land on each side of the place where the stock was killed had long been necessarily used as a public way for the transaction of the business of the defendant with the public, and that it adjoins its depot, and also belongs to the company. *Indianapolis, Peru and Chicago R'y Co. v. Crandall*, 58 Ind., 365. 1877.

VI. PLEADING AND PRACTICE.

171. Agreed statement of facts. An agreed statement in relation to the killing of an animal construed. *Kansas City, Ft. Scott and Gulf R. R. Co. v. Hines*, 10 Amer. & Eng. R. R. Cases, 770 (Kans.). 1883.

172. — Proper diligence having been shown by the agreed statement of facts, on the part of the railway company, the presumption of law against the company was rebutted, and the plaintiff was not entitled to recover. *Bartley v. Georgia R. R. Co.*, 60 Ga., 182. 1878.

173. Alabama statute. An action of trespass does not lie against a railway company for the destruction or injury of animals run over by its trains, unless the wrongful act was done by its direction, or with its assent; the conductor, engine-driver or other subordinate agent, who has charge of the train at the time of the accident, is not, for this pur-

pose, the representative of the corporation. *Selma, Rome and Dalton R. R. Co. v. Webb*, 49 Ala., 240. 1873.

174. — pleading. A complaint or statement, filed on appeal from a justice's court, in an action to recover damages for killing stock, which fails to aver that the killing was negligent, or the result of negligence, on the part of the railroad company, its servants or agents, does not contain a substantial cause of action. *Mobile and Ohio R. R. Co. v. Williams*, 53 Ala., 595; 13 Amer. R'y Rep., 153, 1875; *South and North Ala. R. R. Co. v. Hagood*, 53 Ala., 647. 1875.

175. Appeal. An appeal will not lie to the supreme court, from the appellate court, where the value of the property does not exceed \$1,000. *Hankins v. Chicago and Northwestern R'y Co.*, 100 Ill., 466. 1881.

176. — A new pleading may be filed by plaintiff upon appeal. *Evansville and Crawfordsville R. R. Co. v. Murphy*, 59 Ind., 515. 1877.

177. — The railway company may dismiss its appeal taken from the judgment of a justice of the peace. *Kansas City, Ft. Scott and Gulf R. R. Co. v. Hammond*, 25 Kans., 208. 1881.

178. Arkansas statute; venue. By statute, an action against a railway company for killing stock must be brought in the county in which the injury occurs. *Little Rock and Ft. Smith R. R. Co. v. Clifton*, 38 Ark., 205. 1881.

179. Assignment of cause of action. A right of action, under the statute, against a railway company, for injury to an animal upon an unfenced part of the road, is assignable. *Louisville, New Albany and Chicago R'y Co. v. Goodbar*, 88 Ind., 213, 1882; *Chicago, St. Louis and New Orleans R. R. Co. v. Packwood*, 59 Miss., 280, 1881; 7 Amer. & Eng. R. R. Cases, 584; *East Tenn., Ga. and Va. R. R. Co. v. Henderson*, 1 Lea (Tenn.), 1, 1878; *Galveston, Harrisburgh and San Antonio R. R. Co. v. Freeman*, 57 Tex., 156, 1882.

180. Attorneys' fees. It is error to allow an amendment, in the absence of the defendant and without notice, increasing the claim for attorneys' fees from \$25 to \$40. *Leavenworth, Lawrence and Galveston R. R. Co. v. Van Riper*, 19 Kans., 317. 1877.

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181. Common law. A statement of claim against a railway company for killing the plaintiff's cow set out that the defendant "so carelessly and negligently, rapidly and heedlessly ran and managed its said locomotive engine and cars without ringing its bell or using its steam-cock, or giving any other alarm, that the same ran against and over" the cow. *Held*, that this was a statement of a cause of action at common law and not under the statute, and that evidence to show the speed of the train, and when and at what place the whistle was sounded, was admissible. *Mapes v. Chicago, Rock Island and Pacific R'y Co.*, 76 Mo., 367, 1882; *Edwards v. Same*, ib., 399, 1882.

182. — To be sufficient in an action at common law, the complaint against a railway company, to recover damages for negligently killing stock, must allege that such injury did not result from negligence of the plaintiff. *Jeffersonville, etc., R. R. Co. v. Lyon*, 55 Ind., 477, 1876; 16 Amer. R'y Rep., 250; *Jeffersonville, etc., R. R. Co. v. Lyon*, 72 ib., 107, 1880.

183. — As a railway company is liable for gross negligence resulting in the destruction of a plaintiff's property, irrespective of the question of the erection of fences, when the declaration charges negligence, as at common law, all allegations respecting the want of sufficient fences may be rejected as surplusage, and a recovery had upon the common law liability. *Rockford, Rock Island and St. Louis R. R. Co. v. Phillips*, 66 Ill., 548, 1873.

184. — In an action on the case against a railway company for killing cattle by carelessly and unskilfully running its locomotive against them, the declaration need not aver that this was done on the defendant's railroad track. *Baylor v. Baltimore and Ohio R. R. Co.*, 9 West Va., 270, 1876.

185. Demurrer. In an action to recover double damages for the killing of stock, the objection that the petition fails to set out the notice served upon the company should have been raised by demurrer, and not having been thus raised, it must be regarded as waived. *McKinley v. Chicago, Rock Island and Pacific R. R. Co.*, 47 Ia., 76, 1877.

186. Fence. The complaint alleged that "at a place on the track of said railroad,

where the same was not securely fenced," the defendant, "by its servants, locomotives and cars, ran upon, against and over" the stock and killed it. *Held*, on motion in arrest, that as the defect in the allegation as to fencing could be and was supplied by the evidence and cured by the verdict, the complaint is sufficient. *Louisville, New Albany and Chicago R'y Co. v. Spain*, 61 Ind., 460, 1878.

187. — The plaintiff's sheep got upon the defendant's railway, through a defect of fences, and were run over by an engine driven by a servant who had directions from the railway company to drive at a certain rate per hour. *Held*, that trespass would not lie against the company, and that, if the cattle had a right to be on the railway, the plaintiff's remedy was by action on the case for causing the engine to be driven in such a way as to injure that right. If the cattle were trespassing, there was no neglect or misconduct for which the company was responsible. If the cattle escaped through defect of fences which the company should have kept up, their damage was consequent on that wrong, and recoverable in an action on the case against the company for letting its fences be incomplete or out of repair. *Sharrod v. London and Northwestern R'y Co.*, 4 Welsby, Hurlstone & Gordon (Exchequer), 580, 1849.

188. Illinois statute; pleading. Pleading examined in an action for killing stock. *St. Louis, Jacksonville and Chicago R. R. Co. v. Kilpatrick*, 61 Ill., 457, 1871; 12 Amer. R'y Rep., 438.

189. Indiana statute; jurisdiction. The plaintiff must allege in his complaint and prove on the trial, as a jurisdictional fact, that the injury complained of occurred within the county wherein such action is commenced. 1 R. S. 1876, p. 751. *Evansville and Crawfordsville R. R. Co. v. Epperson*, 59 Ind., 433, 1877; *Louisville, New Albany and Chicago R'y Co. v. Breckenridge*, 64 ib., 113, 1878.

190. — The venue is sufficiently laid where the complaint shows the killing to have occurred in the county where the action is brought. *Detroit, Eel River and Illinois R. R. Co. v. Barton*, 61 Ind., 293, 1878.

191. — Under the statute the owner's ac-

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tion is local, and he must allege, as a jurisdictional fact, that his animals were killed or injured in the county where he brings his suit. But where such complaint contains a description of the land where the railroad was located and avers that the animals were there injured, and avers that the land so described was in the county where the suit is brought, the complaint is sufficient. *Louisville, New Albany and Chicago R'y Co. v. Davis*, 83 Ind., 89, 1882; *Louisville, New Albany and Chicago R'y Co. v. Wilkerson*, 83 ib., 153, 1882.

192. — But it is not necessary that the proof be made by direct or positive testimony; it will be sufficient if facts are proved from which it can be reasonably inferred. *Louisville, New Albany and Chicago R'y Co. v. Kious*, 82 Ind., 357, 1882.

193. — jury trial. Upon hearing of a motion for the writ provided for in § 5, 3 Ind. Stat., 415, to require an agent, etc., of a railway company, against which a judgment for the value of an animal killed has been rendered, to appear and answer as to the amount of money in his hands, etc., the defendant is not entitled to a jury trial. *Logansport, etc., R. R. Co. v. Patton*, 51 Ind., 487, 1875.

194. — pleading. A complaint against a railway company for injuring or killing stock, which does not allege that such injury or death was caused by the defendant's engine, cars or other carriages, is bad, even in the court of a justice of the peace, on demurrer, motion in arrest or motion to dismiss. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Troxell*, 57 Ind., 246, 1877; 18 Amer. R'y Rep., 347; *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Hannon*, 60 Ind., 417, 1878.

195. — A complaint which does not allege that the railroad was not fenced, and does not allege negligence on the part of the defendant, is insufficient. *Toledo, Wabash and Western R'y Co. v. Eidson*, 51 Ind., 67, 1875; *Baltimore, Pittsburgh and Chicago R'y Co. v. Anderson*, 58 ib., 413, 1877.

196. — A complaint against a railway company charged that through the fault, misconduct and negligence of the employes of the defendant in running the locomotive and train out of their regular time and at a high rate of speed, to wit, forty miles an

hour, and without giving any of the proper signals of their approach, the engine struck and killed two mules of the plaintiff then and there upon the track, at a point where a highway crossed a railway. *Held*, that this was a sufficient statement of negligence. *Indianapolis, Cincinnati and Lafayette R. R. Co. v. Hamilton*, 44 Ind., 76, 1873.

197. — A complaint for negligently killing cattle must negative the existence of contributory negligence on the part of the plaintiff. *Toledo, Wabash and Western R'y Co. v. Harris*, 49 Ind., 119, 1874.

198. — The allegation that "the road was not securely fenced as required by law" is not the statement of a mere conclusion of law, and is a sufficient allegation as to the fencing of the road. *Indianapolis, Bloomington and Western R'y Co. v. Lyon*, 48 Ind., 119, 1874.

199. — pleading; fence. In a complaint, under the statute, for the killing of animals, an allegation that, at the place where the animals entered upon the track, the road was not fenced, is sufficient; if it is not the duty of the company to fence the road at that point, such fact is matter of defense. *Jeffersonville, etc., R. R. Co. v. Lyon*, 72 Ind., 107, 1880; *Wabash R'y Co. v. Forshee*, 77 Ind., 158, 1881.

200. — Under the statute, it is not the place of the killing that governs the liability of a railway company, but the place of the entry of the animals upon the track. *Jeffersonville, etc., R. R. Co. v. Lyon*, 72 Ind., 107, 1880; *Louisville, New Albany and Chicago R'y Co. v. Kious*, 82 ib., 357, 1882; *Louisville, New Albany and Chicago R'y Co. v. Overman*, 88 ib., 115, 1882; *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Brown*, 44 ib., 409, 1873.

201. — A complaint against a railway company for killing a cow belonging to the plaintiff charged that the animal was killed by defendant's engine at a point where the railway was by law required to be fenced, and where the same was not fenced. *Held*, that the complaint was sufficient. It was not necessary to aver that the animal went upon the track at a place where the road was not fenced. *Ohio and Mississippi R'y Co. v. Miller*, 46 Ind., 215, 1874; 7 Amer. R'y Rep., 240; *Ohio and Mississippi R'y Co. v.*

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McClure, 47 Ind., 317, 1874; *Fort Wayne, Muncie and Cincinnati R. R. Co. v. Mussetter*, 48 ib., 236, 1878; *Toledo, Wabash and Western R'y Co. v. Harris*, 49 ib., 119, 1874; *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Keller*, 49 Ind., 211, 1874; *Same v. Same*, ib., 217; *Jeffersonville, etc., R. R. Co. v. Lyon*, 55 ib., 477, 1876.

202. — The complaint alleged that the killing charged had occurred in the county where the action was brought, and that, at the point where the stock entered upon the defendant's railway and was killed, the road "was not securely fenced." *Held*, on demurrer, that the complaint sufficiently lays the venue and shows that such road was not "securely fenced in." *Detroit, Eel River and Illinois R. R. Co. v. Blodgett*, 61 Ind., 315. 1878.

203. — **proceedings.** Proceedings under the statute examined. *Logansport, etc., R. R. Co. v. Byrd*, 51 Ind., 525, 1875; *Same v. Bowers*, ib., 526, 1875.

204. — **process; notice.** In an action against a railway company to recover the value of stock killed, a return of the summons, "Served by reading to" A., "who is the local freight agent of said defendant at the city of," etc., does not show good service under § 30 of the Code of Indiana. *Toledo, Wabash and Western R'y Co. v. Owen*, 43 Ind., 405. 1873.

205. — A local freight agent is a general agent of a railway corporation within the meaning of the above statute, and service on such agent is good, though there be a superintendent of the line and a director of the company residing in the county, and conductors daily passing on the trains. *Id.*

206. — **summons.** In a proceeding under § 5 of the act of March 4, 1863, to procure an order upon an agent of the defendant to pay certain moneys, in and coming into his hands, upon a judgment rendered in favor of the plaintiff against the defendant for stock killed, service was had upon the "company by a copy" of the notice "left with a conductor of a train on said road," and the defendant appearing specially, moved "to set aside the notice" upon the defendant, for the reason that said notice is insufficient. *Held*, that the motion was too vague, indefinite and uncertain. *Louisville,*

New Albany and Chicago R'y Co. v. Thompson, 62 Ind., 87. 1878.

207. Instructions. When specific objections to instructions are made at the time they are given, any others which might have been urged, but were not, must be deemed to have been waived. *Price v. B., C. R. and M. R. Co.*, 42 Ia., 16. 1875.

208. Iowa statute; pleading. In an action against a railway company for double damages for stock killed, the petition alleged "that defendant had been duly notified of the killing of said cow and payment thereof duly demanded," which defendant had refused. *Held* sufficient to warrant a judgment for double damages, where no objection was made until after judgment. *Clary v. Iowa Midland R'y Co.*, 37 Ia., 344. 1873.

209. — In an action for damages against a railway company the petition alleged that "the defendant by its agents and servants did run . . . one of its engines in such a grossly negligent and careless manner that the same ran against and over" plaintiff's cow and killed her. *Held*, that the petition was not vulnerable to a motion for a more specific statement. *Grinde v. Milwaukee and St. Paul R'y Co.*, 42 Ia., 376. 1876.

210. — It is not necessary to the maintenance of an action before a justice of the peace against a railroad company for double damages for killing stock, that a petition in writing be filed; an oral statement embodying in substance plaintiff's claim is sufficient. *Finch v. Central R. R. Co. of Iowa*, 42 Ia., 304. 1875.

211. — **misnomer.** Where horses were killed by the Central Iowa Railway Company, and their owner caused to be served on a proper officer of that company a notice of the injury, as contemplated by § 1239 of the Code, which notice was, however, addressed to the Iowa Central Railway Company, *held*, in an action for double damages, that the misnomer did not invalidate the notice, under the rule that "the omission, alteration or transposition of any of the words, if the words in the name used are synonymous with the true name of the corporation, is not a misnomer that will defeat the notice." *Martin v. Central Iowa R'y Co.*, 59 Ia., 411. 1882.

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212. Jurisdiction. A justice of the peace has jurisdiction in cases of this character where the sum claimed does not exceed \$100. *Western and Atlantic R. R. Co. v. Brown*, 58 Ga., 534. 1877.

213. — Justices of the peace have no jurisdiction of actions founded in tort. *Nance v. Carolina Central R'y Co.*, 76 N. C., 9. 1877.

214. Kansas statute; pleading. In an action in a justice's court, under ch. 94 of the Laws of 1874, for killing plaintiff's cow, where plaintiff does not allege that the company's road was not fenced, and says nothing about attorney's fees except in the prayer for judgment, and the only prayer for judgment is "for said sum of \$30, together with costs of suit, and a reasonable attorney fee for the prosecution of this suit," and the case is tried, both in the justice's court and in the district court, upon this bill of particulars, without any objection being made as to its sufficiency, and the district court finds specially that the road was not fenced, that the cow was worth \$30, that a reasonable fee for prosecuting the suit in the justice's court was \$10, and in the district court \$25, for which sums judgment is rendered against the defendant; and the defendant then brings the case to the supreme court, and assigns for error merely that "the decision of said judge was contrary to law," and the question of the sufficiency of the plaintiff's bill of particulars is raised for the first time in the supreme court, and then by brief only, *held*, that the judgment of the district court will not be disturbed. *Kansas Pacific R'y Co. v. Yanz*, 16 Kans., 583, 1876; *Mo. River, Ft. Scott and Gulf R. R. Co. v. Duckett*, 20 ib., 623, 1878.

215. — M. commenced an action in a justice's court under the "act relating to killing or wounding stock by railroads," and set forth in his bill of particulars a good cause of action for \$35 damages for killing his cow, and then alleged "that \$10 is a reasonable attorney fee for the prosecution of this suit," and "prayed for judgment against the said defendant for the said sum of \$35, his damages sustained as aforesaid, and \$10 attorney fee for the prosecution of this suit, and costs." In the district court, to which the case was afterward taken on appeal, the

jury found from the evidence for the plaintiff, and assessed his damages at "thirty-five dollars, and ten dollars attorney fee," and judgment was entered accordingly; and it appears from the record that the plaintiff was assisted by an attorney. *Held*, that the judgment for the attorney fee will not be reversed where no reason for such reversal can be given except that the said bill of particulars does not state facts sufficient to authorize such a judgment. *St. Louis, Lawrence and Western R. R. Co. v. Miller*, 18 Kans., 212. 1877.

216. — An allegation of gross negligence on the part of the defendant is unnecessary in a bill of particulars which discloses no negligence on the part of the plaintiff, filed in an action to recover damages for stock killed by a railroad train. *Central Branch Union Pacific R. R. Co. v. Phillipi*, 20 Kans., 1, 1878; 19 Amer. R'y Rep., 92.

217. — Under the stock law of 1874 the plaintiff must allege that the defendant's railway was unfenced. *Kansas Pacific R'y Co. v. Taylor*, 17 Kans., 566. 1877.

218. — The plaintiff alleged that his "colt was injured and killed by defendant at a place where its road-bed and railway were not fenced, but ought to have been fenced, as required by law." *Held*, that the allegation was sufficient with regard to the want of a sufficient fence. *Missouri Pacific R'y Co. v. Piper*, 26 Kans., 53. 1881.

219. — A party may allege in his petition that the injury was caused by the negligence of the employes in the management of the engine and cars, and also facts showing a cause of action under the statute, and on the trial may prove either or both, and recover accordingly. *Stewart v. Manhattan, Alma and Burlingame R. R. Co.*, 27 Kans., 631. 1882.

220. — In an action prosecuted under the statute, the petition must state or show that the stock was killed or injured in the county in which the suit was commenced; and the petition must also state or show that the railroad was not inclosed with a good and lawful fence. *Hadley v. Central Branch Union Pacific R. R. Co.*, 22 Kans., 359, 1879; *St. Louis and San Francisco R'y Co. v. Byron*, 24 Kans., 350, 1880; *Same v. Ellis*, 25 ib., 108, 1881; *St. Louis and San Francisco*

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R'y Co. v. McReynolds, 24 ib., 368, 1880; *St. Louis and San Francisco R'y Co. v. Dudgeon*, 28 ib., 283, 1883. See, also, *Kansas City, Lawrence and Southern R. R. Co. v. Neville*, 25 ib., 632. 1881.

221. — The stock law of 1874 makes provision for the recovery of a reasonable attorney's fee for the prosecution of a suit for damages for injuring or killing stock in the operation of railways; therefore, there is less reason for favoring insufficient and defective complaints in those actions than in the ordinary cases commenced in justices' courts. *St. Louis and San Francisco R'y Co. v. Byron*, 24 Kans., 350, 1880; *St. Louis and San Francisco R'y Co. v. Armstrong*, 25 ib., 561, 1881.

222. — Where the railway company does not make any appearance in the action, except to take an appeal to the district court, and to make a case for the supreme court, it does not waive the defects or insufficiency of the bill of particulars. *St. Louis and San Francisco R'y Co. v. McReynolds*, 24 Kans., 368. 1880.

223. — In an action brought before a justice of the peace, the plaintiff recovered a judgment before the justice, and the defendant appealed. The plaintiff, with leave of the court, amended his bill of particulars so as to make it allege a demand under the statute. *Held*, that the court below did not err in allowing such amendment. *Missouri Pacific R'y Co. v. Piper*, 26 Kans., 58. 1881.

224. — The plaintiff commenced an action before a justice of the peace, against a railroad company, to recover \$45, the value of a cow owned by him, and alleged to have been killed by the engine of the defendant. The bill of particulars stated a cause of action at common law, for the negligent killing of the cow, and also attempted to state a cause of action under the statute. But it failed to state a cause of action under the statute, for the reason, and for such reason only, that it did not state that the railroad company's road was not inclosed with a lawful fence. After judgment in the justice's court, and after an appeal, the district court permitted the plaintiff to so amend his bill of particulars as to state a cause of action under the statute. *Held*, not error. *Kansas City,*

Fort Scott and Gulf R. R. Co. v. Hays, 29 Kans., 193. 1883.

225. **Leased line.** In an action against a railway company, to recover under the statute for the value of stock alleged to have been killed by the defendant's cars on its railway where the same was not fenced, it is error to admit evidence that such killing had been done by the defendant's cars on the railway of another company. *Cincinnati, Hamilton and Dayton R. R. Co. v. Bunnell*, 61 Ind., 183. 1878.

226. **Limitations.** Actions must be brought within six months after the killing or injury, against the Louisville and Nashville R. R. Co., for damages for killing or injuring stock on its road or branch roads. *Mortimer v. Louisville and Nashville R. R. Co.*, 10 Bush (Ky.), 485. 1874.

227. **Michigan statute; pleading.** A declaration in such an action which charges the defendants as corporations "owning, occupying and doing business on and over" a certain railway (naming it), "under the laws of the state of Michigan," is not open to the objection, under the plea of the general issue, that it does not allege defendants to be corporations or otherwise competent to be sued. *Grand Rapids and Indiana R. R. Co. v. Southwick*, 30 Mich., 444. 1874.

228. — It is not requisite that such a declaration should be specially framed upon the statute imposing the duty of fencing railroads, or should refer to it, the duty being imposed by the general statute, and the action being not one for penalty but for damages resulting from the neglect of a statutory duty. *Id.*

229. — **venue.** In a suit against a railway company for damages arising out of its neglect to fence its line where it crossed the plaintiff's land, the want of venue in the declaration is held cured by the statute, Comp. L. 1871, § 6051, where the injury complained of was located territorially upon land in the county where the suit was brought. Trial by the court stands in the same equity in this regard as trial by jury. *Grand Rapids and Indiana R. R. Co. v. Southwick*, 30 Mich., 444. 1874.

230. **Missouri statute — pleading.** An action for damages for killing of stock cannot be brought under both § 43 of the Rail-

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road Law (Wagn. Stat., 317) and § 5 of the Damage Act (Wagn. Stat., 520). *Wood v. St. Louis, Kansas City and Northern R. R. Co.*, 58 Mo., 109, 1874; 9 Amer. R'y Rep., 84.

231. — If the owner of cattle injured on a railroad track sues for double damages under the Railroad Law, § 43, he must recover, if at all, under that section. He cannot recover under § 5 of the Damage Act, or on a cause of action at common law. *Luckie v. Chicago and Alton R. R. Co.*, 67 Mo., 245. 1878.

232. — Where plaintiff's petition in suit against a railroad company for injuries to stock alleges the duty of defendant to erect and maintain fences, the breach of that duty and the prayer for double damages; and direct reference is made in the body of the petition to § 43 of the Railroad Law, the pleading will be treated as brought under that section, although containing the further averment that the injury was negligently done. *Crutchfield v. St. Louis, Kansas City and Northern R. R. Co.*, 64 Mo., 255. 1876.

233. — The fact that the petition closes with a prayer for double damages will not prevent recovery of single damages if the petition states a cause of action either at common law or under § 5 of the Damage Act, and there is nothing besides the prayer to show that plaintiff intends to claim under § 43 of the Railroad Law. *Scott v. St. Louis, Iron Mountain and Southern R'y Co.*, 75 Mo., 136. 1881.

234. — Where the petition charges that the killing of stock was caused by its failure to fence its road at a point where it was required to fence, and where the accident occurred (Wagn. Stat., 310, § 43), the question of negligence cannot be raised. *Cary v. St. Louis, Kansas City and Northern R. R. Co.*, 60 Mo., 209. 1881.

235. — Under a general averment that the defendant negligently killed plaintiff's animal, evidence was received that the killing took place at a public crossing, and that neither the whistle was sounded nor the bell rung on the locomotive which did the damage, as it approached the crossing; held, no error. *Schneider v. Missouri Pacific R'y Co.*, 75 Mo., 295. 1882.

236. — The statement held insufficient because it did not show that the stock got

on the railroad or were killed in consequence of the failure of the company to construct or maintain fences or cattle-guards; and because it did not show that the killing did not occur within the limits of some incorporated town. *Rowland v. St. Louis, Iron Mountain and Southern R'y Co.*, 73 Mo., 619, 1881; 7 Amer. & Eng. R. R. Cases, 566.

237. — The statement filed with the justice of the peace alleged that the animals "strayed upon the track of said railroad on or near a farm crossing, at a point in the line of said railroad where said railroad was not fenced and where the crossing and cattle-guards were not made as the law requires; and that defendant so carelessly and negligently ran and managed its cars and locomotive that they ran against and over" the animals, killing them. Held, that, as the case was begun before a justice of the peace, these allegations were sufficient to support a recovery. *Belcher v. Missouri Pacific R'y Co.*, 75 Mo., 514. 1882.

238. — The petition must show that the killing occurred at a place where the company was required by law to fence its track, and was occasioned by failure of the company to comply with the law. A mere statement that "the railroad was not fenced and there was no crossing" at the place is insufficient. *Bates v. St. Louis, Iron Mountain and Southern R'y Co.*, 74 Mo., 60. 1881.

239. — It is not essential to the sufficiency of the statement that it contain an express averment that the injury was occasioned by the failure of the company to erect and maintain fences as required by the statute. Any averment from which this may be inferred will be sufficient. *Bowen v. Hannibal and St. Joseph R. R. Co.*, 75 Mo., 426. 1882.

240. — To authorize a judgment against a railroad company for double the value of an animal killed on its track, the petition must aver, either directly or inferentially, that the killing was occasioned by the failure of the company to erect and maintain fences as required by § 809, Revised Statutes 1879. *Sloan v. Missouri Pacific R'y Co.*, 74 Mo., 47, 1881; *Morrow v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 74 ib., 82, 1881.

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241. — A petition is fatally defective if it fails to allege that the injury for which double damages are asked was occasioned by the failure of the company to erect and maintain a fence. *Luckie v. Chicago and Alton R. R. Co.*, 67 Mo., 245, 1878; *Cunningham v. Hannibal and St. Joseph R. R. Co.*, 70 ib., 202, 1879; *Johnson v. St. Louis, Kansas City and Southern R'y Co.*, 76 Mo., 553, 1882.

242. — The petition alleged that defendant's cars "wrongfully and illegally, and against the will of plaintiff," ran over his cattle, and that the same were killed, owing to defendant's failure to erect and maintain good and substantial fences on the side of the road, "where the same passes through, along or adjoining inclosed or cultivated fields of plaintiff." Petition held substantially good. *Mumpower v. Hannibal and St. Joseph R. R. Co.*, 59 Mo., 245. 1875.

243. — It is allowable, in an action begun before a justice of the peace against a railroad company for killing cattle at a public crossing, to unite in one statement an allegation of failure to perform the statutory duty of ringing the bell and sounding the whistle, and an allegation of neglect in running the train; and plaintiff may recover upon proof of either or both, accompanied by evidence that the injury was due to defendant's default. *Lynn v. Chicago, Rock Island and Pacific R. R. Co.*, 75 Mo., 167. 1881.

244. — The petition alleged that the defendant carelessly ran its train over the stock, and that the point on the road where this occurred was not at the crossing of any public road or highway, and was at a point where the railroad ran through uninclosed prairie lands, and was not fenced. Held, that the action was based exclusively on § 43 of the Railroad Law; that evidence of negligence in running the train, or evidence to prove that the killing occurred within eighty rods of a public crossing, and that the whistle was not blown or the bell rung, as required by § 38, was irrelevant. *Collins v. Atlantic and Pacific R. R. Co.*, 65 Mo., 230. 1877.

245. — A statement filed in a justice's court in an action against a railway company for killing stock, to be sufficient under § 43

of the Railway Law, must aver that the killing did not occur within the limits of an incorporated town. *Schulte v. St. Louis, Iron Mountain and Southern R'y Co.*, 76 Mo., 324. 1882.

246. — The statement originally filed alleged that the injury was caused by failure of the company to erect and maintain cattle-guards. An amended statement was afterward permitted to be filed charging the same injury, but alleging that it occurred in consequence of the failure of the company to construct a crossing where its road crossed a public highway, as required by the statute. Held, that there was no error in permitting the amendment. *Lincoln v. St. Louis, Iron Mountain and Southern R'y Co.*, 75 Mo., 27. 1881.

247. — Pleadings examined and held sufficient under the statute. *Haskings v. St. Louis, Kansas City and Northern R'y Co.*, 58 Mo., 302, 1874; *Razor v. St. Louis, Iron Mountain and Southern R'y Co.*, 73 Mo., 471, 1881; 7 Amer. & Eng. R. R. Cases, 562; *Key v. Same*, 73 Mo., 475, 1881.

248. — summons. It is not necessary for the summons to contain a statement of the cause of action. *Anthony v. St. Louis, Iron Mountain and Southern R'y Co.*, 76 Mo., 18. 1882.

249. Negligence. A declaration against a railway company for negligently and wrongfully killing the plaintiff's cattle on its track need not state the acts of omission or commission which constituted the negligence and wrong. *Hawker v. Baltimore and Ohio R. Co.*, 15 West Va., 638. 1879.

250. New trial; newly discovered evidence. A new trial will not be granted on account of newly discovered evidence, when it is not shown that reasonable diligence was used to obtain such evidence for the trial already had. The belief of a stock agent that the appraisement filed with him was correct is not sufficient to excuse want of diligence in investigation of that question. *Ft. Wayne, Muncie and Cincinnati R. R. Co. v. Fhalor*, 51 Ind., 485. 1875.

251. Ohio statute; pleading. In a suit for damages resulting to domestic animals from the failure of a railway company to construct and maintain sufficient fences along the line of its road, as required by the

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act of April 26, 1871 (68 O. L., 79), the facts upon which the company's liability depends must be stated in the petition, and, if not admitted, must be established by the proof. *Baltimore and Ohio R. R. Co. v. Wilson*, 81 Ohio St., 555. 1877.

252. — Where the complaint charges negligence and carelessness generally, it is not error to refuse to instruct the jury limiting the cause of injury to the negligence of a single one of defendant's servants. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Fleming*, 80 Ohio St., 480. 1876.

253. Ordinance of city. Where the declaration, in an action on the case to recover for injury caused by a collision with a railroad engine, averred that defendant neglected its duty to ring a bell or sound a whistle, and otherwise so carelessly conducted its train, by not slackening the speed and in not giving warning of its approach, as to cause the injury, *held*, that, under this averment, evidence of the violation of the ordinance of the city where the injury occurred, regulating the speed of trains, could be given. *Chicago, Rock Island and Pacific R. R. Co. v. Reidy*, 66 Ill., 43. 1872.

254. Ownership of railway. The complaint alleged that defendant "by its locomotive and cars . . . on the railroad" ran over and killed such stock, etc. *Held*, on demurrer, that the allegation as to the ownership of the railway was sufficient, when the objection was made after trial and verdict. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Hunt*, 71 Ind., 229. 1880.

255. Sufficiency of pleadings. The sufficiency of the pleadings determined. *Evansville and Terre Haute R. R. Co. v. Willis*, 80 Ind., 225. 1881.

256. Summons; appearance. An appearance waives any defect in the summons. *Louisville, New Albany and Chicago R'y Co. v. Nicholson*, 60 Ind., 158. 1877. But see *Same v. Thompson*, 62 Ind., 87, 1878; *Louisville, New Albany and Chicago R'y Co. v. Stover*, 57 Ind., 559, 1877; 18 Amer. R'y Rep., 398.

257. Value; variance. A complaint for killing two colts alleged that each was of the value of \$100. The evidence showed the value of one to be \$150, and the other \$50. *Held*, that the variance was not material,

and could be cured by amendment, which, on appeal, will be considered as having been done. *Louisville, New Albany and Chicago R'y Co. v. Overman*, 83 Ind., 115. 1883.

258. Variance. In an action under the act of 1874, the plaintiff alleged in his petition, among other things, that the defendant killed a heifer belonging to him, but the evidence showed that the railroad company wounded the heifer only, and that the plaintiff himself afterward knocked her in the head and killed her. The evidence and the verdict of the jury showed also that the heifer would have died from her wounds if she had not been knocked in the head, and that the plaintiff knocked her in the head merely to stop her sufferings. *Held*, that the variance between the allegation of the petition and the proof was not fatal to a recovery. *Atchison, Topeka and Santa Fe R. R. Co. v. Ireland*, 19 Kans., 405. 1877.

259. Venue. The legal distinction between trespass and trespass on the case cannot be made in the premises. The company may be sued for damages for the killing of a mule in any parish in which the act was done. *State ex rel. v. Judge of District Court*, 33 La. An., 954. 1881.

260. — common law liability. An action against a railway company, based on its common law liability, for negligently killing or injuring animals, is a transitory action, and may be brought in any county through which the railway passes. *Toledo, Wabash and Western R'y Co. v. Milligan*, 52 Ind., 505, 1876; *Detroit, Eel River and Illinois R. R. Co. v. Barton*, 61 Ind., 203, 1878.

261. Verdict; special findings. Several cattle were killed and injured by separate trains of defendant. In an action for the entire damage the defendant asked for special findings as to the amount of damage done by each train. The court submitted the questions with an instruction that if the jury found that damage was done by both trains, and that one train was operated with reasonable care, then they should answer the questions. No special findings were returned with the general verdict, whereupon the defendant moved to require the jury to return answers to the questions, which motion was overruled. *Held*, that the instruction was correct; that under the general

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verdict the questions asked became immaterial. *Lawson v. Chicago, Rock Island and Pacific R. R. Co.*, 57 Ia., 672. 1882.

262. Wilful acts. A petition against a railway company alleged that "defendant carelessly, negligently and wantonly ran its engine and cars over and upon plaintiff's mare," etc. The answer denied that the "defendant carelessly, negligently and wantonly ran over said mare." *Held*, that this was not a denial of the injury complained of; that under these pleadings the court erred in instructing the jury that such denial "puts the plaintiff upon proof of his cause of action." *Harden v. Atchison and Nebraska R. R. Co.*, 4 Neb., 521. 1876.

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263. Consolidation of railways. Evidence held sufficient to justify the inference that defendant owned and controlled the railway at the time the stock was killed, the evidence being in relation to an agreement of consolidation. *Louisville, New Albany and Chicago R'y Co. v. Meadows*, 87 Ind., 441. 1882.

264. Contractors. The statute of March 4, 1863, makes the company owning a railway jointly and severally liable with the "lessees, assignees, receivers and other persons running or controlling any railroad," etc., for stock killed or injured. *Held*, that contractors are embraced in the phrase "other persons," used in the statute. *Huey v. Indianapolis and Vincennes R. R. Co.*, 45 Ind., 320. 1873.

265. Construction train. It is no defense for a railway company, in an action to recover for stock killed by a train, that the injury was done by the train of another company, which was in the exclusive use and possession of the contractors for the construction of defendant's road, who had not finished the same, or delivered to the defendant the completed portion of said road. *Ib.*

266. Engine operated by another company under mere license. Where a railway company, by the mere license or permission of another company, runs an engine over

the road of the latter company without being the assignee or lessee of such company, and a cow is killed by the engine on the road, which injury occurs not from any negligence in the running of the engine, but in consequence of the omission to inclose the road with a good and lawful fence, to prevent animals from being on such road, a judgment for damages, attorney's fees and costs may be properly rendered against the company owning the road. *Kansas City, Fort Scott and Gulf R. R. Co. v. Ewing*, 23 Kans., 273. 1880.

267. Leased lines — California statute. Where a railway company has leased its road and rolling stock to another company, it remains liable under the statute for cattle killed by the trains of the lessee on the unfenced portions of the lessor's railroad. *Fontaine v. Southern Pacific R. R. Co.*, 54 Cal., 645, 1880; 1 Amer. & Eng. R. R. Cases, 159.

268. — Indiana statute. Where a railroad is operated by a lessee, not in the name of the company, but in its own name, it is not liable, under the statute, for stock killed by it. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Hannon*, 60 Ind., 417, 1878; *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Bolner*, 57 Ind., 572, 18 Amer. R'y Rep., 450, 1877; *Same v. Gadsbury*, 57 Ind., 327, 1877; *Same v. Miller*, 58 ib., 596, 1877; *Same v. Green*, 58 ib., 593; *Cincinnati, Hamilton and Dayton R. R. Co. v. Norris*, 61 ib., 285, 1878; *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Hunt*, 71 ib., 229, 1880.

269. — A railway company operating the line of another company in the name of the former is not liable, under the statute, for stock killed on such railroad. *Cincinnati, Hamilton and Dayton R. R. Co. v. Bunnell*, 61 Ind., 183, 1878; *Jeffersonville, etc., R. R. Co. v. Downey*, 61 ib., 287, 1878.

270. — Prior to the amendment of March 14, 1877 (Acts 1877, Spec. Sess., p. 61), the owner of stock killed upon a railroad operated by a lessee in its own name had no remedy under the statute. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Currant*, 61 Ind., 38. 1873.

271. — Complaint against a railway company to recover the value of a mare, alleged to have been killed by the defendant by

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running its train upon the mare. The evidence disclosed that another company, exclusively operating the road as lessee of the defendant, with its own rolling stock, committed the injury. *Held*, that the variance was fatal. *Cincinnati, Richmond and Fort Wayne R. R. Co. v. Wood*, 83 Ind., 593, 1882; *Fort Wayne, Muncie and Cincinnati R. R. Co. v. Hinebaugh*, 43 ib., 354, 1873.

272. — Iowa statute. A railway company is required to construct cattle-guards wherever its track enters or leaves any improved land, and is liable for any injuries resulting from a failure to construct them; and this duty and liability attach equally to its lessee. *Downing v. Chicago, Rock Island and Pacific R. R. Co.*, 43 Ia., 96, 1876; 14 Amer. R'y Rep., 406.

273. — Missouri statute. A railway company which operates its trains with its own servants and agents over a part of the road of another company, under an arrangement with that company, is liable under § 809, Revised Statutes 1879, in double damages for the killing, by its trains, of cattle which come on the track in consequence of the absence of fences. *Farley v. St. Louis, Kansas City and Northern R'y Co.*, 72 Mo., 338, 1880.

274. Railway operated by trustee. A corporation which has the possession, control and management, and is engaged in the business of running and operating a railroad in Kansas, is a "railway corporation," within chapter 94 of the Laws of 1874, although it is so engaged in the execution and discharge of a trust for the benefit of the bond and stockholders of the corporation which built and owned the road, and is not itself the absolute owner thereof. *Union Trust Company v. Kendall*, 20 Kans., 515, 1878; 20 Amer. R'y Rep., 294.

275. Receiver. A railway company is liable to an action, under the statute, for killing stock while the road is being run, operated and controlled by a receiver appointed by the circuit court of the United States; and service of process in such case upon a conductor of a train passing through the country where the animal was killed is sufficient, though the conductor be employed and controlled by the receiver. *Louisville, New Albany and Chicago R. R. Co. v. Cauble*, 46

Ind., 277, 1874; *Indianapolis, Cincinnati and Lafayette R. R. Co. v. Ray*, 51 ib., 269, 1875.

276. — In 1874, the legislature passed a law requiring railroad companies to fence their roads or be liable for stock killed by their trains. The defendant corporation was then in existence. In 1876, its property was passed into the hands of a receiver, duly appointed. In 1879, the receiver was discharged and the property returned to the possession of the corporation. Just before this was done, and while the possession of the receiver continued, stock belonging to plaintiffs was killed by the railroad trains, at a place where the railroad was unfenced and where it might have been fenced. *Held*, that an action might be maintained against the corporation for the enforcement of the liability imposed upon it by said statute. *Kansas Pacific R'y Co. v. Wood*, 24 Kans., 619, 1880.

277. Sale of railway. An action for damages cannot be maintained against a railway company, on account of injuries to stock by trains running on its road, when such injuries occurred after the company had ceased to own or control the road, and while it was owned, operated and controlled by persons who had purchased its franchise and property under a decree of foreclosure. *Western R. R. Co. v. Davis*, 66 Ala., 578, 1880.

278. Title to railway. An action for damages cannot be maintained against a railway company on account of injuries to stock when such injuries occurred after the company had ceased to own or control the road, and while it was owned and operated by other corporations. *Western R. R. Co. v. Huss*, 70 Ala., 565, 1881.

279. Track used by two companies. A railroad company which fails to fence its track as required by the statute is liable for any damage resulting from such failure, whether caused by its own trains or those of another company using its track. *East St. Louis and Carondelet R'y Co. v. Gerber*, 82 Ill., 632, 1876. Either company is liable in such case. *Id.*

280. — Where two railway companies operate trains on the same road, one being the owner and the other a lessee, each is

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liable only for stock injured or killed by its trains, by reason of the road being unfenced, and not for that injured or killed by the trains of the other. *Stephens v. D. and St. P. R. R. Co.*, 36 Ia., 327, 1873; *Clary v. Iowa Midland R'y Co.*, 37 ib., 344, 1873.

VIII. FENCES AND CATTLE-GUARDS.

1. Generally.

281. Barbed wire. A railway company is liable for negligently driving a horse upon a barbed wire fence with which it has inclosed its right of way. *Atlanta and West Point R. R. Co. v. Hudson*, 62 Ga., 679, 1879.

282. Defective fence. The plaintiff hired of the occupier of some land adjoining the defendant's line of railway a stable for his horse. The horse was allowed to graze during the day on the land. One night it escaped from the stable on to the land, and thence, through a defective fence, to the defendant's line, where it was run over and killed by a train. *Held*, that the plaintiff was entitled to the benefit of 8 and 9 Vict., c. 20, s. 68, whereby railway companies are bound to maintain sufficient fences for the protection of the cattle of the "owners or occupiers" of land adjoining their line, and that the defendant was therefore liable. *Dawson v. Midland R'y Co.*, Law Reports, 8 Exchequer Cases, 8, 1872; 4 Eng. (Moak), 418.

283. — The duty imposed upon railway companies by the Railways Clauses Consolidation Act, 1845 (8 and 9 Vict., c. 20, s. 68), as to the making and repairing of fences between their railways and the adjoining lands, is not more extensive than that imposed upon ordinary tenants by the common law. Therefore, where the plaintiff's sheep escaped from his close, through his own defect of fences, and, getting into the intervening close of a third party, escaped thence on to the defendant's railway, and were killed, *held*, that the company was not liable. *Ricketts v. East and West India Docks R'y Co.*, 12 Common Bench, 160; 74 E. C. L., 159, 1852. See 12 Eng. Law & Equity, 520.

284. Failure to fence. Where a statute requires a railway company to fence its road,

or be responsible for all damages resulting from its failure so to do, it was held that it was no defense to an action for killing a cow that she strayed into the highway through the owner's gates and thence through a defective fence of the railway company upon the track. The duty of the company to maintain its fences is a public one. The owner of the cow had the right to presume that the company had done its duty. *St. John and Maine R'y Co. v. Montgomery*, 5 Pugsley & Burbridge (New Brunswick), 441, 1882.

285. Gates. The Y. Railway crosses a highway on a level; and there are gates across each end of the road where it crosses the line of railway. The plaintiff's horses strayed from his field into the highway, through the gates, which were open, on to the railway, and were there killed by a train. *Held*, that by Stat. 5 and 6 Vict., c. 55, s. 9, an obligation was imposed upon the company to keep the gates closed, as well against any stray cattle on the road as against cattle traveling thereon; and that plaintiff was entitled to recover the value of the horses from the company. *Fawcett v. York and Midland R'y Co.*, 16 Adolphus & Ellis (N. S.), 610; 71 E. C. L., 609, 1851.

286. — A railway crossed an occupation way which connected lands of the plaintiff lying on each side of the railway, and which was also a public footway. The crossing being on the level, at the point of intersection the railway put up high gates, of which it gave a key to the plaintiff. The gates obstructed the footway, but the company did not make a bridge over the railway, or provide a stile for foot passengers in pursuance of 8 and 9 Vict., c. 20, §§ 46, 61, 68. The key having been lost, one of the gates was left open, and some colts of the plaintiff having escaped on to the railway were killed by a passing train. *Held*, that it was a question for the jury whether the plaintiff by his own negligence had contributed to the accident. *Ellis v. London and South Western R'y Co.*, 2 Hurlstone & Norman (Exchequer), 434, 1857.

287. — A colt strayed from a field on to a public road, abutting upon which was a yard not fenced from a railway, the gate of which was, through the neglect of the company's servants, left open. Whilst the colt was be-

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ing driven back to the field by the servants of the owner it escaped into the yard and thence on to the railway, where it was killed by a passing train. *Held*, that the company was responsible. *Midland R'y Co. v. Daykin*, 17 Common Bench, 126; 84 E. C. L., 126, 1855; 33 Eng. Law & Equity, 193.

288. Hedges. The plaintiff folded his sheep in a field adjoining a railway, using the quickset hedge forming the company's fence as one side of the inclosure. Some of the sheep, escaping through a small hole in the hedge, got upon the railway and were killed. *Held*, that the company was liable, and that it was no misdirection to tell the jury that by s. 68 of the Railways Clauses Consolidation Act, 1845 (8 and 9 Vict., c. 20), the company was bound to keep its fences sufficiently strong to prevent sheep and cattle from straying out of the adjoining lands,—the jury having found as a fact that the fence was insufficient. *Bessant v. Great Western R'y Co.*, 8 Common Bench (N. S.), 363; 98 E. C. L., 368. 1860.

289. Highway. A railroad company is not, either at common law or under the Railways Clauses Consolidation Act (8 and 9 Vict., c. 20, s. 68), bound to fence against cattle straying on a high road running alongside of their railway, and it is, therefore, not liable for an injury sustained by such cattle in getting from such high road upon the railway through a defect of the fences, although the cattle had strayed on the high road without any fault of their owners. *Manchester, Sheffield and Lincolnshire R'y Co. v. Wallis*, 25 Eng. Law & Equity, 873. 1854.

290. Statutes of various states—California. The proviso in § 30 of the Railroad Act of May 20, 1861, simply provides that a railway company shall not be compelled to perform the offer or agreement (referred to in the preceding part of the section) to fence on the sides of its road, where it runs through uninclosed lands, until the owner of the land has built fences abutting on the railroad. It does not exempt the company from the liability created by § 40 for the value of animals killed by its locomotives on unfenced portions of the road. *Fontaine v. Southern Pacific R. R. Co.*, 54 Cal., 645, 1880; 1 Amer. & Eng. R. R. Cases, 159.

291. — Illinois. Where a railway com-

pany has been operating its road for more than six months, and has failed to fence its track, and while passing through the plaintiff's farm with its train kills plaintiff's stock upon the track, the company will be liable to the plaintiff for the value of such stock. *Toledo, Peoria and Warsaw R'y Co. v. Crane*, 68 Ill., 355, 1873; *Peoria, Pekin and Jacksonville R. R. Co. v. Barton*, 80 Ill., 72, 1875.

292. — By a proper construction of the statute requiring railroad companies to fence their tracks within six months after the road is opened for use, the companies are liable, under the statute, if they fail to fence within six months after they begin to run trains on the track for construction purposes. Nor does the fact that the road is still under the control of the contractors change the liability of the company in that regard. *Rockford, Rock Island and St. Louis R. R. Co. v. Heftin*, 65 Ill., 366. 1872.

293. — Where stock was killed by the engine of a railway company on its track, and the road was not open for use six months prior to the killing, it was held that it was incumbent on the owner of the stock to show negligence on the part of the servants of the company before a recovery could be had against the company. *Rockford, Rock Island and St. Louis R. R. Co. v. Connell*, 67 Ill., 216. 1873.

294. — Where stock is damaged by a passing train at a place where the railroad company is not bound to fence its track, the liability is the same as if no statute existed upon the subject, and the company is not liable unless it is shown that the injury resulted from a want of ordinary care on the part of the servants of the company. *Peoria, Decatur and Evansville R. R. Co. v. Dugan*, 10 Bradwell (Ill.), 283, 1881; *Rockford, Rock Island and St. Louis R. R. Co. v. Lynch*, 67 Ill., 149, 1873.

295. — Where a railway company fails to fence its track, as required by the statute, it must see that its servants so conduct its trains that injury shall not result to stock that may get upon its track if it can be avoided by care and caution. In failing to fence it takes the hazard, and when injury results therefrom it must be required to respond in damages. *Toledo, Peoria and War-*

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saw *R'y Co. v. Lavery*, 71 Ill., 522, 1874; *Ewing v. Chicago and Alton R. R. Co.*, 72 ib., 25, 1874; *Toledo, Peoria and Warsaw R'y Co. v. Logan*, 71 ib., 191, 1873.

296. — cattle-guard. The stock got on the track, near where it was injured, by jumping the cattle-guard from the highway; but it appearing that the railroad company had performed its duty in making the cattle-guard at the public highway, as required by law, and that the same was sufficient to turn ordinary cattle, the company is not liable, unless the injury was caused carelessly or wilfully. *Chicago, Burlington and Quincy R. R. Co. v. Farrelly*, 3 Bradwell (Ill.), 60. 1878.

297. — constitutional law. The constitutional provision that the fee to lands taken for right of way shall not pass, but remain in the land owner, has no application to proceedings completed before the adoption of the constitution, and the duty of railway companies to fence their tracks is not affected by the fact, whether they own the fee or have only an easement in their right of way. *Toledo, Peoria and Warsaw R'y Co. v. Pence*, 68 Ill., 524. 1873.

298. — contributory negligence. To charge the owner of stock, killed by a railway company on its unfenced track, with contributory negligence in allowing it to run at large contrary to law, it must appear that he did so under such circumstances that the natural and probable consequence of doing so was that the stock would go upon the railroad and be injured. *Cairo and St. Louis R. R. Co. v. Woosley*, 85 Ill., 370. 1877.

299. — duty of land owner to fence. In a suit against a railway company to recover for the killing of stock, on the ground of a neglect of the company to fence its track, if the owner of the land where the animals got upon the track received compensation for fencing when the right of way was obtained, the burden of proof is upon the company to show that fact. *Toledo, Peoria and Warsaw R'y Co. v. Pence*, 71 Ill., 174. 1873.

300. — evidence. In an action against a railway company for killing stock, where the evidence is that the road was not fenced at the place where the stock was killed, it is but a fair inference that the stock got upon the

road at the place where it was killed. *St. Louis and Southeastern R'y Co. v. Casner*, 72 Ill., 384. 1874.

301. — gate. Where the evidence tended to show that a cow got upon the railway track through the negligence of the company's servants in failing to keep a gate at a farm crossing in repair, it was held that a verdict finding the company liable would not be disturbed. *Toledo, Wabash and Western R'y Co. v. Nelson*, 77 Ill., 160. 1875.

302. — repair. Where a railway is inclosed by a sufficient fence, and a casual breach occurs therein, without the knowledge or fault of the company, and through such breach stock gets upon the track and is injured, the company is not liable unless it has had a reasonable time to discover such breach, or has been notified and fails to repair before the injury occurred. *Indianapolis and St. Louis R. R. Co. v. Hall*, 88 Ill., 368, 1878; 21 Amer. R'y Rep., 311.

303. — A railway company will not be liable for the temporary insufficient condition of its fence, unless it has notice thereof, and neglected thereafter to repair. *Chicago and Alton R. R. Co. v. Umphenour*, 69 Ill., 198, 1873; *Ohio and Mississippi R'y Co. v. Clutter*, 82 ib., 123, 1876.

304. — Where a railroad company is required to keep its track fenced, and a breach is made in the fence by parties not in the employ or under the control of the company, and the company has no knowledge of such breach, and stock gets upon the track and is killed before the company has had a reasonable time to learn about the defect, it will not be liable; and a covenant or condition, in a deed conveying land to the company for its track, to fence the same, will not add to the defendant's liability under the statute. *Chicago and Alton R. R. Co. v. Saunders*, 85 Ill., 288. 1877.

305. — stock running at large. The mere fact that stock is running at large, in violation of statute, does not relieve railroad companies from liability for an injury to them, resulting from a neglect to fence their roads, and no other negligence need be shown. *Cairo and St. Louis R. R. Co. v. Murray*, 82 Ill., 76. 1876.

306. — Where a mule escaped from an inclosure without the fault of the owner, and

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got upon a railroad track at a point not fenced, but where it was the duty of the company to have had a fence, and the mule is injured by a train, the company will be liable. *Toledo, Peoria and Warsaw R'y Co. v. Delehanty*, 71 Ill., 615. 1874.

307. — switches. The grounds around a warehouse in a village adjoining a switch are public grounds where a fence is not required under the statute. *Toledo, Wabash and Western R'y Co. v. Chapin*, 66 Ill., 504. 1873.

308. — Indiana. An animal having entered upon a railway where it was not fenced, but where it was proper to erect a fence, the railway company was held liable for its injury. *Louisville, New Albany and Chicago R'y Co. v. Zink*, 85 Ind., 219. 1882.

309. — There is no question of negligence by either party, nor of motive for not securely fencing, involved in a suit for stock killed, under the statute requiring railways to be fenced, and it is proper to exclude evidence upon these subjects. *Grand Rapids and Indiana R. R. Co. v. Jones*, 81 Ind., 523. 1882.

310. — Where a railway company properly fences its track, and the owner of animals, for his own accommodation, or through his own negligence, makes a change in the fence, whereby his animals reach such track and are killed, the company is not liable therefor. *Koutz v. Toledo, Wabash and Western R'y Co.*, 54 Ind., 515. 1876.

311. — In an action for damages by the owner, against a railway company, for stock killed at a point where the road was not, but should have been, fenced, an answer alleging that, in awarding damages for the taking of plaintiff's land, a sum had been allowed for the fencing of the land, is bad on demurrer. Such an award leaves it to the option of the land owner to fence his land or not. It is still the duty of the company to the public to keep the road fenced. *Baltimore, Pittsburgh and Chicago R'y Co. v. Johnson*, 59 Ind., 188. 1877.

312. — A railway company is not liable under the statute for injuring or killing stock which enters upon its track at a point where it is not required by such statute to fence. *Indianapolis, Peru and Chicago R'y Co. v. Caudle*, 80 Ind., 112. 1877.

313. — burden of proof. The fact that the railway was not fenced must be proved by the plaintiff; if it could not legally be fenced, this fact is to be proved by the company. *Indianapolis, Bloomington and Western R'y Co. v. Penry*, 48 Ind., 128, 1874; *Indianapolis, Peru and Chicago R. R. Co. v. Lindley*, 75 Ind., 426, 1881; 11 Amer. & Eng. R. R. Cases, 495.

314. — cattle-guards. It is as much the duty of a railway company to fence against animals on a highway as against animals in adjoining fields or woods, and proper cattle-guards at highway crossings are necessary, to prevent animals passing from the highway upon the track. *Evansville and Crawfordsville R. R. Co. v. Barber*, 74 Ind., 169. 1881.

315. — To keep its road "securely fenced," according to the requirements of the statute, a railway company must construct and maintain sufficient cattle-guards on each side of highways crossing its track. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Eby*, 55 Ind., 567, 1877; 16 Amer. R'y Rep., 244.

316. — If, by reason of a railway company's neglect to repair a defect in a cattle-guard, of which it has had reasonable notice, stock enter upon its track, over such cattle-guard, from a highway, and are killed, the company is liable therefor. *Ib.*

317. — contributory negligence. Contributory negligence is no defense to an action under the statute against a railway company for killing stock at a point on its road not securely fenced. *Louisville, New Albany and Chicago R'y Co. v. Cahill*, 63 Ind., 340, 1878; *Indianapolis, Peru and Chicago R. R. Co. v. Wolf*, 47 ib., 250, 1874.

318. — repairs. Where a portion of railway fence was burned, and one week thereafter cattle entered upon the track through the opening so caused and were injured by a train, *held*, that the delay in repairing the fence was unreasonably long, and that the company was liable for the injury to the cattle. *Cleveland, etc., R. R. Co. v. Brown*, 45 Ind., 90. 1873.

319. — A small portion of a fence along a railway was burned on Thursday. The next Sunday a horse escaped through the opening to the track, and was killed on that day by a train. The section boss, whose duty it was to

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repair fences, had passed over that part of the line twice a day between the time of the injury to the fence and the killing of the horse. *Held*, that, under the circumstances, the company had had sufficient time to repair the fence and must be held to have had notice of the defect. *Held*, also, that, as the company ran its trains on Sunday, it could not claim exemption from the labor of repairing the fence on that day. *Toledo, Wabash and Western R'y Co. v. Cohen*, 44 Ind., 444. 1873.

320. — where required. A cow got upon a railway and was killed by a passing engine at a point on said line where there was a saw-mill located and in operation fifty feet from the track, the intervening ground between the track and mill being used by the owners of the mill for piling their lumber and for loading lumber upon the cars for transportation, and by the public for passing to and from the mill with logs and lumber, and for piling wood to be sold to the railway company. *Held*, that the company was not bound to fence the track at such point, and, in the absence of negligence, was not liable for the killing of the cow. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Bowyer*, 45 Ind., 496. 1874.

321. — A railway company is not liable for a failure to fence its track where it is only possible to fence one side. *Indiana, Bloomington and Western R'y Co. v. Leak*, 89 Ind., 596. 1883.

322. — A railway company is not required to fence its track at a place where such fence would interfere with the use of a hay press and saw-mill. *Ohio and Mississippi R'y Co. v. Rowland*, 50 Ind., 349, 1875; *Same v. Same*, 51 ib., 285, 1875.

323. — A railway company is not excused from fencing its track merely because it is within the limits of a town, unless it be a place where a fence would be unreasonable or improper. *Wabash R'y Co. v. Forshee*, 77 Ind., 158, 1881; *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Laufman*, 78 ib., 319, 1881.

324. — The plaintiff may show that after the killing the company repaired and built a fence at the point where the injury occurred, for the purpose of showing that the company regarded the place as one that might legally

be fenced. *Toledo, Wabash and Western R'y Co. v. Owen*, 43 Ind., 405. 1873.

325. — Iowa. The statute providing that every corporation operating a railway shall make proper cattle-guards where the same enters and leaves any fenced land is imperative. *Mundhenk v. Central Iowa R'y Co.*, 57 Ia., 718, 1882; 11 Amer. & Eng. R. R. Cases, 463.

326. — A railway company is liable for injuries resulting from a failure to fence its track in the manner required by statute, unless it be inclosed with fence upon both sides; and the fact that it is fenced upon one side is no defense to an action for damages for the killing of stock. *Tredway v. Sioux City and St. Paul R. R. Co.*, 43 Ia., 527. 1876.

327. — bars. A railroad company is required to use reasonable care and diligence in keeping up bars leading through the fence inclosing its right of way; and if, by reason of its failure to use such care, stock passes on to its road and are injured, it is liable in an action therefor. But it would not be liable for such injuries if the bars through which the cattle passed on to the track had been left down by the plaintiff or a third person, unless they had continued for such a length of time or under such circumstances in this condition as to justify the inference of negligence on the part of the company in not seeing and putting them up. *Perry v. Dubuque Southwestern R'y Co.*, 36 Ia., 102. 1872.

328. — cattle-guard; evidence. In an action against a railway company for injuries resulting from a defective cattle-guard, evidence that another cattle-guard, constructed like the one in controversy, had proved sufficient, was properly rejected. *Downing v. Chicago, Rock Island and Pacific R. R. Co.*, 43 Ia., 96, 1876; 14 Amer. R'y Rep., 406.

329. — evidence. In a suit to recover double damages against a railway company for killing cattle, caused by a defective fence, by one of its trains, evidence of the character and kind of fence where it was claimed the cattle escaped from is not admissible, unless it is shown to be at the time of the injury, or a reasonable time before it. *Brentner v. Chicago, Milwaukee and St. Paul*

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R'y Co., 7 Amer. & Eng. R. R. Cases (Ia.), 574. 1882.

330. — gates. The gates which a railway company is required to maintain at private crossings constitute a part of its fence, and the company is liable, under § 1289 of the Code, for injuries to stock by reason of the defective condition of such gates. *Mackie v. Central R. R. of Iowa*, 54 Ia., 540. 1880.

331. — In an action against a railway company for damages for the killing of stock, wherein it was alleged that a gate was not provided with proper fastenings, it was held that the jury should have been allowed to consider whether or not the defendant was guilty of negligence in the construction of the gate. *Hammond v. Chicago and Northwestern R. R. Co.*, 43 Ia., 168, 1876; 14 Amer. R'y Rep., 412.

332. — The railway company's liability, growing out of the defective construction of the gate, would not be discharged or affected by proof that plaintiff's tenant was in the habit of leaving the gate open, nor even that plaintiff himself was in the habit of doing so. *Ib.*

333. — A defect in the original construction of the gate would be presumed to be known to defendant, and plaintiff would not be required to notify defendant of its existence nor to repair it, even though it could be done at small expense. *Ib.*

334. — While the owner of adjacent realty might be held responsible for the closing of a gate constructed for his convenience and at his request, he would nevertheless be charged with such responsibility only when it was so constructed that it would remain closed if so left by him. *Ib.*

335. — Where the plaintiff's horses were injured on the defendant's railroad, having entered on the track in the night through a gateway in defendant's fence, which was closed in the evening, it was held that the fact that the gate was defectively constructed and out of repair would not raise a presumption that the injury occurred by reason of such defects, so as to cast upon the defendant the burden of disproving such fact, to defeat a recovery. *Johnson v. Chicago, Rock Island and Pacific R. R. Co.*, 55 Ia., 707. 1881.

336. — Whether or not a gate provided

by a railway company at a crossing is reasonably sufficient is a question for the jury, and it is error for the court to instruct them that the plaintiff cannot recover in an action for damages growing out of the company's negligence in the construction and maintenance of a gate. *McKenly v. Chicago, Rock Island and Pacific R. R. Co.*, 43 Ia., 641, 1876; 14 Amer. R'y Rep., 495.

337. — natural obstacle used as a fence. A steep bluff, a hedge, a ditch, or the like, which furnishes as effectual security to the inclosure as the fence prescribed by statute, may be regarded as a lawful fence. *Hilliard v. Chicago and Northwestern R'y Co.*, 37 Ia., 412. 1873.

338. — repairs. Before a railway company will be held liable for stock killed on its track by reason of its failure to keep in repair its fence along the right of way, it must be shown that it had knowledge, actual or implied, that the fence was out of repair, and a reasonable time thereafter to put it in repair. *Hilliard v. Chicago and Northwestern R'y Co.*, 37 Ia., 442, 1873; *Davis v. Chicago, Rock Island and Pacific R. R. Co.*, 40 Ia., 292, 1875; 8 Amer. R'y Rep., 407.

339. — It is the duty of the injured party to use all reasonable care to protect his property, but he will not be allowed to go upon the railway to repair the cattle-guards or to fence the road. *Downing v. Chicago, Rock Island and Pacific R. R. Co.*, 43 Ia., 96, 1876; 14 Amer. R'y Rep., 406.

340. — Where the fence inclosing a railway has been destroyed or become impaired the company is held to reasonable diligence and care in rebuilding or repairing it. *McCormick v. Chicago, Rock Island and Pacific R. R. Co.*, 41 Ia., 193. 1875.

341. — Kansas. In an action to recover damages for the killing of two hogs, in a township where hogs are not permitted to run at large, and the findings of fact show that they were kept in an inclosed field, surrounded by a hog-tight fence; that the company constructed its road through the said field; that the hogs were killed within the limits of the field by the engine of the company, and that the road was not inclosed with a fence to prevent the animals in the field from getting on the road, *held*, that the company was not required to maintain a

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hog-proof fence in said township; therefore the mere failure to inclose its track with a good and lawful fence did not make the company liable to the owner of the animals killed. *Atchison, Topeka and Santa Fe R. R. Co. v. Yates*, 21 Kans., 613. 1879.

342. — Where the testimony is not preserved, and the bill of particulars alleges, and the findings show in general terms, that the road was unfenced, and yet could have been fenced at the place where the stock was killed, and nothing appears as to the condition of fencing at any other place, or as to where the stock went upon the track, *held*, sufficient in this respect to sustain the judgment against the corporation. *Kansas Pacific R'y Co. v. Wood*, 24 Kans., 619. 1880.

343. — horse driven into bridge. Plaintiff's mare got on to the defendant's track at a place where it ought to have been, but was not, fenced. Frightened by an approaching train, she fled along the track until she reached a tie bridge. Here she either jumped forward or was thrown forward by the engine on to the bridge, and her legs falling between the ties, she was fatally injured. *Held*, that the company was liable under ch. 94 of the Laws of 1874. *Atchison, Topeka and Santa Fe R. R. Co. v. Jones*, 20 Kans., 527, 1878; 20 Amer. R'y Rep., 308.

344. — **Maine.** A gate in a fence, which the defendant is bound to erect and maintain in good repair, is to be regarded as a part of the fence. *Estes v. Atlantic and St. Lawrence R. R. Co.*, 63 Me., 308. 1873.

345. — After such a gate had fallen, by reason of its defective hanging, the plaintiff had shut up his cattle in his barn-yard, for greater security, from which they escaped upon defendant's track and were killed; whether or not he was guilty of negligence is to be submitted to the jury. *Ib.*

346. — **Michigan.** The Railroad Law (act 198 of 1873, art. 4, § 15), in requiring companies to fence their tracks, only required reasonable partition fences four and a half feet high, and fairly adapted, so far as their strength and mode of construction were concerned, to keep animals from getting on the track. But act 175 of 1881 leaves them to be approved and regulated by the commissioners of railroads. *Davidson v. Michigan Central R. R. Co.*, 49 Mich., 428. 1882.

347. — A railway company in maintaining fences along the track is only bound to reasonable diligence, and is not liable for injuries occurring to cattle which come upon the track through defects in fences not caused or permitted by want of care. *Grand Rapids and Indiana R. R. Co. v. Monroe*, 47 Mich., 152. 1881.

348. — In a suit to recover the value of a cow killed by a train in a small town, it will not be presumed, in the absence of evidence, that any reason of public or private convenience prevented the application of the general statute (Sess. L. 1872, p. 72), requiring every railway company to fence its track and put cattle-guards at highway crossings, and in default thereof making them liable for all damage done to cattle, etc., thereon; any exceptional case must be proved by the party claiming a benefit therefrom. *Flint and Pere Marquette R'y Co. v. Lull*, 28 Mich., 510, 1874; 12 Amer. R'y Rep., 296.

349. — In an action to recover damages for injuries to horses, claimed to have arisen from neglect to keep up proper cattle-guards, there being some testimony admitted without objection and having some tendency to prove the cattle-guard insufficient, the submission of the question to the jury was held proper. *Grand Rapids and Indiana R. R. Co. v. Judson*, 34 Mich., 506. 1876.

350. — **repair.** In a suit against a railway company for want of reasonable diligence in repairing the fence destroyed by fire, it is not error to exclude evidence that the repairs might have been more quickly made of suitable materials which were near at hand, but which it is conceded did not belong to the company, and which were not shown to have been available to it for that purpose. *Stephenson v. Grand Trunk R'y Co.*, 34 Mich., 323. 1876.

351. — A railway fence being discovered on fire about six or seven o'clock in the evening, and the section foreman getting notice thereof at about eight o'clock that evening, having proceeded the next morning before six o'clock to repair the same as soon as practicable from the nearest materials belonging to the company, which were about half a mile distant, it was held the company was not guilty of any unreasonable delay in making the repairs. *Ib.*

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352. — street crossings. The statute does not apply to crossings of streets and alleys of a city or town, or shipping places in front of mills, etc., or depot grounds, etc., for reasons of public convenience. *Flint and Pere Marquette R'y Co. v. Lull*, 28 Mich., 510, 1874; 12 Amer. R'y Rep., 296.

353. — A railway company which has constructed proper fences as required by the statute (Laws of 1873, p. 538, § 15) is not liable for damages for the injury by a passing train, without any neglect or wilfulness of the employes of the company, of horses that escaped from an adjoining lot and got upon the track through a breach in the fence recently caused by a heavy wind in the nighttime, in the absence of any showing that the company had been negligent in regard either to the strength of the fence or to the length of time taken to restore it. *Robinson v. Grand Trunk R'y Co.*, 32 Mich., 322, 1875.

354. — Minnesota. To an action for cattle injured on the track, they having gone upon the track in consequence of the failure to construct fences, it is not a defense that the cattle were trespassers upon the land from which they passed, for want of a fence, to the track. *Gillam v. Sioux City and St. Paul R. R. Co.*, 26 Minn., 268, 1879.

355. — A railroad company which has failed to fence its road, as required to do by statute, must run its trains upon the basis that cattle rightfully upon adjoining lands may stray upon the track on account of the absence of a fence. The adjoining land owner is not to be deprived of the use of his land by the failure of the company to fence, and in using the same he has a right to expect this course of conduct on the part of the company. *Schubert v. Minneapolis and St. Louis R'y Co.*, 27 Minn., 860, 1880.

356. — charter. Regulating the construction and maintenance by railroad companies of fences and cattle-guards at and along their track is the exercise of the police power of the state. If, in any case, the legislature may bind the state not to exercise this power, an intention so to do cannot be implied, but must appear in express and unmistakable terms. A clause in a railroad charter providing what fences and other structures, required for protection of life

and property, the company shall maintain, and when it shall provide them, is not sufficient to conclude the state from a future exercise of the police power. *Gillam v. Sioux City and St. Paul R. R. Co.*, 26 Minn., 268, 1879.

357. — The charter of the St. Paul and Sioux City R. R. Co. provides that the company, "within two years after the completion of its road through any improved land, shall build, keep and maintain a legal fence, on each side of its road, through such improved land." *Held*, 1. That defendant is one of the corporations referred to in Laws 1872, ch. 25, § 4, so that its duty to fence is governed by the charter provision above referred to; and so that Laws 1872, ch. 25, §§ 1, 2, 3, providing that "all railroad companies in this state" shall, within six months after the passage of said chapter, build, or cause to be built, good and substantial fences on each side of their roads, are not applicable to defendant. 2. That the duty of fencing, imposed by the charter provision aforesaid, is a duty imposed only with reference to the owner of the improved land required to be fenced, or to those who rightfully occupy or use the same. *Devine v. St. Paul and Sioux City R. R. Co.*, 22 Minn., 8, 1875; 19 Amer. R'y Rep., 353; *Winger v. St. Paul and Pacific R. R. Co.*, 22 Minn., 11, 1875.

358. — contributory negligence. Under ss. 1 and 2, ch. 25, Laws 1872, the omission to build and maintain a fence is, in itself, negligence on the part of a railway company. But though the failure to build and maintain fences is thus made an act of negligence on the part of the company, this does not exclude the operation of the general rule regarding contributory negligence, and its effect as respects a right of recovery against such company. *Whittier v. Chicago, Milwaukee and St. Paul R'y Co.*, 24 Minn., 394, 1878; 15 Amer. R'y Rep., 450.

359. — Evidence that the plaintiff suffered the animal in question to run at large in his pasture as usual, after previous notice that it had at several times passed through the railroad fence adjoining, which was defective and insufficient, and through which it finally escaped upon the track and was killed, does not alone establish such contrib-

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utory negligence in law. *Johnson v. Chicago, Milwaukee and St. Paul R'y Co.*, 29 Minn., 425. 1882.

360. — evidence. The fact may be inferred that the animals got upon the track through defects in the fences, where by such defects it appears that cattle might pass. *Holtz v. Minneapolis and St. Louis R'y Co.*, 29 Minn., 384. 1882.

361. — repairs. The duty of a railway company to maintain its fences already built is discharged by the exercise of reasonable care and diligence, and they may be temporarily prostrate or broken without a breach of such duty. *Varco v. Chicago, Milwaukee and St. Paul R'y Co.*, 30 Minn., 18, 1882; 11 Amer. & Eng. R. R. Cases, 419.

362. — Where it appeared that plaintiff's horses escaped through a breach in the railroad fence adjoining his pasture, and were killed by defendant's cars, and that such defect was patent and had previously existed for two weeks or more, *held*, presumptive evidence of negligence on defendant's part in failing to repair the same. *Ib.*

363. — Missouri. It is not necessary to a recovery, in an action for the killing of stock founded on the Railroad Law, to show that three months have elapsed since the completion of the road at the place where the killing occurred. *Blewett v. Wyandotte, Kansas City and Northwestern R'y Co.*, 72 Mo., 583. 1880.

364. — Where stock is killed on a railroad track along inclosed or cultivated fields, and the road is not fenced as required by law (Wagn. Stat., 310-11, § 43), the company will be liable, regardless of the question of negligence. *Null v. St. Louis, Kansas City and Northern R'y Co.*, 59 Mo., 112, 1875; 8 Amer. R'y Rep., 447.

365. — The statute does not require railway companies to fence anywhere; but simply dispenses with proof of negligence in the first instance when animals are killed where there are no fences, but where fences might lawfully have been erected. *Edwards v. Hannibal and St. Joseph R. R. Co.*, 66 Mo., 567. 1877.

366. — It appeared that there were defective fences on both sides of the road where plaintiff's hogs were killed, but it did not appear that the hogs got upon the track in

consequence of the failure of the defendant to erect fences where by law it was required to erect them, or that at the place where they were killed the defendant was required to erect fences. *Held*, that the plaintiff was not entitled to recover. *Clardy v. St. Louis, Iron Mountain and Southern R'y Co.*, 73 Mo., 576, 1881; 7 Amer. & Eng. R. R. Cases, 555.

367. — If cattle come upon a railway track at a point where the track is required by law to be fenced, but is not fenced, and in consequence of the want of a fence are killed, the railway company will be liable; and this though the killing occur at a point where the company is not required to fence. *Snider v. St. Louis, Iron Mountain and Southern R'y Co.*, 73 Mo., 465, 1881; 7 Amer. & Eng. R. R. Cases, 558; *Witthouse v. Atlantic and Pacific R. R. Co.*, 64 Mo., 523, 1877.

368. — In an action brought under § 43 of the act in relation to killing of stock (Wagn. Stat., 310-11), wherever it is shown that stock has been killed on the track where it is the duty of the company to fence in the road, and the company has failed to fence in the manner required by law, a *prima facie* case is made for plaintiff. It is not requisite that the plaintiff should show further, by affirmative evidence, that the stock were caused to go upon the road by the failure of the company to fence it. *Walther v. Pacific R. R. Co.*, 55 Mo., 271. 1874.

369. — If stock comes upon a railway where it is unfenced, and where it is the duty of the company to maintain a fence, and wanders to and is killed at a place where it is not the duty to fence, the company is liable. *Wabash R'y Co. v. Forshee*, 77 Ind., 158. 1881.

[See INJURY TO DOMESTIC ANIMALS; PLEADING.]

370. — cities and towns. Where, within the limits of a town or city, lands dedicated to public use, and crossing or abutting upon the right of way of a railroad company, are occupied and used for farming purposes, such occupancy does not make it lawful for the railroad company to fence across them, and its failure to do so will not subject it to liability under § 5 of the Damage Act. *Elhiott v. Hannibal and St. Joseph R. R. Co.*, 66 Mo., 683. 1877.

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371. — contributory negligence. It appeared that plaintiff had a feed lot separated on the one side from his pasture by a sufficient division fence, and on the other from the railroad track by an insufficient fence; that plaintiff turned his mule into the pasture; that during the night the division fence was blown down by a violent wind, and the mule escaped into the feed lot and thence to the railroad track, where he was killed. *Held*, that these facts did not sustain a charge of contributory negligence on plaintiff's part. *Williams v. Missouri Pacific R'y Co.*, 74 Mo., 453. 1891.

372. — cross-fences. Where fences running alongside the track, and cattle-guards in the track, are required to prevent cattle from getting on the road-bed, cross-fences are necessary parts of such cattle-guards in order to make the inclosure effectual. *Edwards v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 74 Mo., 117. 1891.

373. — gate. If the adjoining proprietor is satisfied with a sliding gate at his farm crossing instead of a gate hung and fastened with a latch or hook, as prescribed by § 43, no one else has a right to complain. *Harlington v. Chicago, Rock Island and Pacific R. R. Co.*, 71 Mo., 384. 1890.

374. — A railroad company is not liable for the killing of stock which come upon the track through a gate left open by some one else without the consent of the company. *Ib.*

375. — highway. The spirit of the statute (Wagn. Stat., 310-11, § 43) contemplates that railway companies shall fence the line of their road along an inclosed field, although a public highway abuts upon the road and intervenes between it and the field. *Robinson v. Chicago and Alton R. R. Co.*, 57 Mo., 494. 1874.

376. — The statutory rule that railroad companies are not required to fence their roads at public crossings extends to highways *de facto* as well as highways *de jure*. *Luckie v. Chicago and Alton R. R. Co.*, 76 Mo., 639. 1892.

377. — open wells on right of way. The statute (Wagn. Stat., p. 310, § 43) imposes upon a railroad company no liability to the owner of cattle accidentally drowned in an uninclosed well situated on the company's right of way, notwithstanding the loss is

occasioned by the failure of the company to erect and maintain proper fences. The proprietor of uninclosed land is under no obligation to make it safe for pasturage, and if the cattle of another stray upon it and are killed by drowning in an unguarded well, there is no liability resting upon him for the loss. A railroad company stands upon the same footing as any other proprietor. *Hughes v. Hannibal and St. Joseph R. R. Co.*, 66 Mo., 325. 1877.

378. — pleading. A statement filed with a justice, charging that, where the accident occurred, the defendant's road was "unfenced" merely, states no facts constituting a cause of action under the statute, § 43. This section applies only to those localities where the law requires the railroad to be fenced. *Davis v. Missouri, Kansas and Texas R'y Co.*, 65 Mo., 441. 1877.

379. — A railroad company is not liable in double damages for cattle killed at the crossing of a private road, or at a point where the railroad runs through uninclosed timbered lands or through uninclosed lands from which the timber has been taken, although such lands are but a narrow strip on each side of the road, and the next adjoining lands to them on each side are inclosed fields. *Walton v. St. Louis, Iron Mountain and Southern R'y Co.*, 67 Mo., 66. 1877.

380. — private road. A private road is a public highway, within the meaning of the statute. *Ib.*

381. — repairs. If a railroad company has once erected a good and substantial fence along its road, as required by law, its only remaining duty is to use proper diligence in keeping the fence in suitable repair. If, in spite of such diligence, animals come upon the track through breaks in the fence caused by others, and are injured, the company will not be liable. *Case v. St. Louis and San Francisco R. R. Co.*, 75 Mo., 668. 1892.

382. — uninclosed land. The failure of a railroad to fence its track through uninclosed land will not make it amenable for killing at that point unless the land was shown to be prairie land. *Cary v. St. Louis, Kansas City and Northern R. R. Co.*, 60 Mo., 209, 1875; *Shelton v. Same*, *ib.*, 412,

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1875; *Musick v Atlantic and Pacific R. R. Co.*, 57 ib., 134, 1874.

333. — The obligation to fence is not extended to timber lands, or land from which the timber has been cut, but which is not cultivated. And when stock is killed at such a place the owner is not entitled to double damages. He can only recover single damages by proceeding under § 5 of the Damage Act (Wagn. Stat., 520). *Tiarks v. St. Louis and Iron Mountain R. R. Co.*, 58 Mo., 45, 1874; *Mason v. Same*, ib., 51, 1874; *Shrum v. Same*, ib., 51, 1874; *Switzer v. Same*, ib., 52, 1874; *Dee v. Same*, ib., 52, 1874; *Riffey v. Same*, ib., 53, 1874; *Grounds v. Same*, ib., 53, 1874; *Proffett v. Same*, ib., 54, 1874; *Stephens v. Same*, ib., 54., 1874; *Buxton v. Same*, ib., 55, 1874.

334. — A railroad company is not liable in double damages under § 43, p. 310, Wagn. Stat., for cattle killed upon its track at a place where the adjoining lands are uninclosed lands which have been cleared of timber. Such lands are not prairie lands. *Schable v. Hannibal and St. Joseph R. R. Co.*, 69 Mo., 91, 1878.

335. — Section 43 of the Railroad Law, as it has stood since the amendment of 1875, requires railroad companies to fence the sides of their roads where they run through uninclosed lands, whether prairie or timber, as well as where they pass through, along or adjoining inclosed and cultivated fields. *Snider v. St. Louis, Iron Mountain and Southern R'y Co.*, 73 Mo., 465, 1881; 7 Amer. & Eng. R. R. Cases, 558; *Razor v. St. Louis, Iron Mountain and Southern R'y Co.*, 73 Mo., 471, 1881; *Slattery v. St. Louis, Kansas City and Northern R'y Co.*, 55 ib., 362, 1874; *Saunders v. St. Louis, Kansas City and Northern R. R. Co.*, 57 ib., 117, 1874; *Sparr v. Same*, ib., 152, 1874.

336. — **Nebraska.** It was stipulated that the hogs were killed by a passing train of defendant at a point on its road not within the limits of any town, city or village, and at a point where said road was not fenced on either side; that said hogs had escaped from the inclosure of the plaintiff, and were at large without the actual fault of the plaintiff, in the day-time, at the time they were killed, but that they were killed without any negligence on the part of said defendant and

its agents and employes other than what may be implied from the neglect to fence the line of its road. A finding and judgment for the stipulated value of the hogs for the plaintiff upheld. *Union Pacific R'y Co. v. High*, 14 Neb., 14, 1883.

337. — By the law of Nebraska railway companies are required to fence their tracks against animals running at large, and, failing to do so, are liable to the owner of any that may be killed or injured in consequence of the omission. *Fremont, Elkhorn and Missouri Valley R. R. Co. v. Lamb*, 11 Nebraska, 592, 1881; 5 Amer. & Eng. R. R. Cases, 367.

338. — And when requested by the owner of land crossed by the road, the company is required to make and keep in good repair an adequate means of crossing the track. *Ib.*

339. — **New Hampshire.** A railway company is not liable for damages done to cattle unlawfully in a pasture adjoining, and escaping thence upon its roads through defective fences which the railroad is bound to keep in repair. *Giles v. Boston and Maine R. R. Co.*, 55 N. H., 552, 1875; 11 Amer. R'y Rep., 203.

390. — **gates left open.** The proprietors of a railroad having complied with the requirements of Gen. St., c. 147, s. 1, are not liable for damages happening to animals coming upon their road through gates or bars left open by an adjoining land owner or his servants, unless such damages might have been avoided by a proper management of their train at the time of the injury. *Hook v. Worcester and Nashua R. R. Co.*, 58 N. H., 251, 1878.

391. — **New York.** The general railroad act of 1850 requires the companies to erect fences of sufficient height and strength to prevent cattle and other animals from getting upon the railroad. *Tallman v. Syracuse, etc., R. R. Co.*, 4 Abbott's Court of Appeals Decisions (N. Y.), 351, 1868.

392. — A railway company is liable for injury to cattle caused by a failure to fence its track. *Lackin v. Delaware and Hudson Canal Co.*, 22 Hun (N. Y.), 309, 1880.

393. — **contributory negligence.** Plaintiff allowed his cow to go in charge of a boy into an open lot in the outskirts of the city of Albany, adjoining a railroad track and

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near a highway crossing. At the time the railroad fences were temporarily down, for the purpose of enabling the company to make improvements. The boy, without the permission or knowledge of plaintiff, left the cow for a short time, and while he was absent she strayed upon the railroad track and was killed by a passing train. *Held*, that the railroad fences and cattle-guards being out of repair, the company was liable for the loss of the cow, and the negligence of plaintiff would be no defense. *Brady v. Rensselaer and Saratoga R. R. Co.*, 3 Thompson & Cook (N. Y. Supreme Ct.), 537, 1874; *Brady v. Rensselaer and Saratoga R. R. Co.*, 1 Hun (N. Y.), 378, 1874.

394. — Where a railway company neglects to maintain fences and cattle-guards along its line, as required by statute, and cattle get upon the track and are injured, the corporation is liable, although the owner is not an adjoining proprietor, and it does not appear how or when the cattle came upon the track. The mere negligence of the owner in permitting his cattle to run at large in the highway which crosses the track is not a defense. *Rhodes v. Utica, Ithaca and Elmira R. R. Co.*, 5 Hun (N. Y.), 344, 1875.

395. — *gates.* Where a gate is put in a fence, erected by a railway company in pursuance of the provisions of the general railroad act, for the convenience of the owners of the adjoining land, and such gate is continually left open by the agents or servants of the company, or by those doing business with it, the fence is not maintained within the true intent and meaning of the statute, and the company is liable for any injury occasioned thereby. *Spinner v. New York Central and Hudson River R. R. Co.*, 6 Hun (N. Y.), 600, 1876; *Spinner v. New York Central and Hudson River R. R. Co.*, 67 N. Y., 158, 1876.

396. — Plaintiff's cattle strayed from the highway through a farm gate in a fence built by a railroad company alongside its roadway upon the track, and were killed by a passing train. It appeared that one of the hinges of the gate was loose, so that it was somewhat difficult, but not impossible, to close it, and it was claimed that the railroad company was accustomed to use this gate

for its own purposes. *Held*, that there was a substantial compliance with the statutes relating to railroad fences; and that if it was the fact that the company was accustomed to use the gate, and the gate was left open through the negligence of any of the servants of the company, it would be responsible. *Spinner v. New York Central and Hudson River R. R. Co.*, 4 Thompson & Cook (N. Y. Supreme Ct.), 595, 1874.

397. — Evidence was introduced to show that a certain gate was used by persons in passing to and from the freight depot of defendant. *Held*, that if the defendant was accustomed to use the gate for its accommodation, or for the accommodation of persons doing business at its depot, and it was left unclosed through the carelessness of any of its agents, such negligence would be the negligence of the defendant, for which it would be responsible. *Spinner v. New York Central and Hudson River R. R. Co.*, 2 Hun (N. Y.), 421, 1874. See, also, *Same v. Same*, 6 ib., 600, 1876.

398. — *cattle-guards.* The question whether a cattle-guard is properly constructed is not a question calling for the testimony of an expert; but when the manner of its construction is shown, the jury is competent to speak of its fitness for use. *Swartout v. New York Central and Hudson River R. R. Co.*, 7 Hun (N. Y.), 571, 1876.

399. — *cities and towns.* Section 44 of the general railroad law, requiring companies to erect and maintain fences along the line of their roads, is applicable to cases in which their tracks are laid in the streets of cities and villages, and they are liable to the owner of cattle injured by their neglect to fence the vacant lots fronting thereon. *Crawford v. New York Central and Hudson River R. R. Co.*, 18 Hun (N. Y.), 108, 1879.

400. — *Ohio.* The provisions of the act of April 18, 1874 (71 Ohio L., 85), relating to the inclosing of railroads by fences and cattle-guards, apply to all railroads then in operation and unfenced, and extending the time within which such railroads were required to be fenced for the period of six months after the date of the passage of the act; and until the time thus extended had elapsed, no liability for an injury to trespassing animals arose from the failure to con-

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struct such fence. *Baltimore and Ohio R. R. Co. v. McElroy*, 35 Ohio St., 147. 1878.

401. — Under the act of March 25, 1859, it is the duty of a railroad company to keep its road properly fenced, and it does not discharge that duty by contracting with another party to perform it, when the performance itself is insufficient. *Gill v. Atlantic and Great Western R'y Co.*, 27 Ohio St., 240, 1875; 11 Amer. R'y Rep., 51.

402. — Under § 2 of the act of 1859 (56 Ohio L., 62), where the owner of lands adjacent to a railway erects and maintains a sufficient fence inclosing his own lands, in such manner that it may be made to answer the purpose of inclosing the railroad also, the fact that compensation was not paid for the right of way through such lands will not prevent the company from joining its fences to the fence constructed by such land owner so as to inclose its road; and where the railroad is rightly inclosed by such joining of fences, no additional fence need be constructed between the railroad and such inclosed lands. *Haxton v. Pittsburgh, Cincinnati and St. Louis R'y Co.*, 26 Ohio St., 214, 1875; 11 Amer. R'y Rep., 257.

403. — If the road is properly fenced, the company is held to the exercise of ordinary care only, in the running of trains, to prevent the killing of animals. Where the road is not properly fenced a higher degree of care is required. *Gill v. Atlantic and Great Western R'y Co.*, 27 Ohio St., 240, 1875; 11 Amer. R'y Rep., 51.

404. — **cattle-guards.** In case of conflict as to the erection of sufficient cattle-guards, the question is for the jury. *Cleveland, etc., R. R. Co. v. Newbrander*, 11 Amer. & Eng. R. R. Cases (Ohio), 480. 1883.

405. — **cities and towns.** The duty imposed upon railroad companies to fence their roads, by the act of March 25, 1859 (S. & C., 331), and the amendments thereto, requires the construction and maintenance of such fences within the limits of cities and villages where they do not obstruct streets, highways or other public grounds. *Cleveland and Pittsburgh R. R. Co. v. McConnell*, 26 Ohio St., 57, 1875; 11 Amer. R'y Rep., 266.

406. — **contributory negligence.** If a land owner, knowing the partition fence to be defective, turns his animals into a field

inclosed by such fence, and, by reason of its insufficiency, his stock goes upon the railroad and is killed by a passing train run without negligence, such land owner is charged with contributory negligence and cannot recover for the loss. *Railroad Co. v. Miami County Infirmary*, 32 Ohio St., 566. 1877.

407. — Under the act of March 25, 1859 (1 S. & C., 331), where a railway fence forms the boundary of an inclosed field, it is the duty of the land owner, as well as the railroad company, to keep the fence in repair. If the land owner knows that such fence is insufficient, and, omitting to repair it, turns his stock into a field which it incloses, and by reason of such insufficiency the stock is killed upon the track without fault of the company in running its trains, the land owner is guilty of such contributory negligence as will prevent a recovery by him. *Sandusky and Cleveland R. R. Co. v. Sloan*, 27 Ohio St., 341, 1875; 11 Amer. R'y Rep., 264.

408. — **Tennessee.** Where a fence along the line of railway has been removed, so that live stock stray upon the road, and are killed by passing trains, such killing is not the direct consequence of the removal of the fence. *Louisville and Nashville R. R. Co. v. Guthrie*, 10 Lea (Tenn.), 432, 1882; 11 Amer. & Eng. R. R. Cases, 478.

409. — **Vermont.** In case for the killing of cows by a train on defendant's railroad, it appeared that the cows, when killed, were lying on the track in plaintiff's meadow, through which the road ran, and into which plaintiff had turned them to graze, and that the road, although it had then been in partial operation about a month, was there still unfenced. *Held*, that under s. 47, c. 28, Gen. Sts., the duty of defendant was absolutely to erect and maintain fences along its road; and that, therefore, the question as to contributory negligence on the part of the plaintiff in turning his cows into the meadow did not arise. *Mead v. Burlington and Lamoille R. R. Co.*, 52 Vt., 278, 1880; 7 Amer. & Eng. R. R. Cases, 550.

410. — **Wisconsin.** Sec. 1, ch. 268 of 1860, and § 30, ch. 119 of 1872, make railway companies responsible for damages occasioned by failure to fence their tracks; and, in an action under those statutes, the injury

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complained of must be affirmatively shown to have been caused by the want of a proper fence; the evidence must connect the injury with the want of a fence at some point on the road, and show that the one was the consequence of the other. *Lawrence v. Milwaukee, Lake Shore and Western R'y Co.*, 42 Wis., 322, 1877; 15 Amer. R'y Rep., 322.

411. — Railway companies are at least liable to occupants as well as to owners of adjoining lands, whose cattle are injured upon railway tracks in consequence of the neglect of the companies to fence (§ 1810, R. S.). *Veerhusen v. Chicago and Northwestern R'y Co.*, 53 Wis., 639, 1882; 6 Amer. & Eng. R. R. Cases, 533.

412. — cattle-guards. The extent of the public duty of railway companies in respect to cattle-guards on their lines is determined by the statute (Laws of 1872, ch. 119, § 30; Tay. Stats., 1044, § 34), which does not require them to construct such guards at farm crossings, but only at highway crossings. *Cook v. Milwaukee and St. Paul R'y Co.*, 36 Wis., 45. 1874.

413. — contributory negligence. In an action for injury occasioned by failure either to erect or to maintain fences on the line of a railway as in other actions for negligence, contributory negligence of the plaintiff is a defense. *Curry v. Chicago and Northwestern R'y Co.*, 43 Wis., 665, 1878; 16 Amer. R'y Rep., 219; *Jones v. Sheboygan and Fond du Lac R. R. Co.*, 42 Wis., 306, 1877; 15 Amer. R'y Rep., 229; *Lawrence v. Milwaukee, Lake Shore and Western R'y Co.*, 42 Wis., 322, 1877; 15 Amer. R'y Rep., 322.

414. — The defendant negligently permitted a gate in its fence to become defective, and the plaintiff's stock escaped through it from his pasture. Thereupon plaintiff fastened the gate with a chain so that his stock could not open it. Four or five weeks later the plaintiff's minor sons, who lived with and worked for him, after driving the stock into the pasture, neglected to secure the gate with the chain, and the stock again escaped through the gate upon the defendant's track and were injured. Held, that the plaintiff was guilty of contributory negligence and could not recover for such injury. *Richardson v. Chicago and Northwestern R'y Co.*, 56 Wis., 347. 1882.

415. — repairs. If defendant left its fence open for a long time, its agents knowing the fact and having time and opportunity to make the repairs, and plaintiff's colts got upon the track through such opening (without contributory negligence on plaintiff's part), defendant was liable for all damages done to the colts. *Laude v. Chicago and Northwestern R'y Co.*, 33 Wis., 640. 1878.

416. — In an action for injuries alleged to have resulted from the defective condition of the defendant's fence, where actual notice to defendant is not shown, plaintiff should be permitted to prove the existence of the defect for some time previous to the accident, in order to charge defendant with notice. *Jones v. Chicago and Northwestern R'y Co.*, 49 Wis., 352, 1880; 1 Amer. & Eng. R. R. Cases, 61.

417. — repairs; floods. Defendant's fence between its track and plaintiff's pasture was swept away by a flood, which was at its height about eight days before plaintiff's horses were injured on said track. During the three days immediately before the injury, the water along the line of the fence had fallen at the rate of nearly eight inches each day; and at the time of the injury it had not subsided so as to leave the entire line of the fence at the place in question uncovered. The jury found that a new fence might have been properly and reasonably constructed two days before the injury. Held, that the court erred in submitting to them the question whether the defendant was negligent in neglecting to rebuild the fence. *Goddard v. Chicago and Northwestern R'y Co.*, 54 Wis., 548. 1882.

2. Contract.

418. Contract with land owner. An agreement with the land owner to release the company from its statutory obligation to erect a fence is no defense to an action for injury to cattle brought by the occupier of the land. *Corry v. Great Western R'y Co.*, Law Reports, 7 Queen's Bench Division, 322, 1881; 2 Amer. & Eng. R. R. Cases, 612; *Same v. Same*, Law Reports, 6 Queen's Bench Division, 237, 1880; 29 Eng. (Moak), 595.

419. — A railway company which, under an agreement with the owner of an inclosed

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and cultivated field, omits to maintain a lawful fence along its road, where it passes through such field, as required by the statute (Wagn. Stat., § 43), is liable for the killing of a stranger's cattle getting into such field and thence upon the road, unless the field is itself inclosed by a lawful fence. *Berry v. St. Louis, Salem and Little Rock R. R. Co.*, 65 Mo., 172, 1877; *Harrington v. Chicago, Rock Island and Pacific R. R. Co.*, 71 ib., 384, 1880.

420. — Where a land owner, in violation of an agreement, neglects to keep a railway fence in repair, he cannot recover damages for an injury to his animals which have passed upon the track through a defect in such fence. *Railway Co. v. Heiskell*, 38 Ohio St., 663, 1883; *Whittier v. Chicago, Milwaukee and St. Paul R'y Co.*, 24 Minn., 394, 1878; 15 Amer. R'y Rep., 450.

421. — The owner of land adjacent to a railway, who has agreed to erect and keep in repair fences between his property and the road, cannot recover for injuries to stock occasioned by want of fence or defects therein. *Seemle*, that his tenants would likewise be estopped to claim indemnity for losses thus resulting. *Warren v. Keokuk and Des Moines R. R. Co.*, 41 Ia., 484. 1875.

422. — W. pastured his horses in the field of B., adjacent to a railway, between which and his land B. had undertaken to maintain a fence. The field was in the possession of S. as tenant of B. The horses having escaped from the field upon the track in consequence of the defective fence, and been killed, it was held that W. could maintain an action for damages against the company. *Ib.*

423. — A tenant of a land owner, while in the occupancy of lands with full knowledge of the undertaking of his landlord requiring him to keep the fences along the railway in repair, and with knowledge of the condition of the fence, placed his live stock in an inclosure which was separated from the right of way by this fence. The stock in some manner got upon the railway track through the fence, and were killed by a passing train. In an action by the tenant against the company to recover for the stock killed, it was held that he could not allege any want of sufficiency in the fence as a ground of re-

covery. *St. Louis, Vandalia and Terre Haute R. R. Co. v. Washburn*, 97 Ill., 253. 1881.

424. — The evidence established that the animals were killed on the defendant's railway, at a point where it was not, but ought by law to have been, fenced, and on the land of one whose grantor thereof had formerly, by a proper instrument and for a valuable consideration, granted to the defendant's predecessor the right of way, and had therein covenanted to build a good fence along said road, and that he and his heirs and assigns would forever maintain the same in good repair. *Held*, that, even if such covenant was binding upon such covenantor's assigns, the defendant was not thereby relieved from liability for the value of the animals so killed. *Cincinnati, Hamilton and Indianapolis R. R. Co. v. Ridge*, 54 Ind., 39. 1876.

425. — An obligation in aid of the building of a railway, to grant the right of way through the owner's land, "the company putting in six cattle-guards as its only obligation," does not bind him to fence the road, and is not a release of damages for stock killed on the land. The company cannot avail itself of such a contract as an exemption from the statutory liability. *Cincinnati, Hamilton and Indianapolis R. R. Co. v. Hildreth*, 77 Ind., 504. 1881.

426. — Where the owner of land through which a railroad runs agrees with the company, for a valuable consideration, to build and repair fences on both sides of the road through his lands, and fails to do so, and on account of the insufficiency of such fences his animals stray upon the track and are injured, he is not entitled to recover for such injury, although the insufficiency of the fences was caused by casualty and without negligence on his part, unless such injury is shown to have been intentional, or the result of gross carelessness on the part of the agents and servants of the company. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Smith*, 26 Ohio St., 124, 1875; 11 Amer. R'y Rep., 48.

427. — If the land owner has received a specific sum for fencing along the line, or had agreed to build and maintain a lawful fence, or had received compensation for so

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doing by way of damages in the condemnation of the land, the burden rests upon the company to show such fact in defense, and not upon the plaintiff to negative it. *Toledo, Peoria and Warsaw R'y Co. v. Pence*, 68 Ill., 524. 1873.

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428. Affidavit. A paper shown to be similar to an affidavit of the killing of stock, served on a railroad company, but not a copy, is not admissible to prove the contents of the affidavit. *Kyser v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 56 Ia., 207, 1881; *Keyser v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 56 Ia., 440, 1881.

429. Agreement to arbitrate. Evidence that defendant's roadmaster agreed upon an arbitration is not competent to show the liability of the company. An offer to arbitrate is not an admission of liability, nor would any admission by the roadmaster, at another time and place, be deemed the admission of the company. *Mundhenk v. Central Iowa R'y Co.*, 57 Ia., 718, 1882; 11 Amer. & Eng. R. R. Cases, 463.

430. Burden of proof. The killing of stock held to raise a presumption of negligence and to shift the burden of proof. So held under various statutes. *Little Rock and Ft. Smith R'y Co. v. Henson*, 39 Ark., 413, 1882; *Little Rock and Ft. Smith R'y Co. v. Finley*, 37 Ark., 562, 1881; 11 Amer. & Eng. R. R. Cases, 469; *Memphis and Little Rock R. R. Co. v. Jones*, 36 Ark., 87, 1880; *St. Louis, Iron Mountain and Southern R'y Co. v. Vincent*, 36 Ark., 451, 1880; *Western and Atlantic R. R. Co. v. Steadly*, 65 Ga., 263, 1879; *Ga. R. R. Co. v. Fisk*, ib., 714, 1880; *Atlantic and Gulf R. R. Co. v. Griffin*, 61 Ga., 11, 1878; *Louisville and Nashville R. R. Co. v. Brown*, 13 Bush (Ky.), 475, 1877; *South and North Alabama R. R. Co. v. Williams*, 65 Ala., 74, 1880; *Roof v. Railroad Co.*, 4 So. Car., 61, 1872; *Western Md. R. R. Co. v. Carter*, 59 Md., 306, 1882; 11 Amer. & Eng. R. R. Cases, 482; *Union Pacific R'y Co. v. Dyche*, 28 Kans., 200, 1882; 11 Amer. & Eng. R. R. Cases, 427.

431. — The killing or damaging stock by railroad cars is *prima facie* evidence of

negligence of the company. (§ 5, ch. 57, Gen. Stat.) *Kentucky Central R. R. Co. v. Lebus*, 14 Bush (Ky.), 518. 1879.

432. — The burden of proof in an action against a railroad company for damages for killing plaintiff's stock is upon the plaintiff as to the killing, and upon the defendant as to carelessness and negligence of the company in the killing. *Ib.*

433. — Evidence that a cow was found killed within a mile and a quarter of the plaintiff's house is sufficient proof that she was killed within five miles of a settlement; and evidence that a colt which was killed was kept up and only ran out to water is sufficient from which a jury might infer that it was killed within five miles of a settlement. *St. Louis and Southeastern R'y Co. v. Casner*, 72 Ill., 384. 1874.

434. — In an action against a railroad company to recover for injury to stock the burden of proof is upon the plaintiff to show that the injury occurred by reason of a want of ordinary care upon the part of defendant or its employees. Proof of the injury alone will not entitle him to recover. *Schneir v. Chicago, Rock Island and Pacific R. R. Co.*, 40 Ia., 337. 1875.

435. — In an action against a railway company alleging the negligent killing or injuring of animals, before a presumption of negligence on the part of the company can arise, proof that the company or its agents caused the injury must be clear and unmistakable. *Kentucky Central R. R. Co. v. Talbot*, 78 Ky., 621, 1880; 7 Amer. & Eng. R. R. Cases, 585.

436. — The act of 1857 (Bat. Rev., ch. 16, § 11), which makes the act of killing stock by the engines or cars of a railway company *prima facie* evidence of negligence, applies only when the facts attending the killing are unknown and uncertain; but when those facts are fully disclosed in evidence, and it is shown that the defendant company adopted every precaution in its power to avert the injury, the court should instruct the jury that the defendant is not chargeable with negligence. *Durham v. Wilmington and Weldon R. R. Co.*, 82 N. C., 352. 1880.

437. — In an action to recover damages for the killing of stock upon a railway, the mere fact of killing was properly held to be no evidence of negligence on the part of

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those in charge of the train. *Burlington and Missouri River R. R. Co. v. Wendt*, 12 Neb., 76. 1881.

438. — If stock intrude upon a railroad track, the company has no claim for damages against the owner; and for the damages done by railroad trains to stock the liability of the company depends upon whether the injury was caused by negligence or mismanagement. The party claiming damages must prove that due precaution to prevent the injury was not used by the company or its employees. Injury to animals is not of itself evidence of negligence. It must be established by positive proof. *Mobile and Ohio R. R. Co. v. Hudson*, 50 Miss., 572. 1874.

439. — Where the testimony fails to explain the circumstances of the injury or killing, but the plaintiff trusts to the simple fact of the injury or killing from which to deduce the inference of negligence or misconduct of the company or its servants, he comes short of proving his case. *Ib.*

440. Circumstantial evidence. In an action brought by the owner of a colt to recover the value of such animal, alleged to have been killed on a railway, the testimony showed that the colt was seen alive on the morning of October 8, 1877, at a place where it usually ran, two or three hundred feet from the track, which was unfenced; that at 11 A. M. of said day a train passed east over the road; that on October 9, 1877, the colt was found dead and buried fifteen or twenty feet from the track; that at this time hair could be seen on the ends of the ties for about two rods, which corresponded with the color of the hair on the colt; and that from the marks along the ends of the ties and between the iron rails, it looked as if an animal had been dragged along the road in an easterly direction. No evidence was introduced to contradict this testimony or explain these circumstances. *Held*, that after a verdict of a jury has been rendered in favor of the plaintiff and the district court has approved the verdict, the supreme court will not reverse the judgment. *Central Branch Union Pacific R. R. Co. v. Pate*, 21 Kans., 539. 1879.

441. — In an action against a railway company to recover damages for domestic

animals killed by its trains, although there is no direct evidence of the killing, the jury must pass on the sufficiency of the circumstantial evidence adduced, and a general charge on the evidence, against the plaintiff's right to recover, is properly refused. *South and North Alabama R. R. Co. v. Small*, 70 Ala., 499. 1881.

442. — It is not necessary that it should be shown by direct evidence that the animals were killed by the company's cars. It is sufficient if there are circumstances shown from which that fact may be fairly and justly inferred. *Indianapolis, Peru and Chicago R'y Co. v. Thomas*, 84 Ind., 194, 1882; 11 Amer. & Eng. R. R. Cases, 491.

443. — Where an animal is seen alive during an afternoon in the vicinity of a railroad, and the next morning the tracks of the animal are traced on an open bridge, and along that bridge, for the space of twenty feet, appear blood and bunches of hair of color corresponding with that of the animal, and the animal, showing marks of violence, is found dead some time thereafter in the water below the bridge, and a witness testifies that, during the night after the animal was last seen alive, he heard a train whistle as it approached the bridge, and then heard something fall into the water and swimming therein, *held*, that a verdict that the animal was killed by the train will not be set aside as against the evidence. *Union Pacific R'y Co. v. Harris*, 28 Kans., 206, 1882; 11 Amer. & Eng. R. R. Cases, 431.

444. — Proof that the plaintiff's cow was seen near the defendant's track, with one of its legs broken, about the time that two trains had passed over the road, is *some* evidence in support of the plaintiff's claim for damages. *Boing v. Raleigh and Gaston R. R. Co.*, 87 N. C., 360. 1882.

445. — Where the question is one purely of fact, yet if there is a total failure of proof to sustain the verdict of the jury, this court will set aside the judgment and remand the cause for a new trial. So held where a cow was injured, and which *might* have been done by a train, but there was no evidence of the fact. *Atchison, Topeka and Santa Fe R. R. Co. v. Seeley*, 24 Kans., 265. 1880.

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446. Cities and towns. Where the evidence showed that the stock was not killed within a corporation nor near a crossing, the jury might infer that it was not killed within the limits of a town, city or village. *St. Louis and Southeastern R'y Co. v. Casner*, 72 Ill., 384. 1874.

447. Common law liability. In a suit against a railway company to recover damages for killing live stock, the plaintiff must prove affirmatively that want of ordinary care on the part of the company or its employees caused the injury. *Cleland v. Minneapolis and St. Louis R. R. Co.*, 7 Amer. & Eng. R. R. Cases (Minn.), 589. 1882.

448. Contributory negligence. In a suit against a railway company for the negligent killing of plaintiff's cow, testimony that the cow was turned out into the street to graze on the commons near the railroad, that she was found lying in the ditch near the track with two legs broken, and that the land on both sides of the track at that point belonged to the defendant, is sufficient evidence to entitle the plaintiff to have his case submitted to the jury, and does not show contributory negligence on the part of plaintiff. *Rowe v. Railroad Co.*, 7 So. Car., 167. 1875.

449. Damages. Where the evidence varies as to the value of the animal, a judgment for a sum between the highest and lowest estimates is proper, although no witness has testified stating the value at the amount of the judgment. *Western and Atlantic R. R. Co. v. Brown*, 58 Ga., 534. 1877.

450. Declarations. Where the evidence tended to show that the colt got upon the railway through a fence, and that a cherry tree had been cut by defendant's employees at that place, and evidence was introduced of declarations of an agent of the company in relation to cutting the tree, *held*, that this evidence of declarations was incompetent. *Coyle v. Baltimore and Ohio R. R. Co.* 11 W. Va., 94, 1877; 18 Amer. R'y Rep., 487.

451. — What was said by the engineer to the conductor of the train immediately after the accident and after the train had stopped, and while they were examining to ascertain what mischief had been done, indicating when he first saw the horses on the track, there not appearing anything but the occur-

rence to cause or produce the statement, may be proved by the plaintiff as part of the *res gestæ*. *O'Connor v. Chicago, Milwaukee and St. Paul R'y Co.*, 27 Minn., 166. 1880.

452. — The statement of the engine-driver in charge of the engine which killed the cattle, made an hour after the accident and several hundred yards from where it occurred, though made while he was on the engine, which was off the track, having been thrown from the track as one of the results of the accident, are not competent evidence for the plaintiff in a suit against the company to prove negligence in the company, as they are no part of the *res gestæ*. *Hawker v. Baltimore and Ohio R. R. Co.*, 15 West Va., 628. 1879.

453. Demurrer to evidence. On a demurrer to evidence, its fair weight, and all reasonable inferences deducible therefrom, are against the party demurring. *Indianapolis, Peru and Chicago R'y Co. v. Goar*, 62 Ind., 411. 1878.

454. — An error committed in the denial of a motion to dismiss an action on the ground of insufficiency of testimony is cured by the after introduction of competent evidence sufficient to supply the deficiency. *Deakin v. Chicago, Milwaukee and St. Paul R'y Co.*, 27 Minn., 303. 1880.

455. Description of locality. In an action against a railway company to recover double damages for stock killed where it had the right to fence but failed to do so, the testimony of a witness who stated what he had seen and knew in relation to the locality, and the condition of the fence where the stock went upon the track, was not hearsay or based upon the opinion of the witness. *Dunn v. Chicago and Northwestern R'y Co.*, 58 Ia., 674, 1882; 7 Amer. & Eng. R. R. Cases, 573.

456. Examination of engine-driver. In an action against a railroad company for killing live stock, at a locality at or near any depot, road-crossing, town, or other place where the statute requires the whistle to be blown, speed reduced, etc., the inquiry whether or not the engineer, after having run one or more trips, afterwards, could remember at what points, including depots, road-crossings and towns through which he passed, he blew the whistle, rang the bell,

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etc., is irrelevant. *Memphis and Charleston R. R. Co. v. Lyon*, 62 Ala., 71. 1878.

457. Fence. It is proper for the plaintiff to inquire of competent witnesses whether the fence was such as good husbandmen usually kept. *Louisville, New Albany and Chicago R'y Co. v. Spain*, 61 Ind., 460. 1878.

458. — The allegation that the track was not fenced must be proved on the trial. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Hackney*, 53 Ind., 488. 1876.

459. — Where the evidence shows that the stock killed had entered upon the track over a line of fence that was generally insecure, it is not necessary that it also show that the particular part thereof over which the stock passed was insecure. *Louisville, New Albany and Chicago R'y Co. v. Spain*, 61 Ind., 460. 1878.

460. — The mere opinion of a witness upon the question whether a certain bank between defendant's track and land occupied by the plaintiff was "as good a protection against cattle as a fence four and a half feet high," is not admissible. *Veerhusen v. Chicago and Northwestern R'y Co.*, 53 Wis., 689, 1882; 6 Amer. & Eng. R. R. Cases, 583.

461. — Where the fences have been accidentally destroyed by fire after the track inspector has made his daily inspection, and the fact is not known until after the injury has been done, the company is not guilty of negligence. Act 198 of 1873. *Toledo, Canada Southern and Detroit R'y Co. v. Eder*, 45 Mich., 329. 1881.

462. Marks on track. A witness was permitted to testify that he "looked about and saw hair on the ties; the first tie had a lot of hair on it, and the second one not so much, and so on," as indicating that the injured cow had been pushed along the railroad track by the company's engine. *Held*, competent. *Central Branch Union Pacific R. R. Co. v. Butman*, 22 Kans., 639. 1879.

463. — In an action to recover for injury to stock alleged to have been caused by its being struck by a railway train, where there is no direct evidence of a collision nor of traces of one along the track, evidence to show that such traces are always found when stock is struck by a passing train is not admissible. *Clark v. Kansas City, St. Louis, etc., R'y Co.*, 55 Ia., 455. 1881.

464. — If the plaintiff, without introducing an eye-witness of the killing, proves marks along the track where the horse was dragged by the engine, the jury may disbelieve the engineer and firemen, who testify that its leg was broken in a water-gap. *New Orleans, Mobile and Texas R. R. Co. v. Toulme*, 59 Miss., 284. 1881.

465. — In an action against a railway company for killing a cow, there was evidence to show that the cow was found beside the defendant's track, torn and mutilated, and that there was blood and cow's hair on the track near by. *Held*, sufficient to warrant the court in submitting to the jury the question how the animal came to her death. *Blewett v. Wyandotte, Kansas City and Northwestern R'y Co.*, 72 Mo., 583. 1880.

466. Ownership. A judgment for plaintiff in an action for damage to cattle cannot stand without proof that plaintiff was the owner of the cattle. *Turner v. St. Louis and San Francisco R'y Co.*, 76 Mo., 261, 1882; *Welsh v. Chicago, Burlington and Quincy R. R. Co.*, 53 Ia., 632, 1880; 21 Amer. R'y Rep., 181.

467. — Proof of possession of the stock killed is *prima facie* evidence of ownership. *Toledo, Wabash and Western R'y Co. v. Stevens*, 63 Ind., 337. 1878.

468. Ownership of train and road. Where there is evidence that, at the time of the killing, the defendant owned and operated the railway upon which the stock was killed, the court trying the cause might properly infer therefrom, in the absence of evidence to the contrary, that the train which struck and killed the stock was the property of the defendant. *Evansville and Crawfordsville R. R. Co. v. Smith*, 65 Ind., 92. 1878.

469. — Courts will judicially know that, as a general rule, trains running upon a railroad are run, directed and controlled by the owners of the road. In an action to recover damages for injuries to live stock, inflicted by a train run on defendant's road, the plaintiff is not required to prove affirmatively that the train was controlled by defendant; in the absence of any evidence to the contrary, the jury is authorized to find the train was so run. *South and North Ala. R. R. Co. v. Pilgreen*, 62 Ala., 305, 1878; *Evansville and Crawfordsville R. R. Co. v.*

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Snapp, 61 Ind., 303, 1878; *Same v. Haddon*, 62 Ind., 209, 1878; *Same v. Beard*, 62 Ind., 210, 1878.

470. Pleading. On trial of an action for killing plaintiff's animal on its road, with its engine, a failure to prove that the defendant was operating the road, and that it ran one of its engines thereon against the animal and killed it, as alleged, was a failure to prove two of the material allegations of the complaint. *Wabash R'y Co. v. Forshee*, 77 Ind., 158, 1881.

471. — Under a general averment that the injury complained of was the result of negligence or want of skill of defendant's employes in the management or running of the train, etc., evidence is admissible that defendant did not have on the train a sufficient number of brakemen and servants to control it. *South and North Ala. R. R. Co. v. Thompson*, 62 Ala., 494, 1878.

472. Proceedings on the trial. After the plaintiff had established his *prima facie* case, and the railway company had closed its exculpatory evidence, it was not error to permit the plaintiff to introduce witnesses again, to show the nature of the accident, and that the necessary precautions had not been observed. *Louisville and Nashville R. R. Co. v. Parker*, 12 Heiskell (Tenn.), 49, 1878.

473. Signals. Where the only proof in a suit for killing stock at a public crossing is the death of the animal, and the failure of the defendant to ring the bell or sound the whistle, it is the duty of the court to declare, as a matter of law, that the plaintiff cannot recover. *Holman v. Chicago, Rock Island and Pacific R. R. Co.*, 62 Mo., 562, 1876; *Moore v. Same*, ib., 584, 1876.

474. — In an action for damages for killing stock in consequence of a failure to ring the bell or sound the whistle as required by statute, it is essential to recovery to show that the damages resulted from such failure. But the connection between the injury and the company's default may be inferred from the circumstances of the particular case. *Alexander v. Hannibal and St. Joseph R. R. Co.*, 76 Mo., 494, 1882.

475. Speed; sound of train. Where there was a question as to the speed at which the train was running, held, that it was proper

to allow witnesses to testify that they judged from the sound of the train that it was running very rapidly, and more than six miles per hour. The weight of such evidence was a question for the jury. *Van Horn v. Burlington, Cedar Rapids and Northern R'y Co.*, 59 Ia., 33, 1882; 7 Amer. & Eng. R. R. Cases, 591.

476. Sufficiency. Evidence held sufficient to sustain verdicts. *Toledo, Peoria and Warsaw R'y Co. v. Hobbie*, 61 Ill., 888, 1871; *Toledo, Wabash and Western R'y Co. v. Craft*, 62 Ind., 390, 1878; *Same v. Same*, 62 ib., 395, 1878; *Ohio and Mississippi R'y Co. v. Steen*, 57 ib., 61, 1877; *Ft. Wayne, Muncie and Cincinnati R. R. Co. v. Grove*, 47 ib., 133, 1874; *Same v. McClurg*, ib., 138, 1874; *Moore v. Missouri Pacific R'y Co.*, 73 Mo., 438; 7 Amer. & Eng. R. R. Cases, 568, 1881; *Stutsman v. Burlington and South Western R. R. Co.*, 53 Ia., 760, 1880; 21 Amer. R'y Rep., 174; *Smith v. Sioux City and Pacific R. R. Co.*, 38 Ia., 173, 1874; *Savannah, Griffin, etc., R. R. Co. v. George*, 57 Ga., 164, 1876; *Atlantic and Gulf R. R. Co. v. Burt*, 49 ib., 606, 1873; *Central R. R. and Banking Co. v. Opie*, 58 ib., 346, 1877.

477. — Proof held sufficient to show that a railway had been in operation for six months. *Rockford, Rock Island and St. Louis R. R. Co. v. Spillers*, 67 Ill., 167, 1873.

478. — Evidence considered, and held insufficient to sustain the verdict. *Jenicke v. Minneapolis and St. Louis R'y Co.*, 27 Minn., 359, 1880; *Bothwell v. Chicago, Milwaukee and St. Paul R. R. Co.*, 59 Ia., 192, 1882; 7 Amer. & Eng. R. R. Cases, 570; *Colliwood v. Indianapolis, Peru and Chicago R'y Co.*, 54 Ind., 15, 1876; *Meade v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 45 Ia., 699, 1877.

479. — Sufficiency of the evidence determined. *Cleland v. Minneapolis and St. Louis R'y Co.*, 29 Minn., 170, 1882; 7 Amer. & Eng. R. R. Cases, 589.

480. Value. In an action brought by the owner of a colt, under the provisions of ch. 94, Laws of 1874, to recover damages from a railroad company for wounding the animal on the line of its road, where the plaintiff has other and better evidence at hand as to the value of the colt for which damages are claimed, it is error to allow proof, against

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the objections of the railroad company, that the injured colt compared 'in appearance with the colts of another person, and, against like objection, to admit proof of the value of such other colts to fix and determine the value of the colt injured. *Atchison and Nebraska R. R. Co. v. Harper*, 19 Kans., 529, 1878; 19 Amer. R'y Rep., 42.

481. — One who knows the property in controversy is competent to testify to an opinion of its value; so, also, is one who is conversant with current prices of such property generally, but who never saw the property in controversy, upon a hypothetical description of it embodied in questions to him. *Smith v. Indianapolis and St. Louis R. R. Co.*, 80 Ind., 233, 1881; 7 Amer. & Eng. R. R. Cases, 582.

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482. **Crossings.** Whether or not a failure to sound a whistle is negligence is a question for the jury, and it is error in an instruction to assume that it is negligence. *Terre Haute and Indianapolis R. R. Co. v. Jones*, 11 Bradwell (Ill.), 322. 1882.

483. — When the safety of persons or property demands that signals be given at crossings, the failure to give them, in the absence of a statute requiring such alarms, would be negligence. *Gates v. B., C. R. and M. R'y Co.*, 39 Ia., 45, 1874; 9 Amer. R'y Rep., 75.

484. — There is no statute in Indiana that requires railway companies to blow the whistle or ring the bells of their engines on approaching a highway crossing, but that duty may devolve upon them in the exercise of ordinary care, without a statute. Whether, in a given case, ordinary care requires the making of such signals is a question for the jury. *Indianapolis, Cincinnati and Lafayette R. R. Co. v. Hamilton*, 44 Ind., 76. 1873.

485. — In an action against a railway company for killing a cow at a road crossing, an omission on the part of the company to ring a bell or sound a whistle at a distance of at least eighty rods from the crossing constitutes a *prima facie* case of negligence in the company. *Illinois Central R. R. Co. v. Gillis*, 68 Ill., 317. 1873.

486. — Although the establishment of whistling posts is intended for the protection of life and property at crossings, yet where an accident occurs beyond the crossing, the disregard of this requirement is a circumstance to be considered as bearing upon the question of negligence. *Western and Atlantic R. R. Co. v. Jones*, 65 Ga., 631, 1880; 8 Amer. & Eng. R. R. Cases, 267.

487. — When it is alleged that stock was killed by a train of cars, where the railroad crossed a public highway, because the bell was not rung or the whistle sounded, all the facts and circumstances must be proved, so that the jury can determine whether the killing was due to such neglect. *Holman v. Chicago, Rock Island and Pacific R. R. Co.*, 62 Mo., 562. 1876.

488. — Under the statute (Wagn. Stat., 310, § 8), the failure by the person in charge of a railroad train to ring the engine bell or blow the whistle, at a distance of at least eighty rods before reaching the crossing of a public highway, is negligence; and if, under such circumstances, cattle are killed at such crossing, such negligence is sufficient of itself to create a liability on the part of the railway company, unless some contributory negligence can be shown on the part of the owner of the cattle. *Owens v. Hannibal and St. Joseph R. R. Co.*, 58 Mo., 386, 1874; 9 Amer. R'y Rep., 19.

489. — Proof that stock were killed at a road crossing by a railroad train, and that the bell was not rung and the whistle not sounded for an interval of eighty rods from the crossing, as required by statute (Wagn. Stat., p. 310, § 38), is sufficient to make out a *prima facie* case against the company, without further evidence that its employes and servants were guilty of negligence. In order to free itself from liability the company must show that it has discharged every duty imposed by law, unless it be shown that the injured party has in some way contributed to the injury, or the circumstances rebut the presumption that the injury resulted from neglect of duty on the part of the company. In suit under the above statute, judgment for double damages would be improper. *Howenstein v. Pacific R. R. Co.*, 55 Mo., 33. 1874.

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490. Evidence. It is not enough, to create a liability for stock killed by a railroad train, to prove the bell was not rung or the whistle sounded. It must be made to appear, by facts and circumstances proved, the accident was caused by such neglect. *Quincy, Alton and St. Louis R. R. Co. v. Wellhoener*, 72 Ill., 60, 1874; *Rockford, Rock Island and St. Louis R. R. Co. v. Linn*, 67 Ill., 109, 1873; *Indianapolis and St. Louis R. R. Co. v. Blackman*, 7 Amer. R'y Rep., 56; 63 Ill., 117, 1872; *Indianapolis and St. Louis R. R. Co. v. Holloway*, 63 Ill., 121, 1872; *Stoneman v. Atlantic and Pacific R. R. Co.*, 58 Mo., 503, 1875; 9 Amer. R'y Rep., 42.

491. — That the rate of speed was not slackened nor the whistle sounded is no evidence of negligence when it appears that such efforts would have been, under the circumstances, unavailing to prevent the injury. *Flattes v. Chicago, Rock Island and Pacific R. R. Co.*, 35 Ia., 191, 1872; 5 Amer. R'y Rep., 518.

492. — It is not sufficient to show that the whistle was not sounded as required by the statute. It must appear that neither was the whistle sounded nor the bell rung. *Van Note v. Hannibal and St. Joseph R. R. Co.*, 70 Mo., 641, 1879.

493. — Where defendant's employes did not ring a bell or sound a whistle until within forty rods of the crossing, and plaintiff's cow, after this signal, ran off the track and down by the side of it about one hundred feet, and then ran upon the track ahead of the train and was killed, *held*, that whether the injury was caused by the failure to ring the bell or sound the whistle the entire distance of eighty rods before reaching the crossing was a question of fact for the jury, and not a question of law for the court. *Chicago and Alton R. R. Co. v. McDaniels*, 63 Ill., 122, 1872; 7 Amer. R'y Rep., 10.

494. — It appeared that the plaintiff's gate was broken open in the night, so that his mule escaped and got upon defendant's track, where it was killed by a passing train; that the train passed over two public streets in the village without ringing a bell or sounding a whistle, as required by the statute, just before reaching the mule, and that the only signal given was that something

was upon the track, which frightened the mule and caused it to run, but the train was then too near it to be checked so as to avoid the collision; and it appeared from this, that if the statute had been complied with the animal would probably have escaped. *Held*, that the company was liable. *Chicago and Alton R. R. Co. v. Henderson*, 66 Ill., 494, 1873.

495. — To constitute an obstruction within the meaning of the statute prescribing the duties of a railway company when a person, animal or other obstruction appears upon the road, the animal must be in a position to be struck or directly injured by the train while moving on the rails. *Louisville, Nashville and Great Southern R. R. Co. v. Reidmond*, 11 Lea (Tenn.), 205, 1883.

496. — Where an animal was on the company's right of way, six or eight feet from the end of the cross-ties of the track, with its head turned from the road, and an unobstructed egress in that direction, it was error to charge the jury that it was the duty of the lookout to watch over the right of way, and whenever animals, on any part of it, are seen, to sound the whistle to frighten them away. *Id.*

497. — While, under some circumstances, a railway company would not be guilty of negligence, though no whistle was sounded, bell rung, or the speed of the train slackened, on the other hand there are cases in which such omissions would be sufficient to establish negligence. *Searles v. Milwaukee and St. Paul R. R. Co.*, 35 Ia., 490, 1872; 5 Amer. R'y Rep., 524.

498. Pleading. The fact that a railroad company's trainmen failed to ring the bell or sound the whistle as the train approached the crossing of a public road may be given in evidence in a common law action against the company for negligently killing plaintiff's steer at the crossing without being specially pleaded. If the action were on the statute (Wagn. Stat., p. 310, § 88), it would be otherwise. *Goodwin v. Chicago, Rock Island and Pacific R. R. Co.*, 75 Mo., 73, 1881; 11 Amer. & Eng. R. R. Cases, 460.

XI. PRIVATE WAYS AND FARM CROSSINGS.

499. Cattle-guards. When a railway company makes gates in its fences to enable a

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farmer, whose lands lie on both sides, to pass and repass, and does not protect the crossing by cattle-guards, the track is not securely fenced, as the statute (R. S. 1891, § 4031) requires. *Grand Rapids and Indiana R. R. Co. v. Jones*, 81 Ind., 523. 1882.

500. Contract. A railway company is bound by statute to fence its track where a private way crosses it, and cannot, in a suit for the value of stock killed by its cars on account of the failure to so maintain a fence, escape liability by showing a contract with the adjacent land owner to maintain a fence at such crossing, the owner of the stock not being a party to such contract. *Indianapolis, Peru and Chicago R'y Co. v. Thomas*, 84 Ind., 194, 1882; 11 Amer. & Eng. R. R. Cases, 491.

501. Evidence; former accidents. In a suit for damages for injury to a horse by reason of the negligent and defective construction of a railway crossing, evidence of a similar former accident, which happened to another at the same place, was incompetent and should have been excluded. *Hudson v. Chicago and Northwestern R. R. Co.*, 59 Ia., 581, 1882; 8 Amer. & Eng. R. R. Cases, 464.

502. Iowa statute. A lane leading from the highway to plaintiff's residence crossed the railway track, and at each end of the lane were gates, which, with the inclosing fences, were maintained by him. His cow having been killed upon the private crossing, it was held that the company was justified in assuming that he preferred the open crossing, and that he could not recover for the killing of the cow. *Tyson v. Keokuk and Des Moines R. R. Co.*, 43 Ia., 207, 1876; 14 Amer. R'y Rep., 423.

503. — Railway companies had the right, under the Revision (§ 1329), to construct fences at private crossings, providing the same with suitable gates, and were liable for injuries to stock resulting from the neglect to construct or maintain proper fences and gates. *McKinley v. Chicago, Rock Island and Pacific R. R. Co.*, 47 Ia., 76. 1877.

504. — It is proper for the jury to be instructed that, if a crossing is more than ordinarily dangerous, they should consider that circumstance in determining whether the railway company used reasonable care

in the operation of its train when the cause of action arose. *Kuhn v. Chicago, Rock Island and Pacific R. R. Co.*, 42 Ia., 420. 1876.

505. — The owner of the stock has the right to expect that the railway company will exercise ordinary care to prevent injury to his property, both in the construction of crossings and in the operation of its train. *Ib.*

506. — Where a railway company has provided a private crossing and supplied the necessary gates, it is held only to the exercise of reasonable care to keep them closed; and it is not responsible for an injury sustained by a third party, which is occasioned by the negligence of him for whose benefit the crossing is provided. *Henderson v. Chicago, Rock Island and Pacific R. R. Co.*, 43 Ia., 620, 1876; 14 Amer. R'y Rep., 484.

507. — When a railway company has provided a private crossing, and supplied the necessary gates and bars, it is only held to the exercise of reasonable diligence and care to keep them closed; and it is not responsible for any injury sustained by a third party, which is occasioned by the negligence of him for whose benefit the crossing is provided. *Henderson v. Chicago, Rock Island and Pacific R. R. Co.*, 39 Ia., 220. 1874.

508. Leased lines. The complaint alleges that at the time of plaintiff's making a conveyance of a right of way over his lands to the O. and M. R. R. Co., and as a part of the consideration for such conveyance, it was agreed between plaintiff and said company that the latter should construct two farm crossings and two cattle-guards on his premises. *Held*, that this does not show any covenant running with the land, and therefore does not show that defendant, as lessee of the railway, is under any obligation to build such cattle-guards, although he took the lease with notice of such agreement of his lessor. *Cook v. Milwaukee and St. Paul R'y Co.*, 36 Wis., 45. 1874.

509. — The action being for the killing of plaintiff's horses by a train on the road of the O. and M. R. R. Co., held and operated by defendant as lessee, and the only negligence alleged being defendant's failure to construct one of such cattle-guards on plaintiff's land, the complaint is held bad, on demurrer. *Ib.*

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510. Open crossing; contract. The testimony showed that the fences which the defendant was required by statute to build, by an understanding between plaintiff and defendant, were left open for an open crossing for plaintiff's cattle. It did not appear that it was any part of the understanding that defendant should take such precautions as would wholly prevent injury to plaintiff's cattle on the crossing. *Held*, that the understanding did not require the defendant to subordinate the operation of its road to the plaintiff's privilege of an open crossing. In approaching the same with its trains defendant must exercise reasonable care in looking out for the cattle, and take all reasonable measures to avoid injuring them. This does not require defendant to stop or slow its trains in order to ascertain whether the cattle are upon the track, or in a dangerous vicinity to it, nor, except when the cattle are discovered upon or in dangerous vicinity to the track, to stop or slow its trains to prevent possible injury to them. *Whittier v. Chicago, Milwaukee and St. Paul R'y Co.*, 26 Minn., 484. 1880.

511. Whistling posts. The statute (§ 708, Code) requiring the erection of "whistling posts" at roads does not apply to private ways. *Ga. R. R. Co. v. Cox*, 61 Ga., 455. 1878.

XII. STATUTORY LIABILITY, AND DECISIONS UNDER VARIOUS STATUTES.

[For other decisions under statutes, see, under title of Injuries to Domestic Animals, the following subdivisions: Highways, III; Cities and Towns, IV; Fences and Cattle Guards, VIII; Signals, X; Private Ways and Farm Crossings, XI.]

512. Alabama. The statute (§ 1699, Code of 1876) exacts certain positive duties of those in charge of a train approaching a public crossing, or other place mentioned in the statute, rendering the railroad company liable for all damage to persons or property occasioned by the failure to observe these requirements, and imposing on it the burden of showing compliance with the statute, if the injury occurs at one of the places therein mentioned. *South and North Ala. R. R. Co. v. Thompson*, 62 Ala., 494. 1878.

513. — Section 1701 of the Code of 1876

was superseded by the later enactment now embodied in § 1711 of that Code, as to the time within which the claim for damages for injuries done to stock by a railroad company should be presented; but that section still stands as a regulation as to the manner in which the claim must be preferred. The claim must be in writing, and must be presented to one of the officers or employees named in that section. *Alabama Great Southern R. R. Co. v. Killian*, 69 Ala., 277. 1881.

514. — The various decisions and statutes in regard to injuries to stock by the cars and locomotives of railroad companies examined, and the construction of the statutes now of force declared as follows: (1) A railroad company is liable for injuries to stock when they result from the negligence of the servants or agents, whenever or wherever it may occur. (2) If the injury occurs at or near a public road crossing, or any regular depot or stopping place, or within the corporate limits of any town or city, or because of an obstruction which could or ought to have been perceived, no degree of diligence will excuse the company from liability, unless all the requirements of the statute have been complied with. (3) In either case, the injury being shown, the burden of proof is on the company to acquit itself of negligence or to show a compliance with the statute. *Mobile and Ohio R. R. Co. v. Williams*, 53 Ala., 595, 1875; 13 Amer. R'y Rep., 153.

515. — If the railroad company appoints an agent for the special purpose of looking up and reporting injuries done to cattle by its trains, and a claim is preferred to him, and he makes report of it to the company in writing within sixty days, the presentment is sufficient, under § 1402 of the Revised Code, although such agent is neither the president, superintendent nor depot agent. Proof that an agent appointed for the purpose of investigating and paying such claims inquired after plaintiff to settle his claim within sixty days after it accrued, and offered to pay his attorney half the amount claimed, will authorize a jury to infer due presentment. *South and North Ala. R. R. Co. v. Brown*, 18 Amer. R'y Rep., 166; 53 Ala., 651. 1875. See *South and North Ala. R. R. Co. v. Hagood*, 53 Ala., 647. 1875.

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516. — attorneys' fees. Section 6 of the act of February 3, 1877, which requires a reasonable attorney's fee, not exceeding \$20, to be assessed by the court, as a part of the costs against every unsuccessful appellant in such actions (Code, § 1715), is unconstitutional and void. *South and North Alabama R. R. Co. v. Morris*, 65 Ala., 193. 1880.

517. — constitutional law. The "act to define and regulate the liabilities of railroad companies," approved February 11, 1852, and carried from the Revised Code into the Code of 1876 as section 1704, is not distinguishable in principle from the similar provision in the act of 1877; and although in the case of *Nashville and Chattanooga R. R. Co. v. Peacock*, 25 Ala., 229, it was held that the liability was not absolute, but that circumstances tending to show that the killing was the result of accident, which could not have been avoided by the exercise of skill and care, could be shown in defense, such is not a fair and natural interpretation of the language. The act is unconstitutional. *Zeigler v. South and North Ala. R. R. Co.*, 58 Ala., 594, 1877; 20 Amer. R'y Rep., 463.

518. — limitation. A claim or demand against a railway company, for damages on account of stock killed by its trains, must be presented to some one of the company's agents, or suit thereon must be brought within sixty days after the injury was done (Code, § 1701); and where the case is tried before the court without the intervention of a jury, the amount claimed being less than \$20, and the statute is pleaded in defense, it is error to render judgment for the plaintiff without proof of such presentment or commencement of suit. *South and North Alabama R. R. Co. v. Reid*, 66 Ala., 250. 1880.

519. — An action for damages against a railway company for an injury to stock or cattle caused by negligence, there being no contract between the parties, must be commenced within one year from the time of the injury (Code, § 3231, subd. 6), the claim having been presented within sixty days. *Hess v. Central R. R. and Banking Co.*, 66 Ala., 472. 1880.

520. Arkansas. The statute (act of February 3, 1875) giving double damages for stock killed by railroad trains when the stock is not posted as required by the statute does

not except from the benefit of that clause the owner who has actual notice of the killing without the posting, and the court cannot except him. *Memphis and Little Rock R. R. Co. v. Carley*, 39 Ark., 246. 1882.

521. Colorado. Section 2 (General Laws 1877, p. 850) fixes the liability of railway companies for stock killed by their trains, and § 3 was designed to regulate the proceedings under the act. The failure of the owner of stock killed to have the value appraised before bringing suit is proper subject matter of plea in abatement. Such defense being of a dilatory character, an omission to interpose the same at the earliest opportunity must be regarded as a waiver. *Atchison, Topeka and Santa Fe R. R. Co. v. Lujan*, 6 Colo., 338. 1882.

522. Georgia. Where the evidence as to the diligence used by railway employes was conflicting, the presumption of negligence being in all cases against the company, and the jury find for the plaintiff, and the presiding judge is satisfied with the verdict, this court will not interfere. *Ga. R. R. and Banking Co. v. Cox*, 64 Ga., 619, 1880; *Woolfolk v. Macon and Augusta R. R. Co.*, 56 ib., 457, 1876.

523. — Where, under the statute, the plaintiff claimed expenses of litigation, it was held not to be erroneous to permit him to show that he had offered to settle, and that the company only offered \$30. So held, partly upon the ground that the verdict was not for more than the actual value of the animal. *Selma, Rome and Dalton R. R. Co. v. Fleming*, 48 Ga., 514. 1873.

524. Illinois. The owner of a horse, who voluntarily permits the same to run at large contrary to law, cannot recover of a railway company for the killing of the same by one of its trains, upon the ground that such company has failed to fence its track at the place where the animal is killed. *Peoria, Pekin and Jacksonville R. R. Co. v. Champ*, 75 Ill., 577. 1874.

525. — Damages under the statute can only be recovered in case of an actual collision with the cars or locomotive. *Schertz v. Indianapolis, Bloomington and Western R'y Co.*, 107 Ill., 577, 1883; *Chicago and Northwestern R'y Co. v. Taylor*, 8 Bradwell (Ill.), 108, 1880.

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526. Indiana. In an action under the statute, the plaintiff must prove that his stock was struck by a train of the defendant. *Louisville, New Albany and Chicago R'y Co. v. Smith*, 58 Ind., 575, 1877; 19 Amer. R'y Rep., 18.

527. — The evidence showed that the defendant's cars struck one only of two animals, which were tied together, and dragged them both along the track so as to kill both. *Held*, that the plaintiff was not entitled to recover for the animal which had not been struck by the cars. *Jeffersonville, etc., R. R. Co. v. Downey*, 61 Ind., 287, 1878.

528. — common law liability. On the trial of a statutory action for killing stock, instructions to the jury, applicable only to an action therefor at common law, are erroneous. *Jeffersonville, etc., R. R. Co. v. Lyon*, 55 Ind., 477, 1876; 16 Amer. R'y Rep., 250.

529. — fright. A railway company is not liable, under the statute (1 R. S. 1876, p. 751), for the injury or death of animals resulting from fright at the locomotives, cars or carriages of the company. *Baltimore, Pittsburgh and Chicago R'y Co. v. Thomas*, 60 Ind., 107, 1877.

530. — judgment; manner of enforcement. Where, upon an appeal, a party has obtained a judgment in the circuit court against a railway company for damages for the injury of his stock, under the act of March 4, 1863, the judgment plaintiff, although his case is not within the letter of the statute, may enforce the collection of his judgment in the manner provided in § 5 of said act, by proceedings against the defendant's agents. *Ft. Wayne, Muncie and Cincinnati R. R. Co. v. Clark*, 59 Ind., 191, 1877.

531. — jurisdiction. If upon the trial of an action originating in the circuit court to recover, under the statute (1 R. S. 1876, p. 752), for stock killed, the jury find that the value of the stock killed was less than \$50, the court should at once dismiss the cause, notwithstanding the fact that the complaint alleges such value to have been in excess of \$50. *Louisville, New Albany and Chicago R'y Co. v. Johnson*, 67 Ind., 546, 1879; *Pennsylvania Co. v. Trimble*, 75 Ind., 378, 1881.

532. Iowa. The words "running at large," used in the statute, imply that the

stock they are used to describe is not under the control of the owner. *Hammond v. Chicago and Northwestern R. R. Co.*, 48 Ia., 168, 1876; 14 Amer. R'y Rep., 412.

533. — A horse that has escaped from control and is at liberty, although it has on a halter and bridle, is running at large, within the meaning of the statute. *Welsh v. Chicago, Burlington and Quincy R. R. Co.*, 53 Ia., 632, 1880; 21 Amer. R'y Rep., 181.

534. — contributory negligence. A railroad company is liable for injuries to stock caused by its negligence where the plaintiff has contributed to the injury no further than merely permitting his stock to run at large. *Searles v. Milwaukee and St. Paul R'y Co.*, 35 Ia., 490, 1872; 5 Amer. R'y Rep., 524.

535. — notice and affidavit. The original affidavit describing the injury must be served on the railway company to render it liable to double damages. A copy is insufficient. *Cole v. Chicago and Northwestern R. R. Co.*, 33 Ia., 311, 1874; *Campbell v. Chicago, Rock Island and Pacific R. R. Co.*, 35 Ia., 334, 1872; 5 Amer. R'y Rep., 539.

536. — In an action against a railroad company for killing stock, where the affidavit of injury alleged that it occurred because defendant had "fenced up the crossing," it was held that the affidavit would estop plaintiff to claim double damages, which the statute allows only for "want of fence." *Davis v. Chicago, Rock Island and Pacific R. R. Co.*, 40 Ia., 292, 1875; 8 Amer. R'y Rep., 407.

537. — Proof of the service of notice and affidavit of loss, to entitle plaintiff to double damages, may be made by copies shown to be correct, without notice to the defendant to produce the originals. *Smith v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 58 Ia., 622, 1882; *Brentner v. Chicago, Milwaukee and St. Paul R'y Co.*, ib., 625, 1882.

538. — A return of service on a notice of a claim for stock killed on a railroad, which recited that service was made upon the "station agent of the road," at a certain place, was held sufficient. *Welsh v. Chicago, Burlington and Quincy R. R. Co.*, 53 Ia., 632, 1880; 21 Amer. R'y Rep., 181.

539. — To authorize a recovery against a

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railroad company for double damages for stock killed or injured under ch. 169, Laws of 1862, it is not necessary that the affidavit of injury should be made by the claimant himself. It may be made by others cognizant of the fact. *Henderson v. St. Louis, Kansas City and Northern R'y Co.*, 36 Ia., 387. 1873.

540. — The affidavit, served for the purpose of entitling claimant to double damages for stock killed by a railroad train, need not specifically designate the place where the injury was done. The jurat to such affidavit may be amended within such reasonable time as not to cause essential injury to the other party, and the notice of claim and the accompanying affidavit may be served by the plaintiff or any other person. *Mundhenk v. Central Iowa R'y Co.*, 57 Ia., 718, 1882; 11 Amer. & Eng. R. R. Cases, 463.

541. — It is not essential that the notice and affidavits required to be served upon the railroad company, where damages are claimed for stock killed, should contain anything more than a statement of the claim and the fact of the injury. *Mackie v. Central R. R. of Iowa*, 54 Ia., 549. 1880.

542. — stock not actually struck by train. Where stock is injured on a railroad which is unfenced, it is a question for the jury whether or not the injury was caused by the negligence of the railroad company. It is not necessary that stock should have been actually struck by a train to authorize a recovery under the statute. *Kraus v. Burlington, Cedar Rapids and Northern R'y Co.*, 55 Ia., 338. 1880.

543. Kansas. The purpose and scope of the law of 1874, requiring all railroad companies whose roads are unfenced to pay for injuries done to stock by their engines and cars, was to obviate the necessity of inquiring into the mere negligence of the owners of the stock, or of the parties in charge of the trains. Where cattle get upon the track at a place where the road can and ought to be fenced, and, without any wanton or wilful act of the owners or persons in charge, are there injured by a passing train, the law applies, and the company is responsible for the injury. *Hopkins v. Kansas Pacific R'y Co.*, 18 Kans., 462. 1877. But see *Central*

Branch Union Pacific R. R. Co. v. Lea, 20 Kans., 353. 1878.

544. — Ch. 93 of the Laws of 1870 has changed the law in this state in reference to the liability of railway companies for injuries done by their trains to cattle on the track. In an action for such injuries it is not error to instruct the jury that the company must exercise ordinary care, and is responsible for ordinary negligence. *St. Joseph and Denver R. R. Co. v. Grover*, 11 Kans., 302. 1873.

545. — attorney's fee. On the trial of an action under the Stock Law of 1874, the opinion of a witness as to the value of the services rendered by the plaintiff's attorney in prosecuting the case is competent, if such opinion is founded upon the character of the case set out in the bill of particulars filed in the action, or upon a hypothetical case put to the witness corresponding with the real case. *Central Branch Union Pacific R. R. Co. v. Nichols*, 24 Kans., 242. 1880.

546. — An action was brought before a justice of the peace under ch. 94 of the Laws of 1874, to recover of a railroad company the value of certain stock killed by one of its trains. The company recovered judgment before the justice. On appeal, the plaintiff recovered judgment, and in it the district court included the fees of the plaintiff's attorney on the trial before the justice; held, no error. *Missouri River, Fort Scott and Gulf R. R. Co. v. Shirley*, 20 Kans., 660, 1878; *Central Branch Union Pacific R. R. Co. v. Young*, 21 ib., 532, 1879; *Same v. Holcomb*, 21 ib., 533, 1879.

547. — bridges. A railway track, being unfenced, two mares belonging to E. got on to it, and, walking along, attempted to cross a bridge. The bridge being built of ties, with open spaces between, their legs slipped into these open spaces and the animals became fastened in the bridge, receiving injuries therefrom. There was negligence, as the jury found, on the part of the company in the construction of the bridge, causing these injuries. Afterward, a train approaching found the animals still fastened to the bridge. The train men proceeded to remove them therefrom, and in so doing the animals sustained still further injuries. Held, that the injuries done in removing the

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animals from the track were done in operating the road, within the meaning of the law of 1874. *Held, further*, that the injuries resulting from the animals falling into the bridge were not within the scope of that act, although the company might be liable therefor on account of its negligence. And further, that where there was nothing in the record by which this court could apportion the damage resulting from these two different injuries, no apportionment could be made of attorney fees allowed on the total recovery, and they must be stricken out altogether. *Atchison, Topeka and Santa Fe R. R. Co. v. Edwards*, 20 Kans., 531, 1878; 20 Amer. R'y Rep., 311.

548. — collision not necessary to recovery. Under that statute no actual collision between the engine and the animal injured is essential to liability. It is enough if the injury occurs in the operating of the railroad, and as a direct result therefrom. *Atchison, Topeka and Santa Fe R. R. Co. v. Jones*, 20 Kans., 527, 1878; 20 Amer. R'y Rep., 308.

549. — constitutional law. Ch. 94 of the Laws of 1874, relating to the killing or wounding of stock by railroads, is constitutional and valid. *Kansas Pacific R'y Co. v. Mower*, 16 Kans., 573, 1876; 9 Amer. R'y Rep., 400; *Atchison and Nebraska R. R. Co. v. Harper*, 19 Kans., 529, 1878.

550. — Under the general police power of the state, the legislature has the power to require railroad companies to fence their tracks, and to make them liable for the value of all stock killed by their trains in consequence of a failure to so fence. *Kansas Pacific R'y Co. v. Mower*, 16 Kans., 573, 1876.

551. — Section 2 of said chapter 94 of the Laws of 1874, giving "a reasonable attorney fee" to the plaintiff, in case of a recovery, for the prosecution of his suit against a railroad corporation for the value of stock killed or injured, is constitutional. Such provision may seem harsh or rigorous, but it is in the nature of a penalty, and is not beyond the power of the legislature. *Id.*

552. — county. The findings read, "That plaintiff resided about three-quarters of a mile from the railroad of the defendant, in the county of D." and then state the circumstances of the injury, which took place

as he was riding toward a spring on the opposite side of the railroad, and about seventy-five yards therefrom. *Held*, that a general conclusion and judgment in favor of the plaintiff will not be reversed on the ground that it does not appear that the animal was killed in the county of D. *Kansas City, Lawrence and Southern R. R. Co. v. Phillibert*, 25 Kans., 582, 1881.

553. — demand. Under the special statute of 1874, imposing liability . . . on railroad companies for stock killed, a demand made upon the general superintendent of a railway company is a sufficient demand upon the company. *Central Branch Union Pacific R. R. Co. v. Ingram*, 20 Kans., 66, 1878; 19 Amer. R'y Rep., 218.

554. — A demand under the act of 1874 is sufficient, if made upon one who is the "stock and claim adjuster," and authorized to settle for stock killed. *Union Trust Co. v. Kendall*, 20 Kans., 515, 1878; 20 Amer. R'y Rep., 294.

555. — Where the evidence, tending to show a demand for the killing of stock, under the statute, is conflicting, and sufficient evidence is given on the trial to sustain the demand, the finding of the trial court that a demand was made will be upheld. *Kansas City, Fort Scott and Gulf R. R. Co. v. McHenry*, 24 Kans., 501, 1880.

556. — To sustain an action under chapter 94 of the Laws of 1874, against a railroad company, for the killing of stock, there must be proof of a demand in accordance with the provisions of section 2 of said act. *Kansas Pacific R'y Co. v. Ball*, 19 Kans., 535, 1878. See *Kansas City, Ft. Scott and Gulf R. R. Co. v. Frazier*, 23 Kans., 698, 1880; *Kansas Pacific R'y Co. v. Taylor*, 23 ib., 730, 1880.

557. — Under the act of 1874, a demand must be made of the railroad company, but this demand "may be made of any ticket agent or station agent of such company," and the demand may be made orally. Hence, when such demand is made, what the agent says at the time concerning the matter may be given in evidence against the company. The agent's statements, made at such time and concerning such matter, are admissions within the scope of his authority and a part of the *res gestæ*. Where a proper oral de-

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mand is first proved, and no evidence is at any time introduced tending to disprove the same, it is not material error for the court to permit the plaintiff to show, by incompetent evidence, that a written demand was also made. *Central Branch Union Pacific R. R. Co. v. Butman*, 22 Kans., 639. 1879.

558. — Where it was shown that the demand for the value of the stock alleged to have been killed was made only in writing, and this demand was proved on the trial of the case, only by the introduction in evidence of a copy of the written demand, and this was done over the objections of the defendant, but by the permission of the court, without any foundation for the introduction of secondary evidence having first been laid, *held*, error. *Central Branch Union Pacific R. R. Co. v. Walters*, 24 Kans., 504. 1880.

559. — **herd law.** In a herd law county, an animal belonging to plaintiff strayed upon the railroad track of defendant, and was killed by one of its trains. The track was unfenced. Plaintiff had picketed the animal in an inclosed field, and had taken reasonable precautions to keep it confined, and prevent it from running at large, but it had broken loose, without any fault or neglect on his part. *Held*, that the company was liable for the value of the animal. *Kansas Pacific R'y Co. v. Wiggins*, 24 Kans., 588. 1880.

560. — Plaintiff was the owner of a quarter section of land, through which ran the defendant's railroad. The quarter section as a whole was inclosed with a legal fence, but there was no fence along the defendant's road, separating the right of way from the rest of the quarter section. The plaintiff turned his mule loose in this quarter section, and during the night time it was injured by the defendant's cars. The night herd law was in force in the township in which the land was situate. *Held*, that while the plaintiff may be said to have confined his animal, within the meaning of the statute, as to all parties except the defendant, an owner of part of the premises within the inclosure, he cannot be held to have so confined it as to the defendant. The obligation of the plaintiff to confine his animal, and that of the railroad to fence its right of way, are of equal force, and the railway company

is not liable for the injury. *Kansas Pacific R'y Co. v. Landis*, 24 Kans., 406. 1880.

561. — Where it clearly appears that plaintiff's animals were killed about the hour of midnight, a verdict for the plaintiff will be set aside as against the evidence, although it was coupled with a special finding that the jury did not know the hour at which the animals were injured, the animals being killed where the night herd law was in force. *Union Pacific R'y Co. v. Dyche*, 28 Kans., 200, 1882; 11 Amer. & Eng. R. R. Cases, 427.

562. — **hogs; running at large.** Where the swine killed were running at large in violation of s. 46 of the stock law, Gen. Stat., 1011, and the herd law of 1872, page 384, *held*, that, as the animals were running at large when killed, the presumption is against the owner that they were at large with his permission, and he cannot recover. *Atchison, Topeka and Santa Fe R. R. Co. v. Hegwir*, 21 Kans., 622. 1879.

563. — **Leavenworth reservation.** "The act relating to killing or wounding stock by railroads" is operative within the limits of the military reservation of Leavenworth, as the act has not been abrogated by congress, and is not inconsistent with the existing laws of the United States. *Chicago, Rock Island and Pacific R. R. Co. v. McGlinn*, 28 Kans., 274, 1882; 11 Amer. & Eng. R. R. Cases, 435.

564. **Minnesota — constitutional law.** Gen. St. 1878, c. 34, § 56, which provides an extra allowance of \$10 in justice's court, and double costs in the district court in case of recovery in this class of actions (except in cases of a previous and sufficient tender by the defendant corporation), is not unconstitutional, but is a legitimate exercise of legislative discretion. This legislation is not liable to the objection that it is unequal or partial legislation, for the reason that it is applicable to all railroad corporations in the state, and to all plaintiffs claiming damages for cattle killed through their negligence. *Johnson v. Chicago, Milwaukee and St. Paul R'y Co.*, 29 Minn., 425. 1882.

565. **Missouri.** Under § 43 of the Railroad Act (Wagn. Stat., 310-11) no recovery can be had for injuries resulting from the negligent management of the locomotive or

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train. For that purpose, suit must be brought under § 5 of the Damage Act. *Crutchfield v. St. Louis, Kansas City and Northern R'y Co.*, 64 Mo., 255. 1876.

566. — animals prohibited from running at large. It is no defense that the animal was a bull and subject to the provisions of § 5 of the act passed for the restraint of certain animals therein named (Wagn. Stat., p. 134). *Schwarz v. Hannibal and St. Joseph R. R. Co.*, 58 Mo., 207, 1874; *Owens v. Same*, ib., 386, 1874; *Mumpower v. Hannibal and St. Joseph R. R. Co.*, 59 Mo., 245, 1875.

567. — checking speed. The failure to stop or check a train, in order to avoid a collision with stock on the track, does not constitute negligence, where such stoppage or checking would endanger persons and property intrusted to the railroad for transportation. *Pryor v. St. Louis, Kansas City and Northern R'y Co.*, 69 Mo., 215. 1878.

568. — constitutional law. In giving the penalty to the owner instead of the public school fund, the statute is not in conflict with s. 5, art. 9, of the constitution of 1865, which provides that "the net proceeds of all sales of lands and other property and effects that may accrue to the state by escheat, . . . or from fines, penalties and forfeitures," shall go to the public school fund; nor with § 8, art. 11, of the constitution of 1875, which provides that "the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the state," shall go to that fund. Both of these provisions refer only to such fines, penalties and forfeitures as the legislature might provide should accrue to the state. *Barnett v. Atlantic and Pacific R. R. Co.*, 68 Mo., 56, 1878; *Cummings v. St. Louis, Iron Mountain and Southern R'y Co.*, 70 ib., 570, 1879.

569. — Section 43 of the Railroad Law (Wagn. Stat., 310), making railroad companies liable in double damages for stock killed by them in consequence of failure to erect and maintain fences, is not obnoxious to either the fifth or fourteenth amendment to the constitution of the United States, both of which prohibit the taking of property without due process of law. Neither is it in conflict with section 8, article 11, of the con-

stitution of Missouri of 1875, which declares that the clear proceeds of all penalties and forfeitures shall belong to the public school fund. *Speelman v. Missouri Pacific R'y Co.*, 71 Mo., 434. 1880.

570. — engine used by employe outside his line of duty. A railroad company is not liable for stock killed by one of its locomotives which was at the time being used by a servant of the company without authority, for his own purposes, and outside of the line of his employment. *Cousins v. Hannibal and St. Joseph R. R. Co.*, 66 Mo., 572. 1877.

571. — jurisdiction. In suit begun before a justice of the peace for the killing of stock, where the statement fails to show in what township the killing took place, the omission is not cured by the fact that the writ shows the township where the defendant is served and the justice presides, and in which the cause is made triable. *Haggard v. Atlantic and Pacific R. R. Co.*, 68 Mo., 302. 1876.

572. — The statute (Wagn. Stat., 809, § 3) giving justices of the peace concurrent jurisdiction with the circuit court in actions against railway companies for killing of stock, etc., confers jurisdiction on the former to give judgment for double the amount of damages—regardless of the amount—in the cases mentioned in the Damage Act (Wagn. Stat., 310–11, § 48). *Parish v. Missouri, Kansas and Texas R. R. Co.*, 63 Mo., 284, 1876; 20 Amer. R'y Rep., 417.

573. — Where suit is brought before a justice of the peace against a railway company combining a claim for killing a horse with a claim for injuries to the harness, it must be instituted under subd. 3, § 3, art. I, of the act touching justices of the peace (Wagn. Stat., 808–9); and judgment for the combined injuries must be limited to \$50. *Dillard v. St. Louis, Kansas City and Northern R. R. Co.*, 58 Mo., 69. 1874.

574. — special charter. By its purchase on February 5, 1872, of the property, "privileges, rights and franchises" of the North Missouri R. R. Co., under the act of March 24, 1870, the Missouri, Kansas and Texas R. R. Co. assumed the obligations and liabilities imposed and obtained the rights conferred on the former company by the charter amend-

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ment of February 18, 1865, and was not subject to the corporation damage law. The legislature, by the corporation law, did not attempt to repeal the charter of the North Missouri R. R. Co. *Daniels v. St. Louis, Kansas City and Northern R. R. Co.*, 62 Mo., 43. 1876.

575. — trespassing animals. *Seemle*, that where stock of a third party trespass upon the land of a proprietor, adjoining a railroad, and go from there upon the road and are killed, the company will not be liable for damages. *Ells v. Pacific R. R. Co.*, 55 Mo., 278. 1874.

576. — where there is no actual collision. A railway company is not liable in double damages under § 43 of the Railroad Law for an injury to stock which does not result from direct or actual collision with the engine or cars; as, for instance, where the animal is killed by the servants of the company in an attempt to extricate it from a trestle into which it has fallen. *Seibert v. Missouri, Kansas and Texas R'y Co.*, 72 Mo., 565. 1880.

577. New York — foreign corporation. The provision of the act of 1854 (ch. 289, Laws of 1854), amending the general railroad act, which requires every railroad company whose line is open for use to erect and maintain fences on the sides of its road, and declaring it liable for damages to cattle, in case its fences are not made or kept in repair, applies to a foreign corporation which had, prior to the passage of said act, under and by virtue of an act of the legislature wherein was reserved a right to alter or repeal, extended its road within the state, so far as such road is opened for use within the state; and it is liable for cattle killed which came upon its track through a defective fence, although the cattle were trespassing. *Purdy v. New York and New Haven R. R. Co.*, 61 N. Y., 353, 1875; 12 Amer. R'y Rep., 138.

578. North Carolina. In an action for killing certain mules of the plaintiff, where negligence is established by force of the statute (Bat. Rev., ch. 16, s. 11), it can only be rebutted by showing that by the exercise of due diligence the stock could not have been seen in time to save them. *Pippen v. Wilmington, Columbia and Augusta R. R. Co.*, 75 N. C., 54. 1876.

579. Ohio. Where live stock running at large without the owner's fault enter the inclosed field of another person, through which a railroad passes, and thence pass upon the railroad by reason of the want of fences which it was the duty of the company to erect so as to separate the railway from the adjacent lands, such owner is not guilty, under the act of April 7, 1865 (S. & S., 373), of contributing, by his own wrong, to an injury done to his cattle by a passing train. *Marietta and Cincinnati R. R. Co. v. Stephenson*, 24 Ohio St., 48, 1873; 6 Amer. R'y Rep., 428; *Railway Co. v. Smith*, 38 Ohio St., 410, 1882.

580. — The owner of such cattle running at large is not guilty of a breach of any duty imposed upon him by the act of April 13, 1865 (S. & S., 7), if they be at large without the omission on his part of reasonable care. *Id.*

581. Pennsylvania. By act of March 28, 1868, entitled "An act for the protection of farmers and owners of cattle, horses, sheep and swine along the line of railroads in the county of Warren," said railway companies are required to erect and maintain fences along the tracks of their roads, and to construct cattle-guards at all the public road-crossings, sufficient to keep orderly cattle from straying upon said tracks; and by the act of April 17, 1869, a non-compliance with these requirements renders a company liable for the value of the animal injured or killed by such neglect. The plaintiff was pasturing his cow upon land near to, though not directly abutting upon, the track. The cow escaped from the inclosure, and, passing out upon a public road, strayed on to the railroad, where there were no guards, and was killed. *Held*, that plaintiff was entitled to recover. *Dunkirk and Allegheny Valley R. R. Co. v. Mead*, 90 Pa. St., 454, 1879; 1 Amer. & Eng. R. R. Cases, 166.

582. Tennessee. The statute is imperative that the whistle must be sounded and the brakes applied when an animal appears on the track (Code, § 1166). *Nashville and Chattanooga R. R. Co. v. Thomas*, 5 Heiskell (Tenn.), 262, 1871; 2 Amer. R'y Rep., 433; *Nashville and Chattanooga R. R. Co. v. Anthony*, 1 Lea (Tenn.), 516, 1878.

583. — All the requirements of § 1166 of

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the Code must be complied with when "any person, animal or other obstruction" appears upon the road, if it be possible to do so; but if from sudden appearance upon the track it be impossible to comply with all the requirements, then the company will not be liable. *East Tenn., Va. and Ga. R. R. Co. v. Scales*, 2 Lea (Tenn.), 688. 1879.

584. — If a train is moving at such rate of speed that to reverse the engine would endanger the lives of the passengers or those on the train, the engine-driver is not required to do so, although thereby the accident or collision might have been prevented. *Nashville and Chattanooga R. R. Co. v. Trozlee*, 1 Lea (Tenn.), 520. 1878.

585. — Although a collision might be avoided by a reversal of the engine, yet the engine-driver is not bound to reverse if by so doing the lives of persons on the train are endangered; but the fact that a reversal would be injurious or hurtful to the machinery is no excuse for non-compliance with the statute. *East Tenn., Va. and Ga. R. R. Co. v. Selcer*, 7 Lea (Tenn.), 557. 1881.

586. — lookout. "Every railroad company shall keep the engineer, fireman or some other person upon the locomotive, always upon the lookout ahead," etc., is not to be construed as requiring, for the exoneration of the company, that somebody on the locomotive must, throughout the whole trip, have been literally always upon the lookout. It is sufficient if the precaution was being observed when the accident happened (Code, § 1166). *Louisville and Nashville R. R. Co. v. Stone*, 7 Heiskell (Tenn.), 468. 1873.

587. — If the headlight of a train running at night is so obscured by rain or other natural causes that the "lookout" cannot see ahead, there being no defect in the headlight or fault on the part of those in charge of the train, it is error to instruct the jury that the company is, without more, liable for all the consequences because of running the train on such a night. *Louisville and Nashville R. R. Co. v. Melton*, 2 Lea (Tenn.), 203. 1879.

588. — The plaintiff's mule was run over and killed. On the trial, the company proved that the engineer was on the lookout ahead; that he saw the mule when it dashed into the road; that he immediately

sounded the whistle; and that one of the brakes was put down; but, as to whether the other two brakes were put down or not, no proof was made. *Held*, that to exempt itself from damages, it was incumbent on the company to show that all three brakes were put down (Code, § 1169). *Memphis and Charleston R. R. Co. v. Smith*, 9 Heiskell (Tenn.), 860, 1872; 20 Amer. R'y Rep., 60.

XIII. GENERAL MATTERS.

589. Appraisal; account stated. An account stated cannot be based on an appraisal of stock where it does not appear that both parties mutually agreed on the appraisers, or recognized them as authorized to bind them by their action. *Chicago and Canada Southern R'y Co. v. Peters*, 45 Mich., 636. 1881.

590. Bridges and culverts. A horse went upon defendant's track, which was not fenced, before a train, and ran ahead of the train until it fell into a bridge and received injuries from which it died; there was but a single narrow passage down the fill of the road affording an avenue of escape between the point where the horse went upon the track and the bridge; the train was stopped before it reached the horse. *Held*, that the railroad company was liable. *Young v. St. Louis, Kansas City and Northern R'y Co.*, 44 Ia., 172. 1876.

591. — The liability of a railway company for injuries to stock, under § 1289 of the Code, attaches when the want of a fence, in connection with the acts of the company's agents, is the proximate cause of the injuries. *Ib.*

592. — Plaintiff's horse went upon the defendant's tracks, at a place where a part of the fence was down, and ran upon a bridge, where his feet slipped between the timbers, causing him to fall and break his leg and rendering it necessary to kill him. *Held*, that the defendant was liable for the damages, under the acts requiring railway corporations to erect and maintain fences on the sides of their tracks, and making them liable for a failure so to do, for "all damages which shall be done by their agents or engines to cattle, horses or other animals."

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Knight v. New York, Lake Erie and Western R. R. Co., 30 Hun (N. Y.), 415. 1883.

593. — Where a horse feeding near a railroad became frightened at the noise of an approaching train, and jumping upon the track ran along ahead of the train until he fell into an open culvert, over which the road passed, and was killed, and all proper means were used by the engineer to prevent a collision, *held*, that the company was not liable. *Brothers v. Railroad Co.*, 5 So. Car., 55. 1873.

594. — A railway company acquiring a right of way over lands is not bound to plank or cover a culvert or drain, so as to prevent cattle from getting fastened therein, and is not responsible for the killing by its trains of cattle thus fastened, if it be shown that the company was duly diligent to prevent its trains from injuring them. *Memphis and Charleston R. R. Co. v. Lyon*, 62 Ala., 71. 1878.

595. — Where stock frightened at a running train runs upon a culvert instead of leaving the track, and is injured by a fall, the parties in charge of the train are not guilty of negligence for not stopping it before the injury occurred, if it was not to have been foreseen or anticipated by them as a natural or probable consequence of not stopping, that the stock would attempt to pass over the culvert or be injured. *Hot Springs R. R. Co. v. Newman*, 36 Ark., 607. 1880.

596. Common law liability. Upon the approach of a train the horses ran along the side of the track a long distance, and were forced upon the track by an embankment, and were driven into a bridge, and some of them were injured by the train, its speed not having been slackened, but having been increased; and the remaining horses were injured on the bridge by another train which followed in a few minutes, the engine-driver of which did not discover the horses until he was near them, though the conductor jumped off the train, and the fireman deserted his post, and when the signal was given there was no person to apply the brakes. *Held*, that the company was guilty of negligence. *Toledo, Wabash and Western R'y Co. v. Milligan*, 52 Ind., 505. 1876.

597. Contribution against wrong-doers.

While it is a general rule that contribution cannot be enforced as between joint wrong-doers, there are exceptions to the rule; and where defendant wrongfully removed a gate which plaintiff had erected to keep live stock off its right of way over defendant's land, whereby the animal of a third party got upon plaintiff's, track and was killed by a train, and plaintiff, on account of its negligence in not having the gate replaced, was compelled to pay the value of the horse to the owner thereof, *held*, that plaintiff was entitled to recover of the defendant the amount so paid for the horse. *Chicago and Northwestern R'y Co. v. Dunn*, 59 Ia., 619. 1882.

598. Cuts; falling of animals. A railway company is not required, within the limits of a city, to place guards around a cut, away from a public thoroughfare, to prevent animals, grazing near the cut in violation of law, from falling down the bank. *Clary v. Burlington and Missouri River R. R. Co.*, 14 Neb., 232, 1883; 11 Amer. & Eng. R. R. Cases, 493.

599. Efforts to prevent injury to train. Necessary efforts made by the agents of a railway, after the discovery of cattle on the track, to save the train and passengers from the threatened danger, would not render the company liable even though they might result in injury to the cattle. *Owens v. Hannibal and St. Joseph R. R. Co.*, 58 Mo., 386, 1874; 9 Amer. R'y Rep., 19.

600. Excavations beside railway; ice. The law does not require a railway company to keep the excavations along the sides of its track free from water and ice, and it will not be liable for stock killed in consequence of ice therein so as to prevent escape from the track over the same. *Peoria and Rock Island R'y Co. v. McClenahan*, 74 Ill., 435. 1874.

601. Fright of animals. A herd of plaintiff's beasts were being driven, at 11 P. M., along an occupation road to some fields. The road crossed a siding of the defendant's railway on a level, and while the cattle were crossing the siding the defendant's employes negligently sent some trucks down an incline into the siding, which separated the cattle from the drovers and frightened them,

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and they rushed away. Six of them were ultimately found at between 3 and 4 A. M., lying dead or dying on another part of the railway; and it appeared that they had gone along the occupation road up to a garden and orchard about a quarter of a mile from the level crossing, had got into the garden through defect in the fences, and so on to the line. *Held* (affirming the judgment of the queen's bench), that as defendant had been guilty of negligence which caused the drovers to lose control over the cattle, and caused the cattle to become infuriated, it was no answer that if the fence of the garden had not been defective the accident would not have happened; and that consequently the damages were not too remote. *Sneesby v. Lancashire and Yorkshire R'y Co.*, Law Reports, 1 Queen's Bench Division, 42, 1875; 15 Eng. (Moak), 176; *Same v. Same*, Law Reports, 9 Queen's Bench Cases, 263, 1874; 8 Eng. (Moak), 337.

602. Hole in railway track. The evidence tended to show that an animal, while running along the railroad track, set its foot into a small hole in the ground, not ordinarily dangerous, and about the size of its own foot, and thereby in some way broke its leg. *Held*, that the injury cannot be said to be the natural and proximate consequence of such neglect, and hence must be attributable to chance or accident, and not the neglect of the defendant. *Nelson v. Chicago, Milwaukee and St. Paul R'y Co.*, 30 Minn., 74. 1882.

603. Horse driven into cattle-guard or fence. Appellant's fence, crossing the lands of appellee, was out of repair. Notice of its defective condition had been given to appellant's servants. While so out of repair, appellee's horse strayed from the field and came upon the track. The engineer slowed the train, whistled, and rang the bell. The horse became frightened at the noise and ran ahead of the train, jumped three cattle-guards, and finally ran into a wire fence. He was injured either in a cattle-guard or by coming in contact with the wire fence. *Held*, that the damage appellee sustained was not occasioned by the agents, engines or cars of appellant. A railroad company is not liable for accidents arising from fright to horses occasioned by escaping steam, sig-

nals, etc., if its agents are free from negligence in their use. *Indiana, Bloomington and Western R'y Co. v. Schertz*, 12 Bradwell (Ill.), 304. 1882.

604. Inevitable accident. If the killing of the cattle on the track was, under the circumstances, an inevitable accident, the railway company is not responsible therefor, though the engine-driver used no precaution, such as blowing the whistle or doing anything else. If no precaution could possibly, under the circumstances, have avoided the accident, the failure to use any precaution will not render the railroad company liable. *Hawker v. Baltimore and Ohio R. R. Co.*, 15 West Va., 628. 1879.

605. Mortgaged animals. The payment in good faith by a railway company to the mortgagor of an animal killed upon the track, although the mortgage has been properly recorded, is a bar to an action for the same injury by the mortgagee. *Loeb v. Chicago, St. Louis and New Orleans R. R. Co.*, 60 Miss., 933. 1883.

606. Neglect of engine-driver. Where the plaintiff's horse was in his pasture, through which the defendant's road ran, and was run over in the day-time by one of the engines of defendant, it appearing on the trial that the horse before being struck ran some two hundred yards on the track, and that there was nothing to prevent the engine-driver from seeing him, and that no alarm was given by the engineer until about the time the horse was run over, *held*, that there was such negligence on the part of the engineer as would make the defendant liable. *Jones v. North Carolina R. R. Co.*, 70 N. C., 626. 1874.

607. No collision with train. Where a mule jumped upon the track in front of a moving train, ran on the road for two hundred yards and then on a trestle, from which it leaped and was killed, the train being stopped before reaching the trestle, it was not error to charge the jury: "If you find that the defendant's train was stopped before it reached or overtook the plaintiff's mule, and that the mule was frightened at the time, and ran along the track of defendant's road, and jumped off and killed itself, the defendant would not be liable, even if all the statutory precautions were not complied with by the defendant." *Holder v.*

Negligence of Co-Employees.

Chicago, St. Louis and New Orleans R. R. Co., 11 Lea (Tenn.), 176. 1883.

608. Open well. The presumption of the law is that the owner of a lot is acquainted with the condition of his own property, if a natural person, and, if an artificial one, that it has such knowledge through its agents and employees. So held where a horse was killed in an open well. *Nelson v. Central R. R. and Banking Co.*, 48 Ga., 152. 1873.

609. Salt on the track. In unloading salt at a depot by the railroad employes, some of it was spilled, and afterwards a cow was killed by the cars at this point, presumably attracted thither by the salt. *Held*, that it was negligence to leave the salt on the track, and the railroad was liable. *Crafton v. Hannibal and St. Joseph R. R. Co.*, 55 Mo., 580. 1874.

610. Statute of another state. In an action for the killing of plaintiff's cow by defendant's train, the complaint recites a statute of Iowa, and the facts necessary under it for the recovery of double damages. *Held*, that it must be treated as an action under that statute, and, no such action being known to the law of Wisconsin, it cannot be maintained here. *Bettys v. Milwaukee and St. Paul R'y Co.*, 37 Wis., 323. 1875. See, *contra*, *Herrick v. Minneapolis and St. Louis R'y Co.*, 11 Amer. & Eng. R. R. Cases (Minn.), 256. 1883.

611. — The allegation of the Iowa statute cannot be rejected as surplusage, and the action treated as a transitory one for single damages. *Ib.*; *Bettys v. Milwaukee and St. Paul R'y Co.*, 37 Wis., 323. 1875.

612. — The double damages of the Iowa statute being by way of penalty, this is an additional reason why the action cannot be maintained here. *Ib.*

613. Title to injured property. Where a cow was killed on a railway, and she had been previously sold, but not delivered, and no money had been paid, the railway company was liable to the party in possession. *Railroad Co. v. Fort*, 11 Heiskell (Tenn.), 388. 1872.

614. Uninclosed land. In Georgia, ordinary domestic animals and railroad trains are equally free, as respects each other, to pass over uninclused lands. If they come in collision, with damage to either, the dili-

gence of their respective owners will become material on the question of compensation. *Georgia R. R. and Banking Co. v. Neely*, 56 Ga., 540. 1876.

615. Wilful neglect. Where the track passed through a cut eighty rods long, and a horse of the land owner was near the track at the entrance of the cut, and the whistle of the engine was sounded, and the horse ran upon the track and into the cut, whence it could not escape up the sides, and the engine was unchecked and the whistle sounded, thereby continuing to frighten the horse until it jumped into a trestle-work at the other end of the cut and was killed, when the train could have been stopped after the horse was in the cut, and before it jumped into the trestle-work, *held*, that the company was guilty of such negligence as rendered it liable at common law for the value of the horse. The negligence was wilful. *Indianapolis, etc., R'y Co. v. McBrown*, 46 Ind., 229, 1874; 6 Amer. R'y Rep., 415.

INJURIES TO EMPLOYEES.

See CONSTITUTIONAL LAW; CONTRACTORS; DAMAGES; INDICTMENT; MEDICAL SERVICES; NEGLIGENCE; RECEIVERS.

I. NEGLIGENCE OF CO-EMPLOYEES.

1. *Neglect of employer.*
 - a. *Generally.*
 - b. *In the selection of servants.*
2. *What constitutes an employe.*
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4. *Employments not common.*
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II. DEFECTIVE ROADWAY, MACHINERY AND MATERIALS.

1. *Roadway.*
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III. RISKS ASSUMED BY EMPLOYEES.

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VII. EVIDENCE.

VIII. PLEADING.

IX. STATUTORY LIABILITY.

X. GENERAL MATTERS.

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I. NEGLIGENCE OF CO-EMPLOYEES.

1. *Neglect of employer.*

a. GENERALLY.

1. Collision. The plaintiff, in the course of his employment as an engine-driver for the defendant, was injured by the collision of the train with another train of the company. *Held*, that the court did not err in charging the court that the company, if its negligence had a share in causing the injuries of the plaintiff, was liable, notwithstanding the contributory negligence of his fellow-servant. *Grand Trunk R'y Co. v. Cummings*, 12 Amer. & Eng. R. R. Cases (U. S. S. C.), 204. 106 U. S., 700. 1882.

2. Dispatching trains. Obedience to the regulations of a railroad company in regard to running trains, with a view to their safety, is a matter of executive detail which neither the corporation nor any general agent of it can personally oversee, but as to which employees must be relied upon. In the absence of any proof of a distinction between the duty of the company in starting trains and in subsequently running them, it will not be assumed. For negligence, therefore, in the observance, or for disobedience of regulations as to the running or starting of trains to the injury of an employee, in the absence of other proof of negligence, the corporation is not liable. *Rose v. Boston and Albany R. R. Co.*, 58 N. Y., 217, 1874; 9 Amer. R'y Rep., 515.

3. Neglect of officers and master. Where it is the province of a certain employee of a railway company to supervise repairs of defects in a railway, his negligence in respect to such defects is the negligence of the company, and notice to him of such defects as are within his province to repair is notice to the company. *Colorado Central R. R. Co. v. Ogden*, 3 Colo., 499. 1877.

4. — A corporation can only act through superintending officers, and the negligence of those officers in respect to other servants is the negligence of the company. *Houston and Texas Central R'y Co. v. Marcelles*, 12 Amer. & Eng. R. R. Cases (Tex.), 231. 1883.

5. — A master is liable for an injury to a servant resulting from the negligence of a

fellow-servant if the master contributes to the negligence. *Crutchfield v. Richmond and Danville R. R. Co.*, 76 N. C., 320, 1877; 14 Amer. R'y Rep., 292.

6. — A master may be liable to a servant for injuries received in his service from the negligence of the master. Also, for injuries received from the negligence of a fellow-servant, if the master was negligent in selecting a bad one. Also, for injuries received from bad machinery negligently selected by him. *Hardy v. Carolina Central R'y Co.*, 76 N. C., 5. 1877.

7. — Risks arising from the negligence of the master are not included among those which the servant is presumed to assume. *Colorado Central R. R. Co. v. Ogden*, 3 Colo., 499. 1877.

8. — A railway company is held only to the exercise of ordinary care to prevent injury to its employees. *Locke v. Sioux City and Pacific R. R. Co.*, 46 Ia., 109, 1877; 16 Amer. R'y Rep., 138.

9. Rules and regulations. It is the duty of a railway company to make such regulations or provision for the safety of its employees as will afford them reasonable protection against the dangers incident to the performance of their duties. *Lake Shore and Michigan Southern R'y Co. v. Lavalley*, 36 Ohio St., 221, 1880; 5 Amer. & Eng. R. R. Cases, 549.

10. Speed of train. The fact that a train was run at an unlawful rate of speed within a city is no ground for imputing negligence to the company as between it and its employee, where there is no evidence that the injury to the latter was caused by collision with any object. *Lockwood v. Chicago and Northwestern R'y Co.*, 55 Wis., 50, 1882; 6 Amer. & Eng. R. R. Cases, 151.

11. Superior employees. A master is liable for acts of his employee done within the scope of his business and in furtherance of his interests, although done in excess, or even in disobedience, of his orders, express or implied. In employing the servant the master takes the risk of his disobedience. He is, therefore, responsible for injuries resulting from such acts, not only to outsiders, but to subordinate fellow-employees. *Chicago and Northwestern R'y Co. v. Bayfield*, 37 Mich., 205. 1877.

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b. IN THE SELECTION OF SERVANTS.

12. Degree of care required. If the injury results from the negligence or misconduct of an agent of a railroad company, liability upon the company can be imposed by showing incompetency of the agent and the want of reasonable care and prudence in his selection, or his continuance in the place after notice of his unfitness. *New Orleans, Jackson, etc., R. R. Co. v. Hughes*, 49 Miss., 258, 1873. See, also, *Howd v. Miss. Central R. R. Co.*, 50 ib., 178, 1874.

13. — Actions by employees against their employer for injuries caused by fellow-servants, based on the actual neglect of the defendant or of some representative who is held in law to be a vice-principal, and where the business requires the employment of many employees, beyond the possible constant supervision of either the employer or of such representative, there can be no negligence without the failure to use such precautions in choosing agents and guarding against perils as diligent prudence and foresight require. *Smith v. Potter*, 46 Mich., 258, 1881; 2 Amer. & Eng. R. R. Cases, 140.

14. — The same degree of care which a railway company should take in providing and maintaining its machinery must be observed in selecting and retaining its employees. Ordinary care on its part implies, as between it and its employees, not simply the degree of diligence which is customary among those intrusted with the management of railway property, but such as, having respect to the exigencies of the particular service, ought reasonably to be observed. It is such care as, in view of the consequences that may result from negligence on the part of employees, is fairly commensurate with the perils or dangers likely to be encountered. This rule applies to telegraph operators. *Wabash R'y Co. v. McDaniels*, 107 U. S., 454, 1882; 11 Amer. & Eng. R. R. Cases, 158.

15. — A common employer is not liable to his servant for injuries done to him through the negligence of his fellow-servant in the pursuit of their common business without fault on his part. He is liable when the offending servant is incompetent in skill or prudence, within his knowledge, or his rea-

sonable means of ascertainment. Ordinary care and diligence in the selection and supervision of servants or employees is not sufficient. There must be due or reasonable care and diligence proportionable to the hazard of the business. The defendant's supposition of the fitness of the engineer, as a reason for retaining him, is, as a plea to the action, subject to demurrer. *Ala. and Fla. R. R. Co. v. Waller*, 48 Ala., 459, 1872.

16. Fireman operating engine. A railway company is guilty of negligence in permitting its order, forbidding firemen to handle its engines, to be violated by its engine-drivers, and retaining them in its employ, after notice of their practice of abandoning their engines to the firemen, which practice led to the placing of an engine in the hands of a careless and incompetent fireman, whereby injury to a co-employee occurred. *Ohio and Mississippi R'y Co. v. Collarn*, 73 Ind., 261, 1881; 5 Amer. & Eng. R. R. Cases, 554.

17. — Notice to the master mechanic, whose duty it was to employ and discharge engine-drivers and firemen, of their practice in violating its orders, is notice to the company. *Id.*

18. — Where the engine-driver places his engine in the hands of a fireman incompetent to manage it, contrary to the rules of the company in whose employ he is, he is guilty of negligence. *Id.*

19. Incompetency. The master is liable for the employment of unskilled persons in labor in which skill is required. But if due care is used in the selection of employees the master is not liable for injury occurring to one employee by the negligent act of another employee. *Melville v. Missouri River, etc., R'y Co.*, 4 McCrary (U. S. C. C.), 194, 1880; *Marquette and Ontonagon R. R. Co. v. Taft*, 28 Mich., 289, 1873; 12 Amer. R'y Rep., 279.

20. — When a superintending agent is invested with power to select, employ and discharge other employees, then the act, knowledge and negligence of such agent is deemed that of the employer concerning all matters within the scope of his authority and discretion; and his negligence in failing to secure the protection of one employee against injury by another whom he knows to be negligent will be deemed the negligence of the com-

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pany. *Texas M. R. R. Co. v. Whitmore*, 58 Tex., 276, 1883; 11 Amer. & Eng. R. R. Cases, 195.

21. — A railway company is responsible to its employes for injuries resulting from the employment or retention of incompetent employes with notice of their unfitness. *Pennsylvania R. R. Co. v. Roney*, 89 Ind., 453, 1883; *Ohio and Mississippi R'y Co. v. Collarn*, 73 Ind., 261, 1881; 5 Amer. & Eng. R. R. Cases, 554; *Mobile and Montgomery R. R. Co. v. Smith*, 59 Ala., 245, 1877; *Houston and Texas Central R. R. Co. v. Myers*, 55 Tex., 110, 1881; 8 Amer. & Eng. R. R. Cases, 114; *Little Rock and Ft. Smith R. R. Co. v. Duffey*, 35 Ark., 602, 1880; 4 Amer. & Eng. R. R. Cases, 687.

22. — Employers are bound only to use such ordinary and reasonable care and precautions for the safety of their servants as the nature and dangers of the business admit of. And in operating a railway, personal presence of directors and officers all along the line being impossible, subordinates with more or less discretionary authority are indispensable; and the principal has a right to trust that an agent or officer carefully chosen will use good judgment in making his own appointments and doing his own duties, and is not bound to regard an employe as incompetent unless for some error or misconduct going to his general fitness for his place. *Michigan Central R. R. Co. v. Dolan*, 32 Mich., 510. 1875.

23. — A caller, whose business it is merely to call the conductors in a certain order when trains are ready, and if one cannot go to call the next, had notice of a special temporary incompetency of a conductor called by him; *held*, that such notice was not notice to the company. *Ib.*

24. — Where a railway company knowingly employs a conductor who is unfit for his position, it is responsible for his negligence to a co-employe; and knowledge of the superintendent, who possesses general powers of management, is knowledge in the company. *Huntingdon and Broad Top Mountain R. R. Co. v. Decker*, 82 Pa. St., 119, 1876; 15 Amer. R'y Rep., 425.

25. — A railroad corporation owes a duty to its employes to exercise due care and diligence in the selection and appointment of

their fellow-servants, and is answerable for injuries resulting from its want of care or skill in these respects; though if these have been observed, it is not responsible to one servant for injuries resulting from the negligence of his fellow-servant. Whoever exercises the power of appointing and removing employes or servants, though his grade of employment as to other matters makes him their fellow-servant, exercises a corporate function; and though he be ever so competent himself, and due care has been exercised in selecting him for that purpose, his negligence and mistakes in selecting employes are the negligence or mistakes of the corporation, for which it must answer. *Tyson v. South and North Ala. R. R. Co.*, 61 Ala., 554. 1878.

26. — In an action against a railway company by an engine-driver for an injury caused by the negligence of a freight conductor, evidence that he was put on the list of conductors some eight months before the accident, after having been employed as brakeman for a somewhat longer period, and that he had once by mistake carried a passenger by his stopping place, and had for that reason spoken disparagingly of himself to his employer, where it appears that he had nevertheless maintained a good standing, and that no fault had been found with him except by himself for this single blunder, does not make out a case of incompetence. *Michigan Central R. R. Co. v. Dolan*, 32 Mich., 510. 1875.

27. — To charge a railroad company with knowledge of incompetence of one of its section foremen, it is sufficient to prove that the road-master, whose duty it was to employ and discharge such foremen, had such knowledge. *McDermott v. Hannibal and St. Joseph R. R. Co.*, 73 Mo., 516, 1881; 2 Amer. & Eng. R. R. Cases, 85.

28. — The master is liable for negligence in the selection of his employes, but he does not warrant their competency. To recover for an injury caused by the incompetency of a co-employe, it must appear that such incompetency was known, or should have been known, to the master, if he had been in the exercise of ordinary diligence. *Blake v. Maine Central R. R. Co.*, 70 Me., 60, 1879; *Ross v. Chicago, Milwaukee and St. Paul*

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R'y Co., 8 Federal Reporter, 544; 2 McCrary (U. S. C. C.), 235, 1881.

29. — Four weeks would not be an unreasonable time under the circumstances of this case. *Ib.*; *Mobile and Montgomery R. R. Co. v. Smith*, 59 Ala., 245. 1877.

30. — Where the employe is so grossly and notoriously unfit that not to know of his unfitness is negligence, the law presumes notice to the employer. *Chicago, Rock Island and Pacific R. R. Co. v. Doyle*, 18 Kans., 58, 1877; 15 Amer. R'y Rep., 187.

31. — Where a railway company retains in its service an employe, after he has shown himself unfitted for the position, and unsafe to be intrusted in it, and this has been brought to the knowledge of a general agent of the company, charged with the duty of employing and discharging such subordinates, it is liable to respond to other employes engaged in the same service, who may sustain injury in consequence of such unfitness and incompetency. *Baulee v. New York and Harlem R. R. Co.*, 59 N. Y., 356. 1874.

32. — acquiescence in negligence. If an employe, with a full knowledge of an habitual and continued negligence of the company or his superior fellow employe in some particular matter, acquiesces therein and continues in the service of the company, without any objection or effort toward a correction of the neglect, he thereby waives his right against the company and takes the risk upon himself. *Lake Shore and Michigan Southern R'y Co. v. Knittal*, 33 Ohio St., 468. 1878.

33. — acting conductor; engine-driver. A railway company will be liable for killing an employe, notwithstanding the fact that deceased, as a head brakeman, was conducting and managing the train at the time of his death, where the company was guilty of negligence in employing an unskilful engine-driver, or in allowing such engine-driver to turn over the engine to a fireman who was not qualified to manage it, and the damage resulted from the conduct of the engine-driver or fireman. *Connor v. Chicago, Rock Island and Pacific R. R. Co.*, 59 Mo., 285, 1875; 8 Amer. R'y Rep., 417.

34. — burden of proof. Proof that a servant was incompetent does not devolve upon his master, when sued for injuries occurring

to a fellow-servant through such incompetency, the burden of proving that the master used ordinary care and prudence in the selection of the servant. *Murphy v. St. Louis and Iron Mountain R. R. Co.*, 71 Mo., 202, 1879; 2 Amer. & Eng. R. R. Cases, 83.

35. — evidence. The negligence of an employe in a particular instance cannot well be shown by testimony of his incompetency or carelessness on other occasions; but if it is also shown that the employer knew of the cases, or that they were of such a character and so frequent that he must have known of them, the employer may be chargeable with negligence in retaining such employe. *Michigan Central R. R. Co. v. Gilbert*, 46 Mich., 176, 1881; 2 Amer. & Eng. R. R. Cases, 230.

36. — In an action to recover damages for personal injuries by a brakeman, where the testimony introduced on the trial under the pleadings tended to prove that the plaintiff was injured through the negligence of the engine-driver in charge of the locomotive of the train; that the engine-driver was incompetent; that the company was guilty of negligence in employing and retaining said engineer, and thereon the jury found a verdict for the plaintiff against the company, and the trial court approved the same, and sufficient evidence was offered to sustain the verdict, — held, that the supreme court will not disturb the judgment on the evidence. *Union Pacific R'y Co. v. Young*, 19 Kans., 488, 1878; 19 Amer. R'y Rep., 52.

37. — flagging train; torpedoes. The neglect of a brakeman in not using torpedoes in flagging a train upon a foggy night was held sufficient to be submitted to the jury in connection with the circumstances attending the employment of the brakeman, upon the question of due care in his selection by the company. *Mann v. Delaware and Hudson Canal Co.*, 91 N. Y., 495. 1883.

38. — notice to employe. To an action by a servant against his employer for negligence in choosing a fellow-servant, owing to whose incompetence the plaintiff suffered an injury, it is not a sufficient answer that the plaintiff, previously to the injury, for a reasonable time in that behalf, was aware of the fellow-servant's incompetence. Negligence on the part of the plaintiff would disentitle him to recover, but knowledge of the

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incompetence of the fellow-servant is only evidence of negligence on the plaintiff's part to be submitted to the jury. *Hoey v. Dublin and Belfast Junction R'y Co.*, 5 Irish Reports (Common Law), 206. 1870.

39. — retention of incompetent servant. When, as in this case, the general fitness and capacity of a servant is involved, the prior acts and conduct of such servant on specific occasions may be given in evidence, with proof that the principal had knowledge of such acts. (Court of Appeals.) *Baulec v. N. Y. and Harlem R. R. Co.*, 48 Howard's Practice (N. Y.), 396.

40. — An individual who, by years of faithful service as an employe, has shown himself trustworthy, vigilant and competent, is not disqualified for further employment, and proved either incompetent or careless and untrustworthy, by a single mistake or act of forgetfulness and omission to exercise the highest degree of caution and presence of mind. *Id.*

41. — If a railroad corporation authorizes an officer to employ persons to maintain and repair the road and carry on its business, and he employs or retains persons unfit for the service in which they are engaged, and injury results to another employe of the corporation from this cause, it is liable. The officer, in such matters, is substituted for the corporation, and his negligence is the negligence of the corporation. *Mobile and Montgomery R. R. Co. v. Smith*, 59 Ala., 245. 1877.

42. — want of knowledge by employer. An engine used in operating a pile-driver for a railway company was defective, and the engineer who managed it was negligent and reckless in controlling his engine. Both these facts were known to a superintending agent of the company, who in person supervised the work of the pile-driver, with full power from the company to employ and discharge all other employes. A laborer while employed by the company was directed by this superintendent to perform service connected with driving a pile; while so doing, his foot was so crushed as to require amputation. The injury resulted not from the defective engine, but the negligence of the engineer; the maimed workman having no notice either that the engine

was defective or that it was being operated by a careless man. In a suit for damages on account of the injury against the company, a verdict was rendered for the plaintiff for \$7,646.11, compensatory damage. *Held*, that if the plaintiff had known, or by due care might have known, of the careless and reckless character of the engineer, and had continued the employment after knowing the risk, placing himself in a position to be injured by such carelessness of his co-employe, he could not have recovered; but being ignorant of the carelessness of the engineer, whose character was known to the supervising agent of the company, he has a right of action. *Texas M. R. Co. v. Whitmore*, 58 Tex., 276, 1888; 11 Amer. & Eng. R. R. Cases, 195.

43. Intemperance. Habitual intemperance of a conductor, under circumstances bringing knowledge thereof to his employer, is sufficient to render it liable for injury resulting therefrom. *Chicago and Alton R. R. Co. v. Sullivan*, 63 Ill., 293, 1872; *Huntingdon and Broad Top R. R. Co. v. Decker*, 84 Pa. St., 419, 1877.

44. — Where the officers of a railway company have had their attention directed to the intemperate habits of an employe, it is their duty to make frequent investigations as to the fact if they retain him in their service. The weight and importance of evidence that they knew of it is for the jury to pass upon. *Michigan Central R. R. Co. v. Gilbert*, 46 Mich., 176, 1881; 2 Amer. & Eng. R. R. Cases, 230.

45. — After proof of negligence, evidence that an employe was intemperate, and was intoxicated at the time of the injury, which intemperance was known by the agent of the company having power to employ and discharge such employes, is proper, with the view of claiming exemplary damages upon the ground of gross negligence. *Cleg-horn v. New York Central and Hudson River R. R. Co.*, 56 N. Y., 44, 1874; 6 Amer. R'y Rep., 179.

2. What constitutes an employe.

46. Hiring of employes; power of conductor. A conductor may lawfully hire an employe to take the place of a brakeman

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who is temporarily absent. *Sloan v. Central Iowa R'y Co.*, 11 Amer. & Eng. R. R. Cases (Ia.), 145, 1883.

47. Laborer cleaning snow. The track-master of a railroad company employed plaintiff with his team to clean snow from the track, and told plaintiff that he would let him know the time the trains would come. Plaintiff, while at work, was injured by a passing train of which he had no warning. *Held* (Gilbert, J., dissenting), that plaintiff was not a servant of the railroad company; that plaintiff had a right to rely upon the assurance that warning would be given and so be relieved from watching for trains; and that the track-master, as incident to his right to employ laborers for the railroad company and set them to work, was authorized to give such assurance. *Bradley v. New York Central R. R. Co.*, 3 Thompson & Cook (N. Y. Supreme Ct.), 288, 1874; affirmed, 62 N. Y., 99, 1875.

48. The fact of employment; when for the jury. Plaintiff, with others, was employed by defendant to work on a pile-driver, under the direction of a foreman of defendant, and whose duty it was to see that the pile-driver was kept in proper condition. Afterwards L. was constructing a pontoon bridge across a river, for a railway track connecting the tracks of defendant's railway on opposite sides of the river, and designed for transferring trains across the river. L. was the owner of the bridge, and building it for himself; but he had a contract with defendant by which it was to furnish him at cost the use of its pile drivers, etc., together with the service of its employes, "for the purpose of putting down and taking up, as required, the tracks used in said transfer business." Under this contract, defendant sent the pile-driver on which plaintiff was employed, and the men employed thereon, to L., "to be used by him in constructing the bridge," and plaintiff, while so employed, received the injury complained of. There was evidence tending to show that when injured he was doing L.'s work, under his direction, who might have discharged him at any time; that he looked to L. for his pay, and was paid by him; and that the company was then exercising no control over him or his work, and did not

recognize its liability to him for wages. *Held*, that upon this evidence the question whether plaintiff was the servant of the defendant or of L., when so injured, should have been submitted to the jury. *Shultz v. Chicago, Milwaukee and St. Paul R'y Co.*, 40 Wis., 589, 1876; 13 Amer. R'y Rep., 453.

49. Volunteers. A complaint against a railway company for personal injury showed that the plaintiff, who was casually passing, at the request of defendant's employe got upon a car that was moving slowly upon a switch, and applied the brakes to stop it, and, while so engaged, other employes of the defendant carelessly caused other cars to collide violently with that which the plaintiff was upon, by reason of which the injury occurred. *Held*, that the plaintiff must be regarded as a mere intermeddler, to whom the defendant owed no duty, either as employe, passenger, or traveler on an intersecting highway; and that the complaint was bad on demurrer. *Everhart v. Terre Haute and Indianapolis R. R. Co.*, 78 Ind., 292, 1881; 4 Amer. & Eng. R. R. Cases, 599.

50. — turn-table. The rule of law, that a master is not in general responsible to his servant for injury occasioned by the negligence of a fellow-servant in the course of their common employment, applies to the case of a person who is injured whilst voluntarily assisting the servants in their work. Therefore, where the servants of the defendant were turning a truck on a turn-table, and a person not in the employment of the defendant volunteered to assist them, and, whilst so engaged, other servants of the defendant negligently propelled a steam-engine and thereby caused the death of the person who so volunteered, and the servants were persons of competent skill, and the defendant did not authorize the negligence, *held*, that the defendant was not liable to an action by the personal representative of the deceased. *Degg v. Midland R'y Co.*, 1 Hurlstone & Norman (Exchequer), 773, 1857; 40 Eng. Law & Equity, 376.

3. What employments are common.

51. General rules. Those are fellow-servants who are co-working in the same common enterprise, under the same master,

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and compensated by him. Differences in wages and work do not affect the question if the general business is the same. *New Orleans, Jackson, etc., R. R. Co. v. Hughes*, 49 Miss., 258. 1873.

52. — *Prima facie* all employes on a train, including conductors, are fellow-servants; whether so or not is a question of law, but depending on the facts; and the burden is on him who seeks to show that the relation does not exist. *McGowan v. St. Louis and Iron Mountain R. R. Co.*, 61 Mo., 528. 1876. See *Rains v. Same*, 71 ib., 164. 1879.

53. — Those who are engaged in the service of the same master, in carrying on and conducting the same general business, in which the usual instrumentalities are employed, may justly be called fellow-servants. A proper test of this relation is whether the negligence of the one is likely to inflict injury on the other. *Valtez v. Ohio and Mississippi R'y Co.*, 85 Ill., 500. 1877.

54. — It is not the relative grades of different officers or employes, or the subordination of the one to the other, which determines when they are fellow-servants in relation to their common employer, but it is the nature of the duty intrusted to them. *Mobile and Montgomery R. R. Co. v. Smith*, 59 Ala., 245. 1877.

55. — The question as to who are co-employes is one of fact. *Indianapolis and St. Louis R. R. Co. v. Morganstern*, 106 Ill., 216, 1883; *Indianapolis and St. Louis R. R. Co., v. Morganstern*, 12 Amer. & Eng. R. R. Cases (Ill.), 228, 1883.

56. — minors. A complaint against a railway company, by the parent of a minor employe of the defendant, to recover for the death of such minor while in the defendant's service, alleged that such minor had been killed through the negligence of another employe of the defendant, and without any fault on the part of the decedent. *Held*, insufficient. *Sullivan v. Toledo, Wabash and Western R'y Co.*, 58 Ind., 26. 1877.

57. Superior and inferior. Where it is claimed that an employe is injured by negligence on the part of his superior officer, it must be shown affirmatively that the superior was in possession, or might by the exercise of ordinary care, prudence or intelligence, have been in possession, of knowledge

as to the dangerous character of the work, which knowledge was unknown, and by the exercise of ordinary care, prudence and intelligence on the part of the employe could not have been known, to said employe. *Thompson v. Chicago, Milwaukee and St. Paul R'y Co.*, 18 Federal Reporter, 239, 1883; 4 McCrary, 629.

58. — The fact that one employe is hired and discharged by one superior agent and another employe by another does not affect the relation of the employes to each other as fellow-servants. *Slater v. Jewett, Receiver*, 5 Amer. & Eng. R. R. Cases (N. Y.), 515, 1881; 85 N. Y., 61.

59. — A railway company is liable when its officers or agents who are invested with a controlling or superior duty in that regard are, in discharging it, guilty of negligence, from which injury to an innocent party results. *Hough v. Railway Co.*, 100 U. S., 213, 1879; 21 Amer. R'y Rep., 451.

60. — An employe will not be precluded from recovering for a personal injury sustained while in the discharge of his duties, in consequence of the act of a superior servant in another department of the service. Thus, a brakeman, who has nothing to do with the placing of a defective freight car upon the road, will not be responsible for the acts of those providing such a car, and may recover for an injury sustained by him, caused by the use of the same, without negligence on his part. *Toledo, Wabash and Western R'y Co. v. Ingraham*, 77 Ill., 309. 1875.

61. — In an action for damages by a servant against his employer for personal injuries, the employer cannot be charged with negligence, as that of himself, of one who was merely a foreman over the plaintiff, who was not engaged in a distinct department of the general service, but in the same work with the plaintiff, and was not charged with any executive duties or control over plaintiff which would constitute him the agent of the employer. *Marshall v. Schrickler*, 63 Mo., 308. 1876. See, also, *Rains v. St. Louis, Iron Mountain and Southern R'y Co.*, 71 ib., 164. 1879.

62. — obedience to orders. If the master, or another employe standing towards the servant injured in the relation of superior or

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vice-principal, orders the latter into a situation of greater danger than, in the ordinary course of his duty, he would have incurred, and he obeys and is thereby injured, the master is liable, unless the danger is so apparent that to obey would be an act of recklessness. *Miller v. Union Pacific R'y Co.*, 17 Federal Reporter, 67. 1883.

63. Various employments — brakeman and laborer. A railway company is not liable for an injury to a laborer upon a dirt train, caused by the neglect of the brakeman in setting the brakes. They are co-employees engaged in the same common employment. *Henry v. Staten Island R'y Co.*, 81 N. Y., 373, 1880; 2 Amer. & Eng. R. R. Cases, 60.

64. — A railway company is not liable to a brakeman for injuries suffered from the negligent setting up and use of a derrick by workmen engaged in widening its railway. *Holden v. Fitchburg R. R. Co.*, 129 Mass., 268, 1880; 2 Amer. & Eng. R. R. Cases, 94.

65. — brakeman and track repairer. It makes no difference that the servant whose negligence causes the injury is a submanager or foreman, of higher grade or greater authority than the plaintiff. This rule applied to track repairer and brakeman. *Ib.*

66. — car inspector and brakeman. A brakeman in coupling freight cars had his arm crushed by a loosened dead-wood on a car which had come from another line. It was the business of inspectors employed on both lines to see that cars transferred were in proper condition, and there was no claim or showing that they were not competent. *Held*, that the inspector was a co-employee of the brakeman and that the risk of error on his part was one of the risks of the brakeman's employment, and that the brakeman could not recover against the company for the injury. *Smith v. Potter*, 46 Mich., 258, 1881; 2 Amer. & Eng. R. R. Cases, 140. See, also, *Kidwell v. Houston and Great Northern R'y Co.*, 3 Woods (U. S. C. C.), 313. 1877.

67. — car inspector and switchman. A switchman and a car inspector are co-employees engaged in the same common employment. *Gibson v. Northern Central R'y Co.*, 22 Hun (N. Y.), 289. 1880.

68. — car repairer and brakeman. The plaintiff's intestate, in the employ of the defendant, in pursuance of instructions given

to him, crawled under one of a train of cars standing on what are called the repair tracks at Suspension Bridge in order to repair the same. While so engaged, an engine was attached to a portion of the train and started to draw it away from the remaining cars and up a grade which existed at that place. After it had gone a short distance a coupling pin broke and the rear portion of the train ran down the grade, struck the cars under one of which the plaintiff was working, and ran over and killed him. After the pin broke, a brakeman, who was upon the front part of the moving train, left this portion of it and sought to get upon the cars which were running down the grade, to stop them, but was unable to do so before the collision. There was no brakeman upon that portion of the train which ran back. In an action to recover damages for the death of the plaintiff's intestate, *held*, that it was negligence in the defendant not to have a sufficient number of brakemen upon the train, so as to have one upon the rear portion of the train to stop it in case such an accident should occur, and that the plaintiff was entitled to recover. *Besel v. New York Central and Hudson River R. R. Co.*, 9 Hun (N. Y.), 457. 1876.

69. — On appeal held that the head brakeman and yard-master were co-employees of the deceased, engaged in the same general employment, and that defendant was not liable. *Same v. Same*, 70 N. Y., 171. 1877.

70. — carpenter and porter. The rule which exempts a master from liability to a servant for injury caused by the negligence of a fellow-servant applies in cases where, although the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts that it must be included in the risks which have to be considered in his wages. Thus, whenever an employment in the service of a railway company is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such

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employment, and within the rule. The plaintiff was in the employment of a railway company as a carpenter, to do any carpenter's work for the general purposes of the company. He was standing on a scaffolding at work on a shed close to the line of railway, and some porters in the service of the company carelessly shifted an engine on a turn-table so that it struck a ladder supporting the scaffold, by which means the plaintiff was thrown down and injured. *Held*, on the above principle, that the company was not liable. *Morgan v. Vale of Neath R'y Co.*, Law Reports, 1 Queen's Bench Cases, 149, 1865; *Same v. Same*, 5 Best & Smith, 570; 117 E. C. L., 568, 1864; *Same Case*, *ib.*, 786.

71. — conductor and brakemen. Conductors and brakemen are co-employees whose acts are not independent in such a sense as to separate them from each other in the line of dangers. *Smith v. Potter*, 46 Mich., 258, 1891; 2 Amer. & Eng. R. R. Cases, 140.

72. — conductor and laborer. The plaintiff was employed by a railway company as a laborer to assist in loading what is called a "pick-up train," with materials left by plate-layers and others upon the line. One of the terms of his employment was, that he should be carried by the train from Birmingham (where he resided, and whence the train started) to the place at which his work for the day was to be done, and be brought back to Birmingham at the end of each day. As he was returning to Birmingham, after his day's work was done, the train in which the plaintiff was, through the negligence of the guard who had charge of it, came into collision with another train, and the plaintiff was injured. *Held*, that inasmuch as the plaintiff was being carried, not as a passenger, but in the course of his contract of service, there was nothing to take the case out of the ordinary rule which exempts a master from responsibility for an injury to a servant through the negligence of a fellow-servant, when both are acting in pursuance of a common employment. *Tunney v. Midland R'y Co.*, Law Reports, 1 Common Pleas Cases, 291. 1866.

73. — conductor and track-layer. A railway company is not liable for injury to the guard of a train, occasioned by the negli-

gence of the "ganger" of the plate-layers in keeping the permanent way in proper repair and condition; the two servants being engaged in one common object, viz., the safe conduct of the passengers on their journey. *Waller v. South Eastern R'y Co.*, 2 Hurlstone & Coltman (Exchequer), 102. 1863.

74. — A trackman, employed to repair a railroad track, and an engineer employed upon an engine belonging to the same company, are not fellow-servants, engaged in a common employment. There is a liability on the part of the railroad company for injuries received by one through the negligence of another. *Chicago and Northwestern R'y Co., v. Bliss*, 6 Bradwell (Ill.), 411. 1880.

75. — engine-driver and car-repairer. Where an employe sustained personal injury while engaged in repairing cars, through the negligence of a fellow-servant, a driver of a switch engine, in mistaking a signal while pushing cars, it was held that the plaintiff could not recover against the company, the common master, he and the fellow-servant being in the same line of employment. *Valtez v. Ohio and Mississippi R'y Co.*, 85 Ill., 500. 1877.

76. — engine-driver and fireman. A railway company is not liable to an employe for an injury caused by the negligence of a co-employe; as where the fireman on a freight train was hurt in consequence of the train being ditched through the engine-driver's neglect to obey signals. *Henry v. Lake Shore and Michigan Southern R'y Co.*, 49 Mich., 495, 1882; 8 Amer. & Eng. R. R. Cases, 110.

77. — engine-driver and laborer. Where a railway company, engaged in ballasting its road, employed a hand to assist in loading and unloading a gravel train, and it was necessary for him to ride on the train from the gravel pit to the place of unloading — the train being run under the direction of a conductor, and said hand having nothing to do with its management, — *held*, that such hand, while riding on the train, was a mere employe, and not a passenger; that he and the engine-driver of the train were engaged in a common service, and that, as he was not under the control or subject to the orders of the engine-driver, the company cannot be held liable for negligence of the engine-driver,

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resulting in his death, if it was not guilty of negligence in the employment of the engine-driver. *Kumler v. Junction R. R. Co.*, 33 Ohio St., 150. 1877.

78. — engine-driver and telegraph operator. A telegraph operator and engine-driver are co-employes. *Dana v. New York Central and Hudson River R. R. Co.*, 23 Hun (N. Y.), 473. 1881.

79. — engine-drivers on different engines. A., an engine-driver in the employ of a railway company, was in charge of a train proceeding southward. Several trains being not on time, the train dispatcher at a point to the north ordered train No. 6, southward bound, to "get orders at Grand Junction." On arriving at Grand Junction the engine-driver of No. 6 found no orders awaiting him and so proceeded to the south. While so doing he collided with the train upon which A. was engine-driver, and A. was in consequence killed. Suit being brought by A.'s widow against the company to recover damages for her husband's death, *held*, that the same had been occasioned by the negligence of a co-employe of deceased, and that therefore plaintiff was not entitled to recover. *Chicago, St. Louis and New Orleans R. R. Co. v. Doyle*, 8 Amer. & Eng. R. R. Cases (Miss.), 171. 1882.

80. — engine-driver and road-master. Through the negligence of a competent road-master of a railway company a switch was misplaced, and a locomotive and train were turned upon a side track, the sleepers of which were rotten; the engine and train were thrown from the track, and the engine-driver and fireman were injured. *Held*, that they were co-employes with the road-master and could not maintain an action against the corporation. *Walker v. Boston and Maine R. R. Co.*, 1 Amer. & Eng. R. R. Cases (Mass.), 141. 1879.

81. — fireman and brakeman. A boy about seventeen years old was employed as brakeman by the engine-driver of an ore train. The engine-driver had power to employ and discharge brakemen, and the boy was capable and experienced in the business. The engine-driver directed the fireman to back the engine upon a side track to the train, and told the brakeman to attend a switch. He himself went to attend another

switch farther on. While this was being done the bell and whistle of a train on the main track near by were both sounding. The first switch was passed, and the engine-driver was about throwing the second when he heard an outcry and saw the brakeman under the engine. The brakeman died in a few minutes from his injuries, and his administrator sued the company for the injury. It was proved that the brakeman knew the train was about moving back, and that there was room enough for him to perform his duties. *Held*, that he needed no farther warning of his danger, and that the accident was due to his own neglect; also, that if the failure to sound the bell and whistle was negligence, it was the fault of the fireman, who was a co-employe of the brakeman, and for whose negligence towards a fellow-servant the company would not be liable. *Greenwald v. Marquette, Houghton and Ontonagon R. R. Co.*, 49 Mich., 197, 1882; 8 Amer. & Eng. R. R. Cases, 133.

82. — road-master and section men. A master is not liable to one servant for injuries caused by the negligence of a co-servant in the same common employment. That the negligent servant is superior in authority, or an overseer of the one injured, does not take the case out of this rule. A road-master and section man are co-employes. *Brown v. Winona and St. Peter R. R. Co.*, 27 Minn., 162. 1880.

83. — engine-driver and brakeman. Where an engine-driver and brakeman were employed in operating the same train, and there was no evidence to prove that the brakeman was placed in a position of subordination to the engine-driver, other than what may be implied from the rules of the company, requiring the driver to give certain specified signals as "a notice" to apply or loose the brakes, and requiring the brakeman to manage the brakes "according to circumstances and the signals of the engine-man," and placing the brakeman, while on the train, in subordination to the conductor, *held*, that they were servants of the company engaged in a common service; that the relation of superior and subordinate did not exist between them; and that, therefore, the company was not responsible to the brakeman for an injury occasioned by the

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negligence of the engine-driver. *Pittsburgh, Fort Wayne and Chicago R'y Co. v. Lewis*, 33 Ohio St., 196, 1877; *Railway Co. v. Ranney*, 37 Ohio St., 665, 1882.

84. — An engine-driver and brakeman are co-employees, engaged in a common service. A railway company is not responsible to a brakeman for an injury occasioned by the negligence of the engine-driver. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Ranney*, 5 Amer. & Eng. R. R. Cases (Ohio), 533, 1882; *Summerhays v. Kansas Pacific R'y Co.*, 2 Colo., 484, 1875; 20 Amer. R'y Rep., 359; *Nashville, Chattanooga, etc., R. R. Co. v. Wheles*, 10 Lea (Tenn.), 741, 1882; 4 Amer. & Eng. R. R. Cases, 633; *Illinois Central R. Co. v. Keen*, 72 Ill., 512, 1874.

85. — engine-driver and switchman. Where the injured party was a switchman, and one of the alleged causes of the accident was excessive speed of an engine on which the plaintiff was riding in the discharge of his duties, the engine-driver and switchman are co-employees engaged in a common enterprise, and if the excessive speed be the sole cause of the accident the plaintiff cannot recover, where it appeared there was due care in the selection of the engine-driver. *Smith v. Memphis and L. R. R. Co.*, 18 Federal Reporter, 304. 1883.

86. — general traffic manager and section man. The general traffic manager of a railway company and a "miles-man" in its employment on the railway are fellow-servants, so that the company is not responsible for the death of the latter through the negligence of the former. *Conway v. Belfast and Northern Counties R'y Co.*, 9 Irish Reports (Common Law), 498. 1875.

87. — inspector and watchman. An inspector and watchman are engaged in the same general employment, and the employer of the watchman is not responsible for an injury caused by the negligence of the inspector. *McFarlane v. Caledonian R'y Co.*, 6 Scotch Session Cases (3d series), 102. 1867.

88. — machinists and boiler makers. Machinists and boiler makers in a railway repair shop are fellow-servants, and their employer is not liable for injury resulting to a machinist from the negligence of one of said boiler makers. *Murphy v. Boston and*

Albany R. R. Co., 88 N. Y. 146, 1882; 8 Amer. & Eng. R. R. Cases, 510.

89. — section boss and laborers. A "section boss" is not a vice-principal, representing the railway company, as against a section hand. They are co-employees engaged in the same general employment. *Barringer v. Delaware and Hudson Canal Co.*, 19 Hun (N. Y.), 216, 1879; *Chicago and Tomah R. R. Co. v. Simmons*, 11 Bradwell (Ill.), 147, 1882.

90. — A "road-master" of a railroad company, having superintendence of the "road department," is not a vice-principal in such a sense as to render the company liable for his negligence to a laborer, when he assumes to act as a mere "boss" or "foreman of a gang." *Hoke v. St. Louis, Keokuk and Northern R'y Co.*, 11 Mo. App., 575. 1882.

91. — section men and train men. When there is one general object, in attaining which an employe is exposed to risk, if he is injured by the negligence of another employe while engaged in furthering the same object, he is not entitled to recover from the master; and it does not matter that they were not employed in the same kind of work. This rule applies to section men on a hand-car, and train men. *Blake v. Maine Central R. R. Co.*, 70 Me., 60. 1879.

92. — An employe of a railway company engaged in repairing the track, and one employed in running trains thereon, are engaged in the same general undertaking; and, where the former is injured by the negligence of the latter, the company is not liable for such injury. *Gormley v. Ohio and Mississippi R'y Co.*, 72 Ind., 31, 1880; 5 Amer. & Eng. R. R. Cases, 581.

93. — shovelers and train men. The engine-driver, brakemen and shovelers employed on a construction train are all co-servants, engaged in the same branch of service, and a shoveler who is injured through the negligence of the engine-driver or brakemen cannot recover from their common employer for such injury, if the employer has used due diligence in their selection. *St. Louis and Southeastern R'y Co. v. Britz*, 72 Ill., 256. 1874.

94. — signalman and laborer. Plaintiff's testator, who was the employe of defendant, was killed by an accident on one of defend-

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ant's trains, upon which he was going to his work. *Held*, that an omission by a signalman of defendant to place a signal, which omission caused the accident, it not being shown that any of defendant's employes were unskilful or incompetent, would be the negligence of a co-employee of the intestate, and give plaintiff no right to recover against defendant. *Moran v. New York Central and Hudson River R. R. Co.*, 3 Thompson & Cook (N. Y. Supreme Ct.), 770. 1874.

95. — steam shovelers. The engineer in charge of a steam-shovel and a workman engaged with the said machine are co-employees, and if the latter is injured by reason of negligence on the part of the former, there can be no recovery. *Thompson v. Chicago, Milwaukee and St. Paul R'y Co.*, 18 Federal Reporter, 239, 1883; 4 McCrary, 629.

96. — superintendent of track-laying and labor. The plaintiff, a laborer, was employed to fill trucks with ballast at a pit and to move them, when filled, along temporarily laid rails, on to the permanent rails, and there attach them to an engine. Whilst so employed one of the temporary rails, in consequence of its having been insecurely placed through the negligence of another servant of the company, whose duty it was to superintend the laying of them, springing up from the pressure of the loaded truck, struck the plaintiff and severely injured him. *Held*, that the injury, having been occasioned by the negligence of a fellow-workman of the plaintiff whilst both were employed in a common occupation, the company was not responsible, in the absence of evidence that it had knowingly intrusted the duty of laying the rails to an incompetent person. *Lovegrove v. London, Brighton and South Coast R'y Co.*, 16 Common Bench (N. S.), 669; 111 E. C. L., 668. 1864.

97. — surveyor and conductor. The plaintiff was an employe of the defendant in the capacity of surveyor, and was injured through the negligence of the conductor on one of defendant's trains, on which he was being transported, free of charge, from Medina, where he lived, to Jordan, where he was at work. *Held*, that there being no evidence that the conductor was an incompetent person for his place, or of neglect on

defendant's part in employing him, the plaintiff could not recover against the defendant damages for his injuries; that the plaintiff was a co-employee with the conductor, within the rule exempting the master from responsibility to one servant for injury sustained by him arising from the negligence of another. *Ross v. New York Central and Hudson River R. R. Co.*, 5 Hun (N. Y.), 488, 1875; affirmed, 74 N. Y., 617, 1878.

98. — train dispatcher and brakeman. Injury to a brakeman upon a train *en route*, by reason of a collision with another train moving in an opposite direction, and which was the result of the negligence of the train dispatcher, whose duty it is to control the movement of trains, affords no right of action against the railroad company for the injury. The brakeman and train dispatcher, though many miles apart, and with distinct duties, are nevertheless co-servants in the accomplishment of the same general object. *Robertson v. Terre Haute and Indianapolis R. R. Co.*, 78 Ind., 77, 1881; 8 Amer. & Eng. R. R. Cases, 175.

99. — train men on different trains. A railway company is not liable for damages, at the suit of one of its employes, for injuries received in a collision between two trains, when such collision was caused by gross negligence on the part of the officers in charge of one of the trains. *Bull v. Mobile and Montgomery R'y Co.*, 67 Ala., 206. 1880.

100. — wrecking train. One of the defendant's coal cars having been derailed at its yards in Buffalo, defendant's division superintendent directed the person in charge of the car shops and yards to send a wrecking train with the requisite machinery and seven men, with a man in charge, to replace the car. In pursuance of this order a wrecking train was sent under the charge of one S., who was employed by the defendant to superintend the removal of wrecks, under the orders of the person in charge of the shops and yards. While the car was being replaced the plaintiff's intestate was killed by the upsetting of the car, which was caused by an improper and negligent order given by S. *Held*, that S. was decedent's co-employee and that the defendant was not liable. *Beilfus v. New York, Lake Erie and*

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Western R'y Co., 29 Hun (N. Y.), 556, 1883.

101. — yard-man and yard-master. McC., plaintiff's intestate, was employed in defendant's yard at H. P. to assist the yard-master, L.; he was hired by L., and was under his control and supervision. While McC. was engaged by the direction of L. in attaching a damaged car standing on a track in the yard to another car, L. negligently signaled to an engine-driver, whose train stood upon the track, to back the train, which he did without signal or warning, and in consequence McC. was crushed between the cars, receiving injuries causing his death. In a suit for damages, *held*, that the yard-master was to be deemed a fellow-servant with the deceased as to all acts done in the range of the common employment, except those done in the performance of some duty which defendant owed to its servant; that the act in question was not one of that character; and that, therefore, defendant was not liable. *McCosker v. Long Island R. R. Co.*, 84 N. Y., 77, 1881; 5 Amer. & Eng. R. R. Cases, 564; reversing *Same v. Same*, 21 Hun (N. Y.), 500, 1880.

102. Voluntary act of employe. An employe cannot recover for an injury incurred in assisting a fellow-servant, either voluntarily or on the request of such servant. *Osborne v. Knox and Lincoln R. R. Co.*, 68 Me., 49, 1877; 19 Amer. R'y Rep., 7.

103. — A person who voluntarily assists another employe in a particular emergency cannot recover from the master for an injury caused by the negligence or misconduct of such servant; he can impose no greater duty on the master than a hired servant. *Ib.*

4. Employments not common.

(See subdivision immediately preceding.)

104. Separate department of service. The rule *respondet superior* applies where an employe of a railroad company is injured by reason of negligence in the discharge of duty of another employe of the same company, engaged in a separate and distinct department, having no immediate or necessary connection with that in which the injured employe is engaged. *Nashville and Chatta-*

nooga R. R. Co. v. Carroll, 6 Heiskell (Tenn.), 347; 12 Amer. R'y Rep., 20, 1871; *Nashville and Decatur R. R. Co. v. Jones*, 9 Heiskell (Tenn.), 27, 1871.

105. Superior and inferior. Fellow-servants are such as are employed in the same service, and subject to the same general control; but if a railroad company sees fit to invest one of its servants with control or superior authority over another with respect to any particular part of its business, the two are not, with respect to such business, fellow-servants, one being subordinate to the other. *Gravelle v. Minneapolis and St. Louis R'y Co.*, 11 Federal Reporter, 569; 3 McCrary (U. S. C. C.), 352, 1882; *Gravelle v. Minneapolis and St. Louis R'y Co.*, 10 Federal Reporter, 711, 1882; *Cowles v. Richmond and Danville R. R. Co.*, 84 N. C., 309, 1881; 2 Amer. & Eng. R. R. Cases, 90.

106. — A subordinate in the same service can recover against the employer for the neglect of other employes who had the power to control and direct him, or who were his superiors with reference to the discharge of the duties pertaining to the work, or over whose actions he had no control or the right to advise. *Louisville, Cincinnati and Lexington R. R. Co. v. Cavens*, 9 Bush (Ky.), 559, 1873.

107. — The rule of the common law exempting the master from liability for an injury to an employe, caused by the neglect of a co-employe, has been accepted in Tennessee, but has been held inapplicable where the injured party has sustained his injury by the fault of his superior. The converse of this rule is denied; and where a superior is injured by the neglect of an inferior, as where the conductor is injured by the engineer, he cannot recover. *Ragsdale v. Memphis and Charleston R. R. Co.*, 3 Baxter (Tenn.), 426, 1874; 20 Amer. R'y Rep., 182.

108. — giant powder. In February, 1883, the Northern Pacific R'y Co. was engaged in building its road through western Montana, and had many gangs of men, numbering not less than fifty each, at work on the line of the route, at from three to five miles apart, under the control and direction of foremen, with the power to employ and discharge, subject themselves to the control of

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a general superintendent and assistant, who passed along the line and inspected the camps at certain periods. Some of these gangs used giant powder for blasting the rocks and frozen earth, and in such case the foreman was charged specially with the duty of handling the powder and thawing it when frozen. The general superintendent was aware of the danger of thawing powder before a fire, and had given general notice not to do it, and provided a safe appliance, called a "heater," for the purpose, subject to the requisition of the local foreman. The plaintiff was employed as a laborer in one of these gangs, where powder was always thawed without a "heater," before the fire, and while assisting in so thawing powder by direction of the local foreman, was injured by its explosion. *Held*, that the local foreman, so far, stood in the place of the defendant, and that the neglect of the former to obtain and use the proper appliance for thawing powder, and his directing the plaintiff to assist in thawing powder without the security of such appliance, were wrongful acts for which the defendant was responsible to the plaintiff. *Gilmore v. Northern Pacific R'y Co.*, 18 Federal Reporter, 866. 1883.

109. — **station master.** A station master, to whom was given the charge and management of all the freight trains within his division, and on whom the special duty devolved of keeping the track clear of obstructions, while engaged in attending to his own personal affairs, was crossing the railway less than eighty rods from the public highway, and was run over and injured by one of the trains. The engine-driver failed to ring the bell or sound the whistle (Wagn. Stat., § 310, § 38). *Held*, that the station master was not merely an employe of the company, but, being its agent, having superintendence of the freight trains, he could not hold the company responsible for the negligence of the engine-driver in failing to sound the bell or whistle; that, if he was not at the time acting as such agent, he was failing in his duty, and could not make his negligence the foundation of a recovery. *Evans v. Atlantic and Pacific R. R. Co.*, 62 Mo., 49. 1876.

110. **Union depots; employes of different companies.** The plaintiff was a porter in the employment of the L. and N. W. R. Co.

at its Manchester station. The defendant also used that station, and its servants, whilst within the station, were subject to the rules of the L. and N. W. R. Co., and to the control of their station master. The plaintiff, whilst engaged in his usual employment in the station, was injured by the negligence of the defendant's engine-driver, in shunting a train without signal. *Held*, that the plaintiff and the defendant's engine-driver were not fellow-servants. *Warburton v. Great Western R'y Co.*, Law Reports, 2 Exchequer Cases, 30. 1866.

111. **Various employments—car inspector and brakeman.** The negligence of the car inspector in failing to detect unsafe rolling stock, in case of injury to a brakeman resulting therefrom, is to be construed as the negligence of the company, and not as that of a fellow-servant. *King v. Ohio and Mississippi R'y Co.*, 11 Bissell (U. S. C. C.), 362; 14 Federal Reporter, 277, 1882; 8 Amer. & Eng. R. R. Cases, 119; *Brann v. Chicago, Rock Island and Pacific R. R. Co.*, 53 Ia., 595, 1880; 21 Amer. R'y Rep., 184.

112. — **engine-driver and conductor.** Conductors and engineers are not fellow-servants, so far as regards the performance of the duties therein specified, under the following order: "Conductors must, in all cases, while running by telegraph or special orders, show the same to the engineer of their train before leaving stations where the orders are received. The engineer must read and understand the order before leaving the station." *Ross v. Chicago, Milwaukee and St. Paul R'y Co.*, 8 Federal Reporter, 544; 2 McCrary (U. S. C. C.), 235. 1881.

113. — **engine-driver and signalman.** At L. were two stations, one belonging to the G. Railway Company and the other to the defendant. These abutted one upon the other, and were approached by parallel lines of rails; the entrance and exit from the stations were governed by signals and points worked by signalmen, whose duty was common to both stations. S. was one of these signalmen; he was engaged and paid by the G. Railway Company, and wore their uniform; but his duty was to attend to the defendant's trains as well as to those of the G. Railway Company. An engine of the defendant's was upon the lines of the G. Railway

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Company, and S. signaled to the driver to go on to the defendant's lines; the driver obeyed, and, having reversed the engine, negligently ran over and killed S., who was then looking at a train coming in another direction. *Held*, reversing the judgment of the exchequer division, that S. and the driver of the engine were not engaged in a common employment, and that the defendant was liable to compensate the widow of S. for his death. *Swainson v. Northeastern R'y Co.*, Law Reports, 3 Exchequer Division, 341, 1878; 31 Eng. (Moak), 277.

114. — engine-driver and switch-tender. Persons engaged by a railroad company in loading its cars with freight, and a person employed by the same company as a switch-tender, are not engaged in a common employment. But an engine-driver running a switch-engine, and a switch-tender, are engaged in common employment. *Chicago, Rock Island and Pacific R. R. Co. v. Henry*, 7 Bradwell (Ill.), 322. 1880.

115. — foreman and workhand in repair yard. A foreman was put in charge of a number of hands, whose business it was to repair cars while standing on the track, in the company's yard, in which trains were accustomed to be made up; it was also the duty of the foreman to work with the hands. While the foreman and a hand were engaged in repairing a car, and the latter was at work under the car by the order of the foreman, he was injured by the striking of the car on which he was working by another car moving on the same track. *Held*, that the hand was the subordinate of the foreman, in respect to the work in which he was engaged at the time he was injured; that it was the duty of the foreman, in putting the hand to work under the car, to use reasonable care to protect him, while thus engaged, from the danger arising from the switching of cars and the making up of trains on the same track; and for an injury resulting from the want of such care, the company is liable. *Lake Shore and Michigan Southern R'y Co. v. Lavalley*, 36 Ohio St., 221, 1880; 5 Amer. & Eng. R. R. Cases, 549.

116. — gravel-train men and superior officer. Where it appeared that the plaintiff was employed as a train hand and was injured while engaged in digging gravel under

the direction of one L., who was engineer, superintendent, conductor and master of the gravel and material train of defendant, whose business it was to employ and discharge hands connected with the train, and who had entire charge of this branch of the business over a section of defendant's road, it was held that the plaintiff and L. were not mere fellow-servants, and that plaintiff was entitled to recover of the defendant for an injury sustained on account of the negligence of L. *Dobbin v. Richmond and Danville R. R. Co.*, 81 N. C., 446. 1879.

117. — section boss and laborer. The office of "section boss" in relation to his subordinates creates the relation of master and servant. The latter have no authority to control or resist the former in his allotted sphere of service. *Louisville and Nashville R. R. Co. v. Bowler*, 9 Heiskell (Tenn.), 866, 1872; 20 Amer. R'y Rep., 65.

118. — In the employment and control of his subordinates, a "section boss" acts as the agent of the common superior. When, by reason of his wrongful act or negligence, his subordinate is injured, the rule *respondet superior* applies, and the corporation is liable for damages. *Ib.*

119. — section hand and brakemen. Where, immediately preceding the injury complained of, section hands employed by a railroad company dig away the earth around a switch-rod so as to leave a cavity, in consequence of which a brakeman, in the discharge of his duty in uncoupling cars, is injured, these section hands will not be considered fellow-servants of the brakeman in such a sense as will relieve the company from liability for the injury, but their act will be taken to be the act of the company. *Vautrain v. St. Louis, Iron Mountain and Southern R'y Co.*, 8 Mo. App., 538. 1880.

120. — section hand and engine-driver. Where a servant of a railway company, employed to work on the track, was run over and injured by an engine through the carelessness of the engine-driver of the company, it was held that the servant injured was not engaged in the same line of employment as the engineer, and might recover of the company for the injury the same as any other person not in its service, if he acted with

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prudence on his part. *Pittsburgh, Ft. Wayne and Chicago R'y Co. v. Powers*, 74 Ill., 341. 1874.

121. — section hand and fireman. A section hand, while engaged in duty, and standing some five or six feet from the rail of the track to avoid a passing train, was struck on the head by a large lump of coal, which was carelessly cast by the fireman of the train from the tender, from the effects of which the person injured died. *Held*, that the company was liable to his personal representative for damages, under the statute. A track repairer and a fireman on a passing train are not regarded as fellow-servants, within the rule. *Chicago and Northwestern R. R. Co. v. Moranda*, 93 Ill., 302. 1879.

122. — track repairers and train men. As between employes of a railway company, whose duty it is to repair its track while trains are using the same, and the company and its representatives, who are engaged in running its trains over the same where the track men are so employed, it is the duty of the latter, so far as is practicable, to adopt such precautions as will guard its employes on the track from dangers incident to their employment. *Dick v. Railroad Co.*, 38 Ohio St., 389, 1882; 8 Amer. & Eng. R. R. Cases, 101.

123. — Where the liability of a railway company for injury to one of its track repairers, by the careless manner of running a train, is in issue, evidence tending to show that the train causing the injury was in charge of a conductor and engineer, and was, at the time, engaged in a race, at a high and dangerous rate of speed, with a train on a parallel road, over several public crossings, on a curve on which the track repairer was at work, in a city limits, and where trains should be run with care corresponding with the circumstances, without sound of bell or whistle, or slack of speed, or any other precaution to warn the men engaged at work on the track of approaching danger, is competent to go to the jury, and should be submitted to it under proper instructions upon the issue joined; and it was error in the court to grant a non-suit, on the assumption that the negligence and carelessness causing the injury was that of a co-

employe in the same service, and not that of the company. *Ib.*

124. — yard-master and driller. Where a yard-master had power to hire and discharge drillers, and a driller was injured through his neglect, *held*, that they were not co-employes engaged in the same general employment, and that the corporation was liable for the injury. *McCosker v. Long Island R. R. Co.*, 59 Howard's Practice (N. Y.), 258. 1880. See, also, *Murphy v. Boston and Albany R. R. Co.*, 59 ib., 197, 1880; *McCosker v. Long Island R. R. Co.*, 28 Hun (N. Y.), 500, 1880.

5. Common law rule.

125. Neglect of co-employe. A railway company is not responsible to an employe for an injury received through the neglect of a co-employe engaged in the same general employment. *Houston and Great Northern R. R. Co. v. Miller*, 51 Tex., 270, 1879; *Robinson v. Houston and Texas Central R'y Co.*, 46 Tex., 540, 1877; 13 Amer. R'y Rep., 303; *Dobbin v. Richmond and Danville R. R. Co.*, 81 N. C., 446, 1879; *Hardy v. Carolina Central R'y Co.*, 76 N. C., 5, 1877; *Totten v. Pennsylvania R. R. Co.*, 11 Federal Reporter, 564, 1882; *Hogan v. Central Pacific R. R. Co.*, 49 Cal., 128, 1874; *Hutchinson v. York, Newcastle and Berwick R'y Co.*, 5 Welsby, Hurlstone & Gordon (Exchequer), 343, 1850; 6 Eng. R. R. & Canal Cases, 580; *Brabbits v. Chicago and Northwestern R'y Co.*, 38 Wis., 289, 1875; *Michigan Central R. R. Co. v. Dolan*, 32 Mich., 510, 1875.

126. — Negligence between co-employes of a railway company is not, as between one of the employes and the company, negligence of the company. *Kansas Pacific R. R. Co. v. Salmon*, 11 Kans., 83. 1878.

127. — The general rule exempting the common master, whether a natural person or a corporation, from liability to a servant for injuries caused by the negligence of a fellow-servant, recognized and considered. *Hough v. Railway Co.*, 100 U. S., 213, 1879; 21 Amer. R'y Rep., 451.

128. — A master is not relieved from responsibility in all cases when a servant is injured by the negligence of a fellow-servant, but only where the servants are engaged in

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the same common employment; that is, in the same department of duty, not in departments essentially *foreign* to each other. *King v. Ohio, etc., R. R. Co.*, 14 Federal Reporter, 277. 1882.

129. — minor. Where a minor, while in the service of a railway company, under an express contract, receives an injury through the negligence of a co-employee in the same line of duty, the company will not be liable to him for such injury. By entering into the employment, he takes upon himself the natural and ordinary risks incident to the service in which he is engaged, among which is the carelessness of his fellow-servants. *Gartland v. Toledo, Wabash and Western R. R. Co.*, 67 Ill., 498. 1873.

130. — rule in federal courts. The courts of Great Britain and America have established the general doctrine of the non-liability of the employer for an injury of one servant caused by the negligence of another servant in the same common employment; and this doctrine of general jurisprudence, as it involves no *federal* question, is no more open to judicial denial in the federal courts than in the state courts, or the ordinary common law tribunals. *Dillon v. Union Pacific R. R. Co.*, 3 Dillon (U. S. C. C.), 319. 1874.

II. DEFECTIVE ROADWAY, MACHINERY AND MATERIALS.

1. Roadway.

131. Bridge. The defendant would be chargeable with negligence if any of its employees, whose duty it was to observe the condition of the bridge, to keep it in repair, had actual or implied notice of the defects therein, or in the exercise of reasonable diligence would have known of them, and failed to make the necessary repairs. *Locke v. Sioux City and Pacific R. R. Co.*, 46 Ia., 109, 1877; 16 Amer. R'y Rep., 138.

132. — Whether, under instructions of the superintendent to the conductor, which had been given in evidence, it was the duty of the conductor to stop the train before attempting to cross the bridge, was held to be a question of fact for the jury. *Id.*

133. — Where a railway bridge was a trestle-work, constructed of timbers fifteen years before an accident thereon, resulting in the loss of life, and many of the timbers were rotten at the heart, and some of the tenons rotted off, and the company had been notified of its unsafe condition before, and had only made some slight repairs at one end only, and had made no thorough examination and repairs, it was held that it was negligent to such a degree as to merit the severest censure. Actual knowledge of the defects is not necessary, but it is sufficient if the company might have been informed, by the use of such diligence as the law requires. *Toledo, Wabash and Western R'y Co. v. Conroy*, 68 Ill., 560. 1873.

134. — Actual knowledge of defects is not necessary to render a railway company liable; it is enough if the company might, by the use of such diligence, have been informed; but when it did not know and could not have learned that the timbers were defective and unsafe, by such diligence, it cannot be held responsible. *Toledo, Peoria and Warsaw R'y Co. v. Conroy*, 61 Ill., 162, 1871; 12 Amer. R'y Rep., 431.

135. — An engine-driver having been employed by a railway company to drive a train, on part of the line of another company over which it had running powers and with which he was not familiar, was accompanied by a pilot-man to assist him on his first trip. The train was stopped by signals outside a station on a dark night when sleet was falling, and the engine-driver walked forward on the line without a lamp to the signal box in order to ask questions as to the working of the line. He fell over a bridge on the line and died from the injuries he received. In an action of damages by his widow against the railway company on whose line the accident happened, *held*, that the company was not bound to fence the bridge, and that the accident happened through the engine-driver's own rashness. *Clark v. Caledonian R'y Co.*, 5 Scotch Session Cases (4th series), 273. 1877.

136. — evidence. In an action against a railway company for damages on account of the death of the plaintiff's intestate, caused by the falling of a train of defendant's cars, on which he was employed, through a

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bridge, one of plaintiff's witnesses offered a piece of timber sawed from the piling of a part of the bridge which did not go down at the time of the accident. *Held*, that the evidence was not admissible to show that the timbers of the bridge which caused the accident were decayed and unsound, but that it was admissible to show that the caps or timbers resting on the piling were not bolted thereto. *Mann v. Sioux City and Pacific R. R. Co.*, 46 Ia., 637, 1877; 16 Amer. R'y Rep., 146.

137. Derrick. If a railway company suffers a derrick, not actually in use for the purposes of its business, to remain for an unreasonable length of time, on land within its control, in such a position near its track as to be in danger of being thrown down by ordinary natural causes so as to interfere with the safe operation of its trains, the company is liable to a brakeman for injuries resulting from its own neglect in not removing the derrick, or in not guarding against the danger of allowing it to remain, even if it was put up by other servants of the company, and independently of the question of their negligence. *Holden v. Fitchburg R. R. Co.*, 129 Mass., 268, 1880; 2 Amer. & Eng. R. R. Cases, 94.

138. Ditches. Whether it is negligence to leave an open ditch under a railway track, where it may be stepped into by a brakeman, is a question of fact for the jury. *Houston and Great Northern R. R. Co. v. Randall*, 50 Tex., 254. 1878.

139. — Where plaintiff's intestate was employed by defendant as switchman and car-coupler, working in a freight-yard drained by a system of small open ditches, running across the track between the ties, which were in existence when he entered the employment, and remained without any change or alteration, every one of which was well known to him, and while engaged in coupling cars he stepped into one of these sluices, fell under the cars and was killed, *neld*, that defendant was not liable. *De Forest v. Jewett, Receiver, etc.*, 8 Amer. & Eng. R. R. Cases, 495; 88 N. Y., 264. 1882.

140. Evidence. It is error to admit evidence of other defects at other places on the road, there being nothing in the case tending to show that such other defects in any

way contributed to the injury complained of, or were the result of a cause presumptively operating at the place of the casualty, or which might have caused the defect which produced the injury. *Morse v. Minneapolis and St. Louis R'y Co.*, 30 Minn., 465. 1883.

141. — D., plaintiff's intestate, was an engine-driver in the service of defendant, who was operating a railway; while running a train D.'s engine was derailed, and he received injuries causing his death. In an action to recover damages, plaintiff's evidence tended to show that the track was defective at the place of derailment; the evidence upon this point was conflicting. Defendant proved, without dispute, that the flange of one of the wheels of the engine was broken at the time of the accident, and that the fracture was due to an undiscoverable flaw. The court refused a motion to dismiss the complaint, and left it to the jury to determine whether the derailment was caused by the defects in the track or the breaking of the wheel, charging them that if the death of D. was caused by the latter plaintiff could not recover. *Held*, no error. *Durkin v. Sharp, Receiver, etc.*, 8 Amer. & Eng. R. R. Cases, 520; 88 N. Y., 225. 1882.

142. Foot of brakeman caught between rails. The fact that the intestate's foot was caught between the rails, so that he was fastened to the place, would not excuse the railway company if its cars were negligently driven over him. *Beems v. Chicago, Rock Island and Pacific R. R. Co.*, 58 Ia., 150, 1882; 10 Amer. & Eng. R. R. Cases, 658. Again reported, 6 Amer. & Eng. R. R. Cases, 222.

143. Frog. In an action against a railway company for injuries to a brakeman, who, in attempting to couple cars, failed to do so at the first attempt, and, instead of stepping out from between them, as he might have done, continued the attempt as the cars were moving on, and caught his foot in the frog, whereby he was injured, it was held that, although the company failed to furnish cars which coupled readily, yet its failure was not the proximate cause of the injury entitling plaintiff to recover. *Williams v. Central R. R. Co. of Iowa*, 43 Ia., 396, 1876; 14 Amer. R'y Rep., 458.

144. — An employer is not bound to make

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use of the newest mechanical appliances for the purpose of insuring the safety of his employes, especially if it does not appear that on the whole it would be advantageous to them. So, a railway company is not bound to block its frogs, particularly if it does not appear in doing so it would not entail greater dangers than it would avert. *McGinnis v. Canada Southern Bridge Co.*, 49 Mich., 466, 1882; 8 Amer. & Eng. R. R. Cases, 135.

145. Guard rail. Where a switchman, while engaged in coupling cars from the inside of a short curve, caught his foot between the main rail and the guard, and thereby lost his leg by having it run over; and it appeared by the testimony of men of experience, that the guard rail was properly constructed, and that it was hazardous to couple from the inside, but comparatively safe from the outside of the curve, and that the party injured was familiar with the curve, and gave no notice to the company of any defect, it was held that, even if the company was guilty of negligence as to the manner in which the guard was constructed, it was slight, and that of the switchman gross, and that he was not entitled to recover for the injury. *Foster v. Chicago and Alton R. R. Co.*, 84 Ill., 164, 1876; 16 Amer. R'y Rep., 452.

146. — Where it is alleged in the petition that a fatal injury to a young and inexperienced employe was caused by the negligence of the company in not placing blocks between its guard rails and the rails of its tracks at the switches, it is the province of the jury to determine whether the party injured, in view of his inexperience and the time he had been employed as a switchman, and of the other facts of the case, knew, or in the exercise of reasonable diligence could have known, of the perils resulting from an absence of the blocks between the guard rail and the rail of the track. These are questions of fact and not of law, and a refusal of the court to permit the jury to pass upon these questions is error. *Mayes v. Chicago, Rock Island and Pacific R'y Co.*, 8 Amer. & Eng. R. R. Cases (Ia.), 527. 1882.

147. Ice and snow. A railway company is not bound to keep the ground near its track free from ice and snow, and the dan-

ger incident to such a condition of the ground is one of the ordinary risks of a brakeman's employment. *Piquegno v. Chicago and Grand Trunk R. R. Co.*, 12 Amer. & Eng. R. R. Cases (Mich.), 210. 1883.

148. Knowledge of employe. A servant voluntarily entering upon an employment, the dangers and hazards of which are known to him, must be held to have assumed the consequences of such risks. *Held*, accordingly, that the defendant was not liable for the death of an employe, resulting from a collision caused by its failure to provide fences along the line of its road, if the deceased knew of the want of fences. *Sweeney v. Central Pacific R. R. Co.*, 57 Cal., 15, 1880; 8 Amer. & Eng. R. R. Cases, 151.

149. — A switchman standing on the foot-board of a tender that was backing on a side-track let go the handrail to shift his lantern from one hand to the other, and was jerked off by reason of a worn rail left there by his co-employees, the trackmen. He had full means of knowing the condition of the track, and the custom of the road as to using worn rails for side-tracks. *Held*, that the risk was one assumed by his employment, and that he had no ground of recovery. *Michigan Central R. R. Co. v. Austin*, 40 Mich., 247. 1879.

150. — It cannot be affirmed, as matter of law, that an engine-driver or fireman has the same opportunity as the corporation, or whatever subordinates may represent it, whose duty it is to keep the track in repair, to ascertain and know of defects; and, in case of injury to him in consequence of such defects, he cannot be deemed guilty of contributory negligence simply because he knew that the track was somewhat out of repair. *Mehan v. Syracuse, Binghamton and New York R. R. Co.*, 73 N. Y., 585, 1878; *Dale v. St. Louis, Kansas City and Northern R'y Co.*, 63 Mo., 455, 1876; 21 Amer. R'y Rep., 217.

151. — In an action against a railway company for injuries to the plaintiff by its negligence, he offered to prove that he was a freight conductor; that it had a siding on which coal cars were to be run out to empty coal on a platform, and it was his duty as conductor to run out on the siding the coal cars brought with his train; that by reason

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of the shortness of the curve of the siding and its improper connection with the main line, it was dangerous to run the cars on the siding; that he had notified the superintendent and foreman of the railway of such danger and they promised to remedy the defect, and requested the plaintiff to continue till the repair was made; that nothing was done towards the repair, and while the plaintiff was running his train on the siding, using due care, the front car, by reason of the shortness of the curve, ran off the track, and the plaintiff on the second car was forced by the shock from the car and injured. The court below rejected the offer. *Held*, that it should have been received. *Patterson v. Pittsburgh and Connellsville R. R. Co.*, 76 Pa. St., 389, 1874; 9 Amer. R'y Rep., 381.

152. — Plaintiff, while in the employ of defendant as an engine-driver, was injured by the overturning of his engine, caused by the bad condition of defendant's track. In a suit to recover damages, it appeared that plaintiff was running his engine by express orders, without cars attached, ahead of a passenger train; he knew that the road was somewhat out of repair, and that he incurred some danger; but it did not appear conclusively that he knew how badly it was out of repair, or that the danger was very great. Three or four passenger trains, besides freight trains, passed over the road daily each way; it did not appear that any accident had previously happened, caused by the bad condition of the road. Plaintiff and other employes had frequently run their engines over the road with safety, in the same way plaintiff was running his at the time of the accident. Plaintiff was ordered by competent authority to so run his engine, and he had the assurance that the road would soon be put in repair. *Held*, that the evidence authorized the submission of the question of contributory negligence to the jury. *Hawley v. Northern Central R'y Co.*, 2 Amer. & Eng. R. R. Cases, 248; 82 N. Y., 370. 1880.

153. Notice to company. In order to hold the company responsible to an employe (such as a conductor) for injuries sustained because of the road or its appurtenances being out of repair, it must be shown that

the company is in default in its duty, either by the selection of incompetent servants or an insufficient number of them to do the work, or failure to furnish proper materials, or that the company had notice of the bad condition of the road, or is chargeable with negligence for not knowing. *Howd v. Mississippi Central R. R. Co.*, 50 Miss., 178. 1874.

154. — An action was brought to recover damages for the death of plaintiff's husband, a fireman employed on one of defendant's engines, who had been killed because of the train having run from the track. The accident was caused by the defective condition of the track, and evidence was given to show that notice thereof had been given to the foreman of the gang of men employed by defendant to repair its tracks, before the accident. *Held*, that if notice of the defects had been given to defendant, and the injured employe was free from fault, the plaintiff should recover. *Gage v. Delaware, Lackawanna and Western R. R. Co.*, 14 Hun (N. Y.), 446. 1878.

155. — Ordinarily a notice by an employe to a subordinate, however extensive his authority, is not sufficient, he being but a fellow-servant. *Patterson v. Pittsburgh and Connellsville R. R. Co.*, 76 Pa. St., 389, 1874; 9 Amer. R'y Rep., 381.

156. — If the servant of a railway company, appointed to keep the track in repair, knows, or by the proper discharge of his duty might know, of its condition, then his knowledge, or that which he might have acquired, is imputable to the company. *Porter v. Hannibal and St. Joseph R. R. Co.*, 71 Mo., 66, 1879; 2 Amer. & Eng. R. R. Cases, 44.

157. Storms. The track of a railway, and especially every exposed place, ought to be examined after every storm, before a train is allowed to pass; and if that is not done, and injury results, whether to passengers or servants of the train, the corporation is liable. *Hardy v. North Carolina Central R. R. Co.*, 74 N. C., 734, 1876; 13 Amer. R'y Rep., 121.

158. — To allow a break in the embankment of a railroad, caused by a storm and unprecedented freshet, to remain open for ten hours, without some one stationed at or

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near the place to warn passing trains of the danger, is negligence which nothing can excuse. *Ib.*

159. — On the trial of an action to recover for an injury resulting in the death of an employe caused by the track being in an unsafe condition from sand having washed upon it in a storm, the court charged the jury that it is the duty of those who use hazardous agencies to control them carefully and to adopt every ordinary known and usually approved invention to lessen the danger and guard against every ordinary probable danger by such means as ordinary prudence would suggest or dictate; and railway companies are bound to take notice of the topography of the country along their lines of road, and to take notice of the climate and the storms and floods that annually occur in those localities, and make all necessary guards against danger caused by ordinary and usually severe storms of the locality. It is the duty of the defendant to so construct its road as to make it reasonably safe, and to guard against wash-outs, land-slides and obstructions which might endanger the lives of the passengers and employes passing over the same; and any neglect of the defendant in that behalf would make it liable to the plaintiff if such neglect caused the injury. It was also the duty of the defendant to keep its road in suitable and safe repair, and keep and maintain suitable ditches and culverts, at suitable and proper places, to carry off the surplus water naturally running down upon the track or road; and the neglect to perform that duty, if such neglect was the cause of the accident, will make the defendant liable. *Held*, notwithstanding the court also, in general terms, charged the jury that the degree of care and prudence required of the defendant in the case was "due and ordinary care," "reasonable care" and "ordinary prudence," that the charge, as a whole, was erroneous. *Gates v. Southern Minnesota Ry Co.*, 28 Minn., 110, 1881; 2 Amer. & Eng. R. R. Cases, 237.

160. — It is a sufficient defense that the track, culverts, etc., were substantial and durable and supervised in their construction by competent engineers, so as to be able to withstand all ordinary storms in that local-

ity; and the fact that the storm which caused the accident was of extraordinary and unprecedented violence did not render the company liable on the ground of negligence. *Houston and Texas Central Ry Co. v. Fowler*, 56 Tex., 452, 1892; 8 Amer. & Eng. R. R. Cases, 504.

161. — A railway company is liable in an action on behalf of its fireman, killed by the washing out of a culvert, the culvert being in an improper condition resulting from the negligence and carelessness of its bridge builder and road-master. *Davis v. Central Vermont R. R. Co.*, 55 Vt., 84, 1882; 11 Amer. & Eng. R. R. Cases, 173.

162. — The negligence of the bridge builder and road-master in caring for the culvert, in law, was the neglect of the defendant; and notice to the former of a defective construction was notice to the latter; hence it is not a question of whether the employe whose negligence caused the injury and the servant injured were co-employes, nor whether the former was ordinarily skilful, nor whether the defendant was negligent in employing them. *Ib.*

163. *Switches.* Railway companies are bound to use appliances which are not defective in construction; but as between them and their employes they are not bound to use such as are of the very best or most improved description. If they use such as are in general use, that is all that can be required. This principle applied to the use of the T rail for guard to railroad switches, it appearing that a guard made of U rail would be safer for employes and would answer the purpose of the company equally well, yet the T was the one in general use. *Smith v. St. Louis, Kansas City and Northern Ry Co.*, 69 Mo., 32. 1878. See, also, *Cagney v. Hannibal and St. Joseph R. R. Co.*, 69 ib., 416. 1879.

164. — This principle applied to a case where the injury occurred in the use of a shaping-machine which the evidence showed was complete without a guard or fender as a security against the negligence of workmen or possible accidents. *Cagney v. Hannibal and St. Joseph R. R. Co.*, 69 Mo., 416. 1879.

165. — A railway company is not liable to a road-master in its employ for an injury received by him while riding in one of its cars

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which is thrown down a bank by the breaking of a switch on its road, in the absence of testimony that there was any negligence in procuring a proper switch or any defect in the switch which could have been discovered upon the most careful inspection, or that the switch was intended, or could reasonably have been expected, to hold the cars upon the tracks, which were driven at unreasonable speed, or of other evidence of negligence, for which the corporation would be liable. *Ladd v. New Bedford R. R. Co.*, 119 Mass., 412, 1876; 9 Amer. R'y Rep., 273.

166. — Through the negligence of a competent road-master a switch was misplaced, and a locomotive and train were turned upon a side-track, the sleepers of which were rotten. The engine and train were thrown from the track, and the engine-driver and fireman were injured. *Held*, that they were co-employees with the road-master and could not maintain an action against the corporation. *Walker v. Boston and Maine R. R. Co.*, 128 Mass., 8. 1879.

167. — A railway company held not to be liable for damages resulting from a defective switch, under the facts in the case. *Piper v. N. Y. Central and Hudson River R. R. Co.*, 56 N. Y., 630. 1874.

168. — An engine-driver in charge of a train was running at some speed into a yard, his train being behind time, when the engine ran into a misplaced switch negligently left open by the engine-driver or men in charge of another train. The fireman, seeing the danger, jumped off; but the engine-driver, looking ahead, did not perceive the danger, and was killed in the collision which ensued. It appeared that the train was moving faster than the rules of the company allowed; but the same was behind schedule time, and in that case a moderate increase in speed was permitted. It appeared, further, that it was impossible for decedent to keep to schedule time, and that the officers of the company knew this fact, and that in consequence trains came in often more swiftly than was allowed by rule. Decedent, on approaching the switch, could not have seen that it was open. There was also evidence to show that those whose duty it was to make the switch safe were not competent to discharge the duties assigned them, and that the company

did not use ordinary care in their selection, and had notice of their incompetency. In an action against the company by the administratrix of decedent to recover damages for his death, *held*, that plaintiff's decedent was not guilty of contributory negligence. *Held*, further, that there was such evidence of negligence on the part of the defendant as would warrant the court in supporting a verdict for the plaintiff. *Pennsylvania Co. v. Roney*, 12 Amer. & Eng. R. R. Cases (Ind.), 223. 1883.

169. — A railway company is under no obligation to its employes to provide its tracks with target switches; a common switch is adequate and sufficient. *Salters v. Delaware and Hudson Canal Co.*, 3 Hun (N. Y.), 338; *Same v. Same*, 5 Thompson & Cook (N. Y. Supreme Ct.), 559. 1874.

170. Switch-yard; ashes piled in yard. The plaintiff was in the employ of the defendant as a night-brakeman in defendant's yard at Winona, one of his duties being to couple cars. In the discharge of such duty he slipped and fell upon a pile of wet ashes, which, according to defendant's custom, had been taken out of the fire-box of a locomotive, and dropped upon the track. Plaintiff claimed that defendant was negligent, both in depositing the ashes upon the track and in not removing the same. No complaint is made that the track itself was not in good order and condition. The court instructed the jury that this mode of disposing of ashes was so common and long continued that it was practically the act of the company, and that it could not be heard to claim that it was only the negligence of plaintiff's co-servants. *Held* that, in view of these instructions, the case of *Drymala v. Thompson*, 26 Minn., 40, has no application to the case at bar. The risk was one assumed by the plaintiff. *Hughes v. Winona and St. Peter R. R. Co.*, 27 Minn., 137. 1880.

171. Track. An employe does not assume the risk of a defective construction of the roadway. *Trask v. California Southern R. R. Co.*, 11 Amer. & Eng. R. R. Cases (Cal.), 192. 1883.

172. — A railway company is liable for damages for the death of an engine-driver caused by the gross neglect of the company in the construction of the railway. *Brick-*

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man v. South Carolina R. R. Co., 8 So. Car., 173, 1876.

173. — A master's liability for injuries to his employe from defective arrangements is not that of an insurer or guarantor, if the defect was apparent to ordinary observation. It is a question of reasonable care and diligence in providing against it. *Batterson v. Chicago and Grand Trunk R'y Co.*, 49 Mich., 184, 1882; 8 Amer. & Eng. R. R. Cases, 123.

174. — A railway company owes a duty to the public to keep its track in safe condition and run its trains with regularity and dispatch for the carriage and transportation of passengers and freight. But an employe cannot have a right of action against the company on this obligation. *Henry v. Lake Shore and Michigan Southern R'y Co.*, 49 Mich., 495, 1882; 8 Amer. & Eng. R. R. Cases, 110.

175. — The plaintiff, an engine-driver, was accustomed to run a freight train at about twelve miles an hour. The road was in bad order from defendant's neglect to repair it, which fact was known in a general way to plaintiff. Promises had been made that the track should be put in repair. The plaintiff was directed to run his engine, without any train, to a station at a much higher rate of speed than was customary. He objected on the ground that the condition of the road made it unsafe to do so, but finally consented. The engine was thrown from the track and the plaintiff was injured. Plaintiff did not know of the particular defect by which his engine was thrown from the track. *Held*, that the question whether or not plaintiff was guilty of contributory negligence in running upon the track, with knowledge of its defective condition, was one for the jury, and that a motion for a non-suit was properly denied. *Hawley v. Northern Central R'y Co.*, 17 Hun (N. Y.), 115, 1879; *Same v. Same*, 82 N. Y., 370, 1880.

176. — In an action by a fireman employed by a railroad company, for injuries resulting from an unsafe track, if plaintiff was exercising at the time ordinary care, and had no knowledge of the unsafe condition of the track, and the company knew of the condition of the road, or might have known thereof by the exercise of reasonable care and diligence, plaintiff would be entitled to

recover. *Dale v. St. Louis, Kansas City and Northern R'y Co.*, 63 Mo., 455, 1876; 21 Amer. R'y Rep., 217; *Lewis v. St. Louis and Iron Mountain R. R. Co.*, 59 Mo., 495, 1875; 8 Amer. R'y Rep., 450.

177. — It is the duty of railway companies to keep their works and all portions of their track in such repair and so watched and tended as to insure the safety of all who may lawfully be upon them, whether passengers or servants or others. And if they fail to do so, they will be held liable for the consequences. *Ib.*

178. — The master's liability arises from the fact that he subjects his employe to dangers which in good faith he ought to provide against, but he is not responsible for those dangers to which the servant voluntarily subjects himself, though he does so without carelessness or breach of duty. *Pittsburgh and Connellsville R. R. Co. v. Sentmeyer*, 92 Pa. St., 276, 1879; 5 Amer. & Eng. R. R. Cases, 508.

179. — A railway company is bound to use ordinary care in the repairing of its roadway. *Houston and Tex. Central R'y Co. v. Dunham*, 49 Tex., 181, 1878.

180. — It is no defense that the employes charged with the duty of repairing the roadway are co-employes with the injured party. *Ib.*; *Lewis v. St. Louis and Iron Mountain R. R. Co.*, 8 Amer. R'y Rep., 450; 59 Mo., 495, 1875; *Hall v. Mo. Pacific R'y Co.*, 74 Mo., 298, 1881; *Colorado Central R. R. Co. v. Ogden*, 3 Colo., 499, 1877.

181. — The degree of care and prudence which a master is bound, as between himself and his employe, to exercise in providing the tools, machinery and appliances for transacting the business of the employment, is that reasonable care and prudence in selecting or ordering what he requires in his business, which every prudent man is expected to employ in providing himself with the conveniences of his occupation. *Gates v. Southern Minnesota R'y Co.*, 28 Minn., 110, 1881; 2 Amer. & Eng. R. R. Cases, 237.

182. — While the master must use ordinary care in providing suitable and fit appliances and structures for the use of his servants, he is not bound to provide against the danger arising from an unnecessary use of such appliances and structures for pur-

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poses to which the same are not adapted. Neither is he responsible for injuries resulting from the risks ordinarily incident to the service. *Chicago, Burlington and Quincy R. R. Co. v. Abend*, 7 Bradwell (Ill.), 130. 1880.

183. — A fireman of a locomotive brought an action of damages against the railway company, his employer, on the ground that, while sitting on the pushing frame of his engine, in the execution of his duty, sprinkling sand on the rails, the engine came in contact with a quantity of rubbish on the line, whereby his leg was broken; that the accident occurred on a dark morning in February, when he could not see the obstruction, and in a cutting where the line was unprotected by a ditch or dyke. The action held to be well grounded. *Morris v. Monkland R'y Co.*, 19 Scotch Session Cases (2d series), 360. 1857.

184. — In an action against a railway company for negligent injury to an employe from a defect in a roadway which has just come under its control from another company, there can be no presumption that defendant had had sufficient time to remedy the defect. *Batterson v. Chicago and Grand Trunk R'y Co.*, 49 Mich., 184, 1882; 8 Amer. & Eng. R. R. Cases, 123.

185. — A railway company whose track is broken without any fault of its own is under no obligation to its employes to repair it within any specified time, if it duly warns them so that they shall not be injured in consequence thereof. *Henry v. Lake Shore and Michigan Southern R'y Co.*, 49 Mich., 495, 1882; 8 Amer. & Eng. R. R. Cases, 110.

186. — rail taken up. The track is one of the instrumentalities for the working of the road, and therefore something which it is the master's absolute and personal duty to employ due care in maintaining and keeping in a condition suitable to the purposes for which it is to be used. Application of these views was made to the case at bar, in which the plaintiff, an employe of defendant on a wood train, was injured through the negligence of a section foreman in taking up a rail for track repair, without putting out proper signals to warn approaching trains. *Drymala v. Thompson*, 26 Minn., 40. 1879.

187. Tunnel; voluntary exposure to danger. The plaintiff, a workman in the employ of a contractor engaged by the defendant, had to work in a dark tunnel, rendered dangerous by the passing of trains. After he had been working a fortnight he was injured by a passing train. The jury found that the defendant, in not adopting any precautions for the protection of the plaintiff, had been guilty of negligence. *Held*, by a majority of the court of appeal (Cockburn, C. J., Mellor and Grove, JJ.), reversing the decision of the court of exchequer, that the plaintiff, having continued his employment with full knowledge, could not make the defendant liable for an injury arising from danger to which he voluntarily exposed himself. *Woodley v. Metropolitan District Railway Co.*, Law Reports, 2 Exchequer Division, 384, 1877; 21 Eng. (Moak), 507.

188. Unballasted side-track. A brakeman received an injury in attempting to change a link attached to an engine while it was in motion over an unballasted part of a side-track, the ties being above the ground, whereby he caught his foot between one of the ties and the brake-beam of the tender, and was thrown down and was run over, losing both his feet. It appeared that this occurred in daylight, so that he must have seen the condition of the side-track, and that he did not have the engine stop before going upon the track, as he might have done, and the proof failed to show that common prudence required the ballasting of such a side-track, only used for standing cars. *Held*, that he could not recover for the injury by reason of his own negligence. *Pennsylvania Co. v. Hankey*, 93 Ill., 590. 1879.

2. Machinery.

189. Brake-beam. The complaint alleges that plaintiff was in defendant's employ as a brakeman on a freight train, and it was his duty to go between the freight cars and couple them with such machinery, etc., as defendant provided; that defendant negligently used and operated a car upon whose brake-beam, at the end of the car, was a large and long bolt, out of place, and which unnecessarily, carelessly and unskilfully

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projected beyond the frame, beam or brake-head, in the way of the brakeman going to couple the cars; that defendant negligently suffered the bolt to remain, without cutting off the projecting part thereof and without informing plaintiff of its dangerous condition; and that, while going between said car and another to couple them, plaintiff was tripped and thrown down by said bolt, and thus sustained certain injuries. *Held*, that a cause of action is stated. *Wedgewood v. Chicago and Northwestern R'y Co.*, 41 Wis., 478. 1877.

190. — The question of defendant's negligence was properly submitted to the jury upon evidence that a bolt in the brake-beam of one of its cars projected unnecessarily for a considerable distance, so as to be in the way of a brakeman coupling such car to another, and that the injury complained of, received by plaintiff while coupling for defendant, was caused by such projection. *Wedgewood v. Chicago and Northwestern R'y Co.*, 44 Wis., 44, 1878; 19 Amer. R'y Rep., 393.

191. — Such projection, if a defect, being an obvious one, which defendant was bound to remedy, there was no error in refusing to charge the jury that if the car became thus defective after it was first put in use by defendant several years before the accident, the latter was not liable unless it had notice of the defect. *Id.*

192. **Brakes.** When a brakeman upon defendant's railroad was injured while applying a brake on a train, by the breaking of a rod, and on the trial below it was found that in the original construction of the rod defendant had exercised proper care; that at the starting point of the train there was no person charged with the duty of inspecting the machinery, etc.; that there was a defect in the rod which rendered it unfit for use, discoverable upon an ordinary careful inspection, but which was unknown both to plaintiff and defendant; that plaintiff had no reasonable opportunity to make an examination, and in the exercise of ordinary prudence could not have avoided the accident, — *held*, that plaintiff was entitled to recover. *Johnson v. Richmond and Danville R. R. Co.*, 81 N. C., 453. 1879.

193. — In an action against a railroad

company by a brakeman who was injured in consequence of a defective brake which he was operating on a freight car, whereby he was thrown to the ground and severely hurt, *held*, that evidence to show that the brake upon the car and the apparatus attached thereto were of the most primitive and awkward construction, and were placed on the wrong side of the car, and that the shelf upon which the brakeman stood was without guards, and no seat was provided for his use, was inadmissible. The rule that the servant shall be exposed to no risks from imperfect or inadequate machinery only applies where such imperfection or inadequacy are latent and not obvious to the servant, and cannot be ascertained or guarded against by the exercise of due care and caution. *De Graff v. New York Central and Hudson River R. R. Co.*, 3 Thompson & Cook (N. Y. Supreme Ct.), 255, 1874; affirmed, 76 N. Y., 125, 1879.

194. — The injury to the deceased was caused by a defective brake, and the car had passed several inspection stations without the defect being discovered. It was the duty of the brakeman using the car, as well as of the car inspector, to notice and report the defect, if it existed, and if they were negligent in this respect, and by reason thereof the deceased was killed, the question arises whether or not the brakemen were fellow-servants with him, and, if they were, no recovery can be had. *Chicago and Alton R. R. Co. v. Bragonier*, 11 Bradwell (Ill.), 516. 1882.

195. — An employe has a right to presume that the machinery used is safe, and if, as in this case, a brakeman is injured by reason of the nut on the brake being gone, of which he had no knowledge, he is not guilty of contributory negligence. *Chicago and Eastern Illinois R. R. Co. v. Hagar*, 11 Bradwell (Ill.), 498. 1882.

196. **Broken car.** A railway company is not chargeable with negligence merely because it delays, for any length of time, to repair a broken car while it remains unused and not so situated as to create danger; nor merely because it moves such car to its shop for repairs, and does not make such repairs at the place where the car was injured; nor merely because it puts such car in a train with others in order to take it to the repair

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shops. *Flanagan v. Chicago and Northwestern R'y Co.*, 45 Wis., 98, 1878; 18 Amer. R'y Rep., 73; *Flannagan v. Chicago and Northwestern R'y Co.*, 50 Wis., 462, 1880; 2 Amer. & Eng. R. R. Cases, 150.

197. — A rule of the defendant to send all its cars used in carrying ore, after they had unladen at the point of transshipment, to the repair shops for inspection and for such repairs as any of them may be found to require, is reasonable, and persons employed to move trains of such unloaded cars to the shops must be held to have assumed the extra hazard of such employment; and the company is not chargeable with negligence because one or more of the cars in such a train is out of repair. *Flannagan v. Chicago and Northwestern R'y Co.*, 50 Wis., 462, 1880; 2 Amer. & Eng. R. R. Cases, 150.

198. — If a car is in good order when it leaves the shop or when placed upon the track, the company is not responsible for defects arising from use while running until notified of defects, or until, in the exercise of such vigilance as the law requires, it could and would have learned of such defect. *Chicago and Eastern Illinois R. R. Co. v. Hagar*, 11 Bradwell (Ill.), 498. 1882.

199. *Buffers.* A railway company will not be liable to an employee for personal injury received while coupling cars having double buffers, simply because a higher degree of care is required in using them than in those differently constructed. *Indianapolis, Bloomington and Western R. R. Co. v. Flanagan*, 77 Ill., 365. 1875.

200. *Burden of proof.* In an action for damages against a railway company based upon negligence in failing to keep its cars in repair, the plaintiff must not only establish by a preponderance of evidence that his own negligence did not contribute to the injury, but also that he was ignorant of the defects which resulted in the injury. *Belair v. Chicago and Northwestern R'y Co.*, 43 Ia., 662, 1876; 14 Amer. R'y Rep., 575.

201. — If a servant is injured by reason of defective appliances placed in his hands by the master or his agent, the master is liable in damages, unless he can clearly show that he has used due care in the selection and preservation of the same, or that the servant had knowledge of the defect and

failed to notify the master, or that the injury resulted from contributory negligence. In this case the injury was occasioned by the fact that the "bumpers" did not correspond in height. *Cowles v. Richmond and Danville R. R. Co.*, 84 N. C., 309, 1881; 2 Amer. & Eng. R. R. Cases, 90.

202. — The mere happening of an accident is not *prima facie* evidence of the neglect of the employer; but when the cause of the accident is known to be some particular defect in the tools, machinery, or other appliances, the existence of the defect is of itself evidence of negligence for which liability attaches, unless the employer can satisfactorily explain by the proof that he has not been negligent in the matter of providing against the defect. *Smith v. Memphis and L. R. R. Co.*, 18 Federal Reporter, 304. 1883.

203. *Cars of unequal height.* A brakeman in the employ of a railway company cannot maintain an action against the company for personal injuries, caused by the making up of a train of cars, with platforms of unequal height, by the ordinary employees of the company, under the direction of one of its station masters. *Hodgkins v. Eastern R. R. Co.*, 119 Mass., 419, 1876; 9 Amer. R'y Rep., 271.

204. — A railway company is held not to be guilty of negligence in making use in its trains of an old mail car, which was lower than the others, so as to be liable to its employees, who knowingly incurred the risk, for an injury resulting from the coupling of such old car with another, though the danger be greater than with cars of equal height. *Fort Wayne, Jackson and Saginaw R. R. Co. v. Gildersleeve*, 33 Mich., 133, 1876; *Botsford v. Michigan Central R. R. Co.*, ib., 256, 1876.

205. — An experienced brakeman undertook to couple together two cars of unequal height, without using the ordinary crooked link, adapted for preventing accidents in such cases. He knew of the inequality in height, and had the entire charge of the train. Owing to miscalculation on his part, and without any defect in the construction of either car, they came together, and he was crushed between them. *Held*, that he was not entitled to recover for the injuries so sustained. *Hulett v. St. Louis, Kansas*

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City and Northern R'y Co., 67 Mo., 239. 1878.

206. Car steps. Where the answer conceded that the fall occurred whilst the deceased was in the discharge of his duty as a brakeman, and the legitimate inference from the proof was that he fell by reason of the round giving way, *held*, that the admission and the proof together establish that the deceased, in the discharge of his duty, and for the purpose of such discharge of duty, took hold of the round, which, owing to an old break, easily discoverable by the defendant if an inspection had been made, and not seen by the deceased on account of the darkness of night and the necessary haste of its use, gave way, causing him to fall and be crushed by the train. *Held*, also, that these facts establish both the negligence of the master and the freedom from negligence of the servant, and throw upon the master the entire responsibility of the accident. *Jones v. New York Central and Hudson River R. R. Co.*, 62 Howard's Practice (N. Y.), 450. 1881.

207. — If a brakeman receives an injury from a defective ladder attached to a freight car in use, it must be shown that the company either knew or might have known the defect causing the injury to make it liable for such injury. *Chicago and Alton R. R. Co. v. Platt*, 89 Ill., 141, 1878; *Toledo, Wabash and Western R'y Co. v. Ingraham*, 77 ib., 309, 1875.

208. Check-chains. A railway company is not liable to an employee for an injury received by him while riding in one of its cars, which is thrown from the track, on the ground that the cars were imperfect for the want of check-chains, if he was of the opinion that cars without check-chains were dangerous, and knew that some of the defendant's cars were not so provided, and did not notice until after the accident whether the car in which he was riding had check-chains or not. *Ladd v. New Bedford R. R. Co.*, 119 Mass., 412, 1876; 9 Amer. R'y Rep., 273.

209. Collision; air-brakes. The statute (R. S. Ont., c. 165, s. 90) requires trains to be stopped on approaching all railway crossings. Owing to a defect in the tube of the air-brake the train was not stopped, and a col-

lision ensued. These brakes were shown to be the best appliances in use, and were tested during the day, but were not applied at a sufficient distance from the crossing so as to enable the use of the hand-brakes in case of the giving way of the air-brakes. The plaintiff was a conductor on the Grand Trunk Railway, and his train was run into by the defendant's train, and plaintiff was injured. *Held*, that the plaintiff was entitled to recover. *Brown v. Great Western R'y Co.*, 2 Ontario Appeal Reports, 64, 1877; 3 Canada Supreme Court Reports, 159, 1879; 40 Upper Canada, Queen's Bench, 333, 1877.

210. Combination of negligence. Where a collision occurred, occasioned by the absence of a tail light and disturbance of time arrangements, the disturbance as to time occurring by reason of a defective engine, it was held that the neglect to place the tail light on the train was the act of a co-employee in the same employment, but the company was liable for the disturbance of time arrangements on account of the defective engine, and the question was therefore one for the jury. *Chandler v. Melbourne and Hobson's Bay R'y Co.*, 2 Victorian Rep. (Australia), 71; 2 Australian Jurist, 53, 1871.

211. Common law rule. A railway company is liable to an employee, at common law, for injuries resulting from a defect in its machinery known to it or which it might have known by the exercise of reasonable care on its part, although the negligence of a fellow-servant contributes to the accident. *Atchison, Topeka and Santa Fe R. R. Co. v. Holt*, 29 Kans., 149, 1883; 11 Amer. & Eng. R. R. Cases, 206.

212. Cow-catcher. If a fireman, discharging his duty, without fault on his part, in consequence of an unsafe pilot or cow-catcher, used by the company with knowledge by the company of its defects, receives a personal injury, the company will be liable to him. *Indianapolis and St. Louis R. R. Co. v. Estes*, 96 Ill., 470. 1880.

213. Dead-woods. The omission of a railway company to warn an inexperienced brakeman of the specific danger of coupling cars that are furnished with double dead-woods does not make the company liable for an injury received by him in so doing, if the risk is such as to be manifest to any person,

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and if, on being employed, he was warned in general terms of the danger of coupling cars of different construction, and was told not to take any chances. *Hathaway v. Michigan Central R. R. Co.*, 12 Amer. & Eng. R. R. Cases (Mich.), 249. 1883.

214. — In an action by an employe to recover damages of the company for a personal injury received while attempting to couple a car loaded with railroad iron with a caboose car, on the ground of negligence of the company in providing unsafe dead-woods and draw-bars, and from the careless manner of loading the iron, so as to leave the rails projecting, where the proof failed to show any defect whatever in the construction of the dead-woods and draw-bars, or that any better was ever invented or used, but did show that the plaintiff had several months' experience in such business and in coupling cars similarly loaded, and had ample time to examine how the car was loaded and its mode of coupling, and it appearing the accident was the result of his own want of proper care, it was held that a recovery against the company could not be sustained. *Toledo, Wabash and Western R'y Co. v. Black*, 88 Ill., 112, 1878; 21 Amer. R'y Rep., 290.

215. **Derrick.** An employe of a railway company was killed while at work by the breaking of a rope on a derrick in use and belonging to the company. It was shown that the rope externally appeared sound, but had been in use for two or three years, and continually exposed to the weather, and there was evidence that it was actually rotten when the break occurred. There was evidence also that such a rope, after exposure for a year or more, becomes unsound, although this one showed no outward sign of decay. *Held*, that there was evidence for the jury upon the question whether such a rope was a sound one, and if not, the company would be liable for one injured by reason of such unsoundness. *Baker v. Allegheny Valley R. R. Co.*, 95 Pa. St., 211, 1880; 8 Amer. & Eng. R. R. Cases, 141.

216. — Plaintiff was injured by the breaking of the rope of a derrick, while assisting in discharging ore from his boat to the defendant's cars. It did not appear that the derricks were used for defendant's benefit,

that its officers had any control over them, or that it furnished the rope. It appeared that for a long time the derrick was under the control of M. & Co., who employed the men who discharged the cargo. *Held*, that the defendant was not liable. *Derrenbacher v. Lehigh Valley R. R. Co.*, 4 Amer. & Eng. R. R. Cases (N. Y.), 624. 1882.

217. — The plaintiff was injured by the fall of a derrick while in the employ of a railway company as a laborer in building a culvert. It was shown on the trial that O. superintended the work in building said culvert for the company; that he hired the plaintiff and all the other laborers on the work, and had the power to hire and discharge such laborers whenever he thought proper; and although the materials and machinery for the work were furnished to O. by other and superior agents of the company, yet that it was the duty of O. to inspect such machinery, to see that it continued in good order, and to report to his superiors, so that they might furnish him other machinery, if it became defective; that while O. was using said derrick it became defective, and he knew it, but he nevertheless continued the work and continued to use it, and in consequence of such defect it fell and injured the plaintiff while he was at work for the company, and under the orders of O. *Held*, that the plaintiff and O. were fellow-servants of the company, but that O., with reference to the plaintiff, was a superior servant and the representative of the company, and that the company was responsible to the plaintiff for his injuries, caused by the negligence of O. *Kansas Pacific R'y Co. v. Little*, 19 Kans., 267. 1877.

218. — A railway company was held liable for a defect in the hook of a derrick, under the facts of a particular case. *King v. New York Central and Hudson River R. R. Co.*, 72 N. Y., 607. 1878. But see *Derrenbacher v. Lehigh Valley R. R. Co.*, 21 Hun (N. Y.), 612, 1880; reversed on appeal in *Same v. Same*, 87 N. Y., 686, 1882.

219. **Draw-bar.** It is not *per se* negligence on the part of a railway company to use upon its road an engine, the draw-bar of which is too short to permit one of its cars to be safely coupled to, or detached from, such engine. *Whitman v. Wisconsin and*

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Minnesota R. R. Co., 12 Amer. & Eng. R. R. Cases (Wis.), 214. 1883.

220. Duty of company. Employers are only required to provide machinery of good material and to have it constructed in a good and workmanlike manner. They are not insurers of their employes against injury from its use. *Indianapolis, Bloomington and Western R'y Co. v. Toy*, 91 Ill., 474, 1879; *Michigan Central R. R. Co. v. Smithson*, 45 Mich., 212, 1881; 1 Amer. & Eng. R. R. Cases, 101; *Conway v. Illinois Central R. R. Co.*, 50 Ia., 465, 1879; *Galveston, Harrisburg and San Antonio R. R. Co. v. Delahunty*, 53 Tex., 206, 1880; 4 Amer. & Eng. R. R. Cases, 628; *Lake Shore and Michigan Southern R'y Co. v. McCormick*, 74 Ind., 440, 1881; 5 Amer. & Eng. R. R. Cases, 474; *Wabash, St. Louis and Pacific R'y Co. v. Fenton*, 12 Bradwell (Ill.), 417, 1883.

221. — It is the duty of a railway company to exercise reasonable and ordinary care to provide safe and suitable machinery, and it will not be discharged from liability for defects which reasonable and ordinary diligence would have discovered, though it in fact was ignorant of such defects. *Muldowney v. Illinois Central R'y Co.*, 36 Ia., 462, 1873; *Jones v. New York Central and Hudson River R. R. Co.*, 22 Hun (N. Y.), 284, 1880; *Louisville and Nashville R. R. Co. v. Orr*, 84 Ind., 50, 1882; 8 Amer. & Eng. R. R. Cases, 94; *Palmer v. Denver and Rio Grande R'y Co.*, 3 McCrary (U. S. C. C.), 635, 1882; *Missouri Pacific R. R. Co. v. Lyde*, 57 Tex., 505, 1882; 11 Amer. & Eng. R. R. Cases, 188; *Wedgewood v. Chicago and Northwestern R'y Co.*, 44 Wis., 44, 1878; 19 Amer. R'y Rep., 393.

222. — While the law requires of the employer a high degree of care in furnishing his workmen with safe tools, it also requires in the case of a skilled workman, operating with a dangerous implement, a correspondingly high degree of care on his part in its use. *Chicago and Alton R. R. Co. v. Mahoney*, 4 Bradwell (Ill.), 262. 1879.

223. — A railway company is under a legal obligation to supply and maintain suitable cars and appliances for operating its road, and to use all reasonable means to guard against defects in its engines and cars which would endanger the lives and limbs of

its servants while in the performance of their duties. *Wedgewood v. Chicago and Northwestern R'y Co.*, 41 Wis., 478, 1877; *Same v. Stame*, 44 Wis., 44, 1878.

224. — It is not, however, held to the exercise of extraordinary care, and is required to furnish such appliances only as are reasonably calculated to insure the safety of its employes. *Cooper v. Central R. R. Co. of Iowa*, 44 Ia., 134. 1876.

225. — If the coupling of a freight car suddenly becomes out of repair, the railway company using the same will not be liable for an injury to an employe, received in consequence thereof, unless its attention had been called to the defect, or the company, by the exercise of a high degree of care, could have discovered the defect, and had an opportunity to make the needed repairs. *Indianapolis, Bloomington and Western R. R. Co. v. Flanigan*, 77 Ill., 365. 1875.

226. — The servant has a right to assume that the machinery and implements furnished him by his master are safe and suitable for the business, and he is not, while the master is, required to examine them for that purpose. *Porter v. Hannibal and St. Joseph R. R. Co.*, 71 Mo., 66, 1879; 2 Amer. & Eng. R. R. Cases, 44.

227. — An employe who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge, and also the risks and perils incident to the use of the machinery and property of the employer as they were at the time of the employment, so far as such risks were apparent. *Evans v. Lake Shore and Michigan Southern R'y Co.*, 12 Hun (N. Y.), 289. 1877.

228. — Railway companies are bound to use due care in seeing that their cars and other rolling stock are maintained in a reasonably safe condition; and when a brakeman, in the proper discharge of his duty, is injured from a failure on the part of the company to perform this personal duty, it is liable. *King v. Ohio, etc., R. R. Co.*, 14 Federal Reporter, 277. 1882.

229. — A railway company is not bound to employ mechanical appliances to protect one servant from injuries liable to result from the negligence of another. The rule is otherwise as to passengers. *Salters v. Dela-*

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ware and Hudson Canal Co., 3 Hun (N. Y.), 338. 1874.

230. — Where a master has furnished his employes with tools and appliances, which, though not the best possible to be obtained, may by ordinary care be used without danger, he has discharged his duty and is not responsible for accidents. *Pittsburgh and Connellsville R. R. Co. v. Sentmeyer*, 92 Pa. St., 276, 1879; 5 Amer. & Eng. R. R. Cases, 509.

231. — There is no presumption that a railway company or its superintendent of car shops has any better means of information as to current improvements in machinery than are accessible to an experienced mechanic in the shops. *Cagney v. Hannibal and St. Joseph R. R. Co.*, 69 Mo., 416. 1879.

232. — An employe has a right to repose confidence in the caution of his employer and to rely upon his not putting him in charge of implements which, from improper construction or other causes, are so dangerous that a prudent man would not make use of them. *Fort Wayne, Jackson and Saginaw R. R. Co. v. Gildersleeve*, 33 Mich., 133, 1876; *Botsford v. Michigan Central R. R. Co.*, ib., 256, 1876.

233. — The machinery and cars furnished by railway companies for use ought not to be so unskilfully constructed that the slightest indiscretion on the part of the operatives would prove fatal; and, where they are so constructed, it is such negligence as will render them liable for damages occasioned thereby to an employe who is ignorant of such unskilful construction. *Toledo, Wabash and Western R'y Co. v. Fredericks*, 71 Ill., 294. 1874.

234. — Where the business is carried on by machinery, it is the master's duty to keep the machinery in such condition as, from the nature of the business and employment, the servant has the right to expect that it would be kept, and, where he fails to do so, he is liable for injuries arising from his negligence. *Totten v. Pennsylvania R. R. Co.*, 11 Federal Reporter, 564, 1882; *Gravelle v. Minneapolis and St. Louis R'y Co.*, 11 ib., 569, 1882; *Atchison, Topeka and Santa Fe R. R. Co. v. Holt*, 29 Kans., 149, 1883; 11 Amer. & Eng. R. R. Cases, 206.

235. — It is the duty of railway com-

panies to furnish good, well-constructed machinery, adapted to the purposes of its use, of good material and of the kind that is found to be safest when applied to use; and, whilst they are not required to seek and apply every new invention, they must adopt such as is found, by experience, to combine the greatest safety with practical use. *Toledo, Wabash and Western R'y Co. v. Asbury*, 84 Ill., 429. 1877.

236. — An employer cannot be held to be under so strict obligation to his employes as to be required to make use only of the safest known appliances, and to be held responsible for any failure to discard what is not such. *Fort Wayne, Jackson and Saginaw R. R. Co. v. Gildersleeve*, 33 Mich., 133, 1876; *Botsford v. Michigan Central R. R. Co.*, ib., 256, 1876; *Lake Shore and Michigan Southern R'y Co. v. McCormick*, 74 Ind., 440, 1881; 5 Amer. & Eng. R. R. Cases, 474.

237. — It is negligence for a railway company to use cars dangerous in their construction, when others can be procured which are not dangerous. Railroad companies are bound to procure the best cars; otherwise they will be held responsible. *St. Louis and South Eastern R'y Co. v. Valirius*, 56 Ind., 511, 1877; 18 Amer. R'y Rep., 116.

238. — It is the duty of a railway company not only to furnish reasonably well constructed and safe machinery and appliances for the use of the employes operating its road, but to exercise a continued supervision over the same to keep them in proper repair. *Brann v. Chicago, Rock Island and Pacific R. R. Co.*, 53 Ia., 595, 1880; 21 Amer. R'y Rep., 184.

239. — Every railway operator owes to his employes a duty to furnish machinery adequate and proper for the use to which it is to be applied, and to maintain it in like condition. For every injury happening by reason of neglect to perform this duty, he is liable as for a tort; and this whether the act or omission causing it was due to his personal neglect, or the neglect of an agent employed by him, and whether there were one or more parties concerned as operators or employes. *Kain v. Smith*, 80 N. Y., 458, 1880; 2 Amer. & Eng. R. R. Cases, 545.

240. — A master is liable for injuries suffered by his servant, where, by his own

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negligence or malfeasance, he has enhanced the risk to which the servant was exposed beyond the natural risk of the employment, or has knowingly, or without informing the servant, used defective machinery which has caused the injury. *Wedgewood v. Chicago and Northwestern R'y Co.*, 41 Wis., 478, 1877; *Same v. Same*, 44 Wis., 44, 1878.

241. — It is not negligence for a railway company to use machinery that is a necessity of its business and which all persons in its employment must be presumed to know is a necessity. *Michigan Central R. R. Co. v. Smithson*, 45 Mich., 212, 1881; 1 Amer. & Eng. R. R. Cases, 101.

242. — An employer who introduces, without notice to his employe, new and unusual machinery, whether belonging to himself or another, involving an unexpected or unanticipated danger, through the introduction of which the employe, while using the care and diligence incident to his employment, meets with an accident, is liable in damages. *O'Neil v. St. Louis, Iron Mountain and Southern R'y Co.*, 9 Federal Reporter, 387; 3 McCrary (U. S. C. C.), 423, 1881.

243. — Where an accident occurs to an employe in consequence of the introduction of a foreign and defectively-constructed car into the train on which he is employed, and he sues the railroad company for damages, he is not bound to allege in his petition that the accident was caused by the introduction of a foreign car. *Ib.*

244. — When an employe, in obedience to the employer, incurs the risk of machinery, which, though dangerous, is not so much so as to threaten immediate injury, or it is reasonably probable may be used safely by extraordinary caution, the master is liable for a resulting accident. *Patterson v. Pittsburgh and Connellsville R. R. Co.*, 76 Pa. St., 389, 1874; 9 Amer. R'y Rep., 381.

245. — It is the duty of the master to furnish safe machinery, and he cannot set up as a defense that the defect in machinery was caused by the neglect of an employe. *Kain v. Smith*, 89 N. Y., 375, 1882; affirming *Same v. Same*, 25 Hun (N. Y.), 146, 1881; *Fay v. Minneapolis and St. Louis R'y Co.*, 30 Minn., 231, 1883; 11 Amer. & Eng. R. R. Cases, 193; *Herbert v. Northern Pacific R'y Co.*, 8 Amer.

& Eng. R. R. Cases (Dakota), 85, 1882; *Drymala v. Thompson*, 26 Minn., 40, 1879.

246. — A brakeman has a right to assume, without inspection, that the cars he is required to couple are in a proper state of repair for handling; and it is not negligence on his part to rush in between two cars to make the coupling without stopping to see if the bumpers are safe. *King v. Ohio and Mississippi R'y Co.*, 11 Bissell (U. S. C. C.), 362; 14 Federal Reporter, 277, 1882; 8 Amer. & Eng. R. R. Cases, 119.

247. **Engine.** Where an engine-driver was killed by an explosion of a boiler which had been for some time out of repair, and had been frequently reported and sent to the repair-shop for repairs, *held*, that defendant engaged in operating the road was not excused from liability by the facts that there was no negligence on his part in the employment of a superintendent of repairs, or in omitting to make proper regulations; that the master-mechanic having charge gave proper instructions for the thorough examination and repair of the engine, and that the negligence causing the accident was that of the mechanics directed to make the repairs. *Fuller v. Jewett*, 80 N. Y., 46, 1880; 1 Amer. & Eng. R. R. Cases, 109.

248. — In an action by a switchman to recover damages for the crushing of his hand while coupling cars, from negligence, it appeared in evidence that the accident was caused by the throttle-valve of a locomotive then being used being out of repair, which caused a sudden and unexpected movement of the locomotive, and that this defect, and the dangerous condition of the locomotive, had existed some time before the accident, and was known to the engine-driver, who had often, before and after the injury, told the foreman of the round-house (his immediate superior) of its dangerous condition. *Held*, that it was but reasonable to assume that the railway company, through the foreman, had notice of the unsafe condition of the engine, whether he had charge of the machinery or not, and that the company was guilty of gross negligence in allowing such engine to be used. *Chicago and Eastern Illinois R. R. Co. v. Rung*, 104 Ill., 641, 1882; 11 Amer. & Eng. R. R. Cases, 218.

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249. — The plaintiff, an employe, while repairing a car on a side-track, was struck by another car, which was moved against him by an engine attached thereto. The engine was moved by the escape of steam through a defective valve into the cylinder, which defect had been known to defendant's superintendent for several months. Defendant's employe in charge of the engine, knowing of the defect, had left it without using certain means, which he knew of, which would have prevented the escape of the steam. *Held*, that defendant was liable for the injury sustained. *Cone v. Delaware, Lackawanna and Western R. R. Co.*, 15 Hun (N. Y.), 172. 1878.

250. — It was no defense that the engine-driver could have so managed the engine as to have prevented the accident. *Same v. Same*, 81 N. Y., 206, 1880; 2 Amer. & Eng. R. R. Cases, 57.

251. — In a suit for damages for alleged negligence causing the death of K., plaintiff's intestate, it appeared that the death was caused by the explosion of the boiler of an engine upon which K. was employed as a fireman. Plaintiff's evidence tended to show that the engine was infirm and weak, was frequently, and from necessity, taken to the repair shops for repairs; that it was unable to hold water, or sustain a full head of steam. *Held*, that the question of defendant's negligence was one of fact for the jury. *Kirkpatrick v. New York Central and Hudson River R. R. Co.*, 79 N. Y., 240. 1879.

252. — A., in the employ of a railway company as yardman, while engaged as such, attempted to board the switch-engine, with which he was working, by standing in the middle of the track and stepping on the rear footboard while the engine was approaching him, tender first, at a rate of from one to three miles an hour, but, in the attempt, fell, was run over by the engine, and died from the effect of his injuries. The hand-rail on the rear end of the engine, which was approaching the deceased, had been torn off the previous night, and had not been replaced, and the rear footboard of the engine in question was partly broken at one end. Suit was brought by the administratrix, the mother of the deceased, to recover damages. *Held*, that the act of so attempting to board

the engine was clearly a case of gross contributory negligence on the part of the deceased, and the verdict should be set aside. *Cunningham v. Chicago, Milwaukee and St. Paul R'y Co.*, 12 Amer. & Eng. R. R. Cases (Minn.), 217. 1883.

253. — An engine-driver may recover damages against a railway company for personal injuries caused by a defect in the engine, which was due to the neglect of the agents of the company charged with keeping the engine in proper repair, although the directors and superintendent had no reason to suspect negligence or incompetence on the part of such agents. *Ford v. Fitchburg R. R. Co.*, 110 Mass., 240. 1872.

254. Evidence. An action by the legal representatives of a deceased person under § 3 of the Damage Act (Wagn. Stat., p. 520) can only be maintained where the deceased, had he survived, could have recovered damages for the injury; and the same evidence as to the cause of the injury is required in the one case as in the other. Proof of the fact that the employe was injured or killed in consequence of the use of defective machinery will not, of itself, make out a case against the employer. It must also be shown that the employer was aware of the defect, or that, by the use of reasonable care on his part, it would have been discovered. *Elliott v. St. Louis and Iron Mountain R. R. Co.*, 67 Mo., 272. 1878.

255. Explosion of boiler. Subordinates under the control of a superior are entitled to hold him as representing the master, and the master is responsible for his incompetency or misconduct. This rule held to apply to an explosion of a boiler whereby an engineer was killed. *Nashville and Decatur R. R. Co. v. Jones*, 9 Heiskell (Tenn.), 27, 1871; 19 Amer. R'y Rep., 261.

256. — In an action against a railroad company to recover damages for the death of an employe, who was killed by the explosion of a locomotive belonging to the defendant while employed thereon as fireman, it was shown on the part of the plaintiff that the engine had been purchased in 1869 as a second-class engine, then out of use, and that the agents of the defendant, intrusted with the power of making the purchase, failed to ascertain the age of the

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engine, the use to which it had been subjected, or its condition, further than by an examination of its appearance as then presented. It was proved that at the time of the explosion, resulting in the death in question, the engine was in a very defective condition; that its dome was cracked, and the plates of iron of which the boiler was composed had from some cause lost their tenacity and power to resist an ordinary pressure of steam, and that the defective condition of the engine had been brought to the knowledge and attention of the employees of the defendant whose business it was to repair it. *Held*, that upon this proof there was evidence legally sufficient upon which the court below was justified in submitting the case to the jury, although, on the part of the defendant, it was proved that every precaution was taken, and that the engine was repaired, and was supposed to be in a good, safe condition. *Cumberland and Pa. R. R. Co. v. State*, 44 Md., 288. 1875.

257. — *Held*, that there was in this case sufficient evidence of defendant's negligence to go to the jury. *Cumberland and Pa. R. R. Co. v. Hogan*, 45 Md., 229. 1876.

258. — Employers engaged in constructing or repairing machines for others are not liable to their employees engaged in the later part of the work, for an injury resulting from the fact that another employee in the same shop so negligently did the prior part of the work, as to leave the machine unfit to have the latter part of the work done upon it. The general rule that the master is bound to provide a machine which is safe for his servants does not apply where the accident occurs not in the operation of a machine belonging to or used for the master, but in his construction or repair of a machine for others. *Murphy v. Boston and Albany R. R. Co.*, 8 Abbott's New Cases (N. Y.), 41; 59 Howard's Practice (N. Y.), 197. 1880.

259. — An engine-driver is not debarred from recovering damages against the company for injuries from an explosion caused by a defect in the boiler of the engine, by the fact that he was acting in intentional violation of the rules of the company, unless the accident was due, in whole or in part, to such violation; nor by the fact that

such rule provided that the driver of an engine should be held responsible for the condition of the engine; must be sure that it was in good working order, and must immediately stop, draw his fire, station his signal men and procure assistance, whenever any defect was detected in an engine that would make it, in his judgment, unsafe to proceed; nor by the fact that he knew the engine was not in good working order, if he did not know and ought not to have known that it was unsafe. *Ford v. Fitchburg R. R. Co.*, 110 Mass., 240. 1872.

260. — Where an engine-driver was killed by the explosion of a boiler of a locomotive, and it appeared that the boiler was made of the best material, and by first-class manufacturers, and had not been used long enough to create any suspicion of its unsafe condition, and the defect was not of such character as could have been discovered by any of the tests usually employed for the purpose, and there was no sign or indication of its unsafety, it was held that the company was not liable for the injury. *Indianapolis, Bloomington and Western R'y Co. v. Toy*, 91 Ill., 474. 1879.

261. — The fact of the explosion of the boiler of a locomotive and killing of a person not in the employ of the railroad company, and in no way connected with it, is *prima facie* evidence of negligence in the company. But where such an explosion happens through the negligent manner in which the engine is managed by the engine-driver, and kills the latter; or, if he had good reason to believe the boiler was unsafe, or if, by the exercise of ordinary skill, he could have learned that the engine was unsafe, and still used it, no recovery can be had for his death. The explosion will not afford *prima facie* evidence of negligence against the company. *Toledo, Wabash and Western R'y Co. v. Moore*, 77 Ill., 217. 1875.

262. — Although the *prima facie* presumption from an explosion of the boiler of a locomotive is, that there was negligence, either in testing or putting the materials together, or that it has been negligently used, yet when suit is brought by the engine-driver who had charge of the engine, or his representatives, against the person owning the engine, there is no presumption in his

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favor that the explosion was caused by defects in the boiler rather than from its negligent use, and the burden is on the plaintiff to show that the engine-driver was not himself guilty of negligence which caused the explosion, or, if guilty, that his negligence was slight and that of the defendant gross. *Illinois Central R. R. Co. v. Houck*, 72 Ill., 285, 1874.

263. Foreign car. A switchman had his hand crushed while coupling a freight car furnished with double dead-woods and received from another line where such a contrivance was generally used. He had not been expressly notified that he should be required to handle such cars, but in the course of commerce, and as a matter of necessity, as well as of statutory duty, they were being constantly received and forwarded like all other cars adapted to the gauge of the road, and having occasion to run thereon. *Held*, that the switchman could not maintain a suit against the company for negligent injury in receiving the cars or in omitting to notify him thereof. *Michigan Central R. R. Co. v. Smithson*, 45 Mich., 212, 1881; 1 Amer. & Eng. R. R. Cases, 101.

264. — On a dark night, when snow was on the ground, the plaintiff, a brakeman, was sent to couple together two cars in a freight train which had broken apart. The defendant had three rails laid to enable it to run broad and narrow gauge cars in the same train. Freight cars usually have upon their ends pieces of wood, called bumpers, extending six or eight inches beyond the car, so that if the draw-heads pass each other, the shock is received by the buffers, and a brakeman, if he be between the cars, will be uninjured. One of the cars which the plaintiff was to couple was a broad gauge and the other a narrow gauge car. The buffers only extended three inches beyond the car. These cars did not belong to the defendant. The draw-heads passed each other and the plaintiff was injured. *Held*, that the question of the defendant's negligence in failing to have proper bumpers upon the cars used by it was properly submitted to the jury, and that a verdict in favor of the plaintiff would not be disturbed. *Gottlieb v. New York, Lake Erie and Western R. R. Co.*, 29 Hun (N. Y.), 637, 1883.

265. — The defendant received into its service from another railway company a freight car which proved to be in bad order, and which it neglected to inspect and repair within a reasonable time thereafter. The plaintiff, a brakeman, in attempting to couple the car, was severely injured in consequence of its defective condition, which was not known to him, but was discoverable on proper inspection. *Held*, that, as respects such defects, the company was answerable for the same degree of care and diligence in the management and use of a foreign car received into its service as in the case of its own cars in like circumstances. *Fay v. Minneapolis and St. Louis R'y Co.*, 30 Minn., 231, 1883; 11 Amer. & Eng. R. R. Cases, 193. See, also, *St. Louis and South Eastern R'y Co. v. Valirius*, 56 Ind., 511, 1877; 18 Amer. R'y Rep., 116.

266. — If a railway company permits a defective and dangerous car to come into its yards or upon its tracks, and remain for so many days that it might, by the exercise of a high degree of diligence, discover its condition, and if, from the want of such diligence, an injury happen to an employe, who was exercising due care, the company will be liable, although it does not own the car. *Chicago and Alton R. R. Co. v. Bragonier*, 11 Bradwell (Ill.), 516, 1892.

267. — One railway company receiving a loaded car from another, and running it upon its own line, is not bound to repeat the tests which are proper to be used in the original construction of such a car, but may assume that all parts of the car which appear to be in good condition are so in fact. *Bal-lou v. Chicago, Milwaukee and St. Paul R'y Co.*, 54 Wis., 257, 1882; 5 Amer. & Eng. R. R. Cases, 480.

268. — It does not constitute negligence for a railway company, in the ordinary course of business, to receive and transport the cars of other roads, in general use, which may not be constructed with the most approved appliances; and the transportation or use of such cars by the company is one of the risks which an employe assumes in undertaking the employment. *Baldwin v. Chicago, Rock Island and Pacific R. R. Co.*, 50 Ia., 680, 1879.

269. — The statutory requirement that

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every railway shall impartially and diligently receive and forward the cars of other lines does not apply to cars unfit for passage, but means that no needless delays or hindrances shall be interposed, and that all precautions against the use of improper cars shall be adopted with reference to reasonable dispatch. *Smith v. Potter*, 46 Mich., 258, 1881; 2 Amer. & Eng. R. R. Cases, 140.

270. Hand-car. A section-master in temporary charge of a hand-car must note such defects in it as are discernible in the reasonable and ordinary exercise of diligence in the course of his duty, and decline or cease to use it, if it be obviously unsafe; otherwise he cannot recover for an injury to himself which his declaration alleges to have been caused, in part, by the defective character or condition of the car. *Georgia R. R. and Banking Co. v. Kenney*, 58 Ga., 485; 16 Amer. R'y Rep., 131, 1877; *Kenney v. Cent. R. R. and Banking Co.*, 61 ib., 590, 1878; *Central R. R. Co. v. Kenney*, 64 ib., 100, 1879.

271. — If the defect in the car was such as to deceive human judgment, the company, as well as the plaintiff, stands excused. And whatever diligence he exercised in seeing to the apparent safety of the vehicle goes to the credit of his employer as well as to his own credit. *Ib.*

272. — In an action by an employee against a railroad company for personal injury resulting from negligence in equipment of a hand-car, wherein contributory negligence was a defense, the following charge on that subject was held not positive error: "If the handle of the lever was defective, and such defect was known to the plaintiff, and he accepted, or continued in its service, using the same with full knowledge of the defects, he could not recover;" and "if the plaintiff might, by the exercise of ordinary care, have escaped the injury, he cannot recover." *East Tenn., Va. and Ga. R. R. Co. v. Smith*, 9 Lea (Tenn.), 685. 1882.

273. — Where an employee was injured by a defect in a hand-car, and the defect is apparent, the employee is presumed to assume the risk. But if the danger was greater than could be discovered by the use of ordinary care, then the employer may be in default when the injury was produced in a manner not anticipated. *International and Great*

Northern R. R. Co. v. Doyle, 49 Tex., 190, 1878.

274. — The plaintiff, an employe, was injured while riding on a hand-car, owing to its defective condition. One Brown, as "section boss," had charge of about five miles of track, and was foreman of the men employed to keep it in repair, hiring and working with them. He was responsible for tools and machinery, and if any were wanted, or out of repair, he applied or reported to the track-master, who furnished the necessary machinery, and ordered repairs. If the machinery was defective, Brown was ordered to have it repaired. The track-master employed the foremen of the sections, and they were subject to him. Brown knew of the defect in the hand-car, but had not notified the track-master thereof. *Held*, that Brown did not represent the company so as to render it liable for his negligence, resulting in an injury to a fellow-servant. *Barringer v. Delaware and Hudson Canal Co.*, 19 Hun (N. Y.), 216. 1879.

275. Headlight. It is gross negligence for a railway company to run its trains on a dark night without a headlight. *Burling v. Illinois Central R. R. Co.*, 85 Ill., 18. 1877.

276. Hoisting apparatus; neglect of conductor. In an action of damages by one injured by the giving way of a hoisting apparatus, used in connection with a train of the company, it appeared that plaintiff had reason to believe at the time that the apparatus was unsafe, but relied on the assurance of the conductor that it was "all right," and so was injured. But there was no proof that the conductor had the superintendence or control over the men or the work, or power to provide or replace machinery. *Held*, that the conductor was a fellow-servant merely, and not a vice-principal, and his reassurance to plaintiff, and representation that there was no danger, would not bind the company, and render it responsible. But if he represented the company in the premises, such assurance would amount to a guaranty on its part, and would bind it for any resulting damage. And so notice to him of danger would affect the corporation if he acted in that capacity, and not otherwise. *McGowan v.*

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St. Louis and Iron Mountain R. R. Co., 61 Mo., 528. 1876.

277. Inspection of cars. Whether or not a railway company was guilty of negligence in failing to inspect and repair a car of another company passing over its road, such as would render it liable to an employee for injuries sustained by reason of such car becoming out of repair on its passage over the road, in a particular which would have been disclosed by an inspection conducted with ordinary care, was held to be a question for the jury. *Brann v. Chicago, Rock Island and Pacific R. R. Co.*, 53 Ia., 595, 1880; 21 Amer. R'y Rep., 184.

278. — It is the duty of a railway company to exercise ordinary care for the inspection of its locomotives and cars, and to prevent the use of those which are unsafe or unfit for use; but a system of inspection which would embarrass the operation of the road cannot be required. *Smoot v. Mobile and Montgomery R'y Co.*, 67 Ala., 13. 1880.

279. — A railway company is liable to a brakeman for injuries received in the performance of his duties, through the negligence of the company's inspector of machinery in failing to discover and remedy defects in a brake. The inspector represents the company, and is not a fellow-servant of the brakeman. *Long v. Pacific R. R. Co.*, 65 Mo., 225. 1877.

280. — A notice of the defect to the car-inspector and master-mechanic would only tend to show negligence of duty on their part, and they being fellow-servants of the plaintiff, no cause of action could be based on such negligence. *Kidwell v. Houston and Great Northern R'y Co.*, 3 Woods (U. S. C. C.), 313. 1877. See, also, *Smith v. Potter*, 46 Mich., 258; 2 Amer. & Eng. R. R. Cases, 140. 1881.

281. — Engines and other machinery used in operating a railway are liable to become defective and dangerous, and every corporation employing such agencies is charged with notice of this fact, and is bound to exercise a degree of watchfulness commensurate with the nature of their business, and the consequences incident to neglect. Frequent examinations or other measures of precaution are necessary to prevent engines and machinery from becoming defective and

dangerous from natural causes. *Atchison, Topeka and Santa Fe R. R. Co. v. Holt*, 29 Kans., 149, 1883; 11 Amer. & Eng. R. R. Cases, 206.

282. Jaw-brace. The facts that the foreman of the gang in which plaintiff was engaged directed him, after turning a switch, to mount the second car from the engine for the purpose of aiding in sending the unloaded cars down to the repair shop, and that plaintiff was injured in mounting the car in consequence of its having a broken jaw-brace, are not sufficient to warrant a jury in finding the company guilty of negligence, where there is no evidence that such foreman was charged with the business of inspecting the cars, or knew of the defect in said car, or had any better means of knowledge than the plaintiff. *Flannagan v. Chicago and Northwestern R'y Co.*, 50 Wis., 462, 1880; 2 Amer. & Eng. R. R. Cases, 150.

283. Knowledge of employee. A brakeman who continues in the service of a railroad company with knowledge that the guard of a switch is made of T rail cannot recover for injuries sustained in consequence of his foot being caught between the guard and the frog, notwithstanding it may appear that if the guard had been made of a different rail it would have been less dangerous. *Smith v. St. Louis, Kansas City and Northern R'y Co.*, 69 Mo., 32. 1878.

284. — An employee who knows, or by the exercise of ordinary diligence could know, of any defects or imperfections in the cars or machinery about which he is employed, and continues in the service without objection, is presumed to have assumed all the consequences from such defects, and to have waived all right to recover for injuries caused thereby. *Muldowney v. Illinois Central R. R. Co.*, 8 Amer. R'y Rep., 487; 39 Ia., 615, 1874; *Way v. Same*, 40 Ia., 341, 1875; 8 Amer. R'y Rep., 400; *Houston and Texas Central R. R. Co. v. Myers*, 55 Tex., 110, 1881; 8 Amer. & Eng. R. R. Cases, 114; *Baker v. Western and Atlantic R. R. Co.*, 68 Ga., 699, 1882; *Johnson v. Western and Atlantic R. R. Co.*, 55 Ga., 133, 1875; *Le Clair v. St. Paul and Pacific R. R. Co.*, 20 Minn., 1, 1873; *Porter v. Hannibal and St. Joseph R. R. Co.*, 71 Mo., 66, 1879; 2 Amer. & Eng.

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R. R. Cases, 44; *Chicago and Alton R. R. Co. v. Munroe*, 85 Ill., 25, 1877; *Umbach v. Lake Shore and Michigan Southern R'y Co.*, 83 Ind., 191, 1882; 8 Amer. & Eng. R. R. Cases, 98.

285. — If a servant knows that what is provided is not safe and fit, he should quit the employment; and if he does not, but continues it, he is deemed to have assumed the risk of all such known defects, unless he has been induced by the master to believe that the defects will be remedied. *Illinois Central R. R. Co. v. Jones*, 11 Bradwell (Ill.), 324. 1882.

286. — In actions for injuries resulting to a servant from defective machinery or appliances, the real question is whether the servant has had opportunities with his employer for observing the defective machinery or materials, and intends to waive any objection to them. *Dale v. St. Louis, Kansas City and Northern R'y Co.*, 63 Mo., 455, 1876; 21 Amer. R'y Rep., 217.

287. — An employe is not under the same obligation as the employer to resort to means to discover defects. He has a right to presume that his employer has done his duty and complied with the law; hence it is only when he has knowledge of defects in machinery which he continues to use without objection that he is presumed to have waived the defect. It is his *knowledge*, and not his *means of knowledge*, that affects his right to recover. *Muldowney v. Illinois Central R'y Co.*, 36 Ia., 462. 1873.

288. — In an action by an employe for personal injuries caused by defective track, an instruction declaring defendants exempt from liability, notwithstanding its unsafe condition, if plaintiff knew, or could, by the exercise of ordinary diligence, have known, of the state of the track, is properly refused. It is not the business of the servant whether the machinery and structure of the road are defective, but the duty of the company is to keep them in a safe condition, and is responsible for injuries resulting from such defects. *Porter v. Hannibal and St. Joseph R. R. Co.*, 60 Mo., 160. 1875.

289. — In an action against a railway company under § 1816, R. S., for injuries to an employe, where the whole evidence shows that the sole cause of the injuries was the

use of one bolt of insufficient length in fastening a slat of the ladder of a freight car, together with the somewhat decayed condition of the wood at the place of such bolt, and that there was no external indication of these defects, and the person injured had been frequently in charge of the same car and in the habit of using the same ladder, there was no error in directing a non-suit. *Ballou v. Chicago, Milwaukee and St. Paul R'y Co.*, 54 Wis., 257, 1882; 5 Amer. & Eng. R. R. Cases, 480.

290. — If a servant remains in his master's employment with knowledge of defects in machinery which he is obliged to deal with in the course of his regular employment, he assumes the risks attendant upon the use of the machinery unless he has notified the master of the defects so that they may be remedied within a reasonable time. If he sees that the defects have not been remedied, yet continues to expose himself to the danger, the master's liability ceases. *Crutchfield v. Richmond and Danville R. R. Co.*, 78 N. C., 800, 1878; 16 Amer. R'y Rep., 212.

291. — The fact that an employe knows, or could know, by ordinary care, of defects in the appliances about which he works, which render his employment more than ordinarily hazardous, and still remains in the employment until he is injured, tends to show contributory negligence, but is not conclusive of such negligence. *Perigo v. Chicago, Rock Island and Pacific R. R. Co.*, 55 Ia., 836. 1880.

292. — An employe who knows, or by the exercise of ordinary diligence could know, of defects in the things about which he is employed, and continues in the service without objection and without promise of change, waives all right to recover for injuries caused thereby; and this waiver cannot be affected by the particular situation in which he may be placed, or the rapidity and promptness with which he is required to act at the time of the injury. *Perigo v. Chicago, Rock Island and Pacific R. R. Co.*, 52 Ia., 276. 1879.

293. — That the machinery which caused the injury was open to plaintiff's inspection, and was so worn as to be more than ordinarily dangerous, will not necessarily defeat

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a recovery where it was a matter of skill and judgment to know how much wear and tear it would stand, and plaintiff was not an expert in the matter. *Bridges v. St. Louis, Iron Mountain and Southern R. R. Co.*, 6 Mo. App., 389. 1878.

294. — In the absence of proof that plaintiff was in charge of the car at the time of the injury, except so far as is implied in his service as brakeman, or had any duty of inspecting it, there was no error in refusing to charge that it was his duty to observe any defect in it. *Wedgewood v. Chicago and Northwestern R'y Co.*, 44 Wis., 44, 1878; 19 Amer. R'y Rep., 393.

295. — A., a brakeman, was engaged on a dark night in coupling and uncoupling cars; in order to couple a certain freight car to an engine it became his duty to remain on the steps of the engine tank, where he was already standing, while the engine backed to the car. He jumped off, however, from the step of the tank and crossed the track, an act which there was no necessity that he should perform; shortly afterwards the engine was backed, when A. was heard to cry out, and seen to spring back from the tank, the wheels of which almost immediately passed over his body and killed him. No one saw how or why A. fell. There was some evidence that the steps of the tank were defective in number and construction, but A., who had been employed about the engine in question for a long time, was not directly proved to have ever asked for their alteration, although the company was in the habit of making such changes on application of its employes; it also appeared that the road-bed was rough by reason of recent repairs. In an action by the widow and children of A. against the railroad company to recover damages for his death, alleged by them to have occurred while he was endeavoring to climb upon the tank, by reason of the failure of the company to provide proper steps and a smooth road-bed, *held*, that there was no evidence of negligence to submit to a jury. *Philadelphia and Reading R. R. Co. v. Schertle*, 97 Pa. St., 450, 1881; 2 Amer. & Eng. R. R. Cases, 158.

296. — By the custom and regulations of a railroad company, trains in convoy were equipped each with one engine-man, one fire-

man, one conductor and one brakeman. The conductor of a train in convoy, on such road, had his leg crushed by collision with the train immediately following his, and died shortly thereafter. In an action against the railroad company by the widow of the deceased to recover damages for his loss, it was held that if he had knowledge of this custom and practice at the time of his employment and afterwards, and with such knowledge continued for eight or nine months in his employment, as conductor on trains in convoys thus equipped, and also knew that the train following his on the night of the collision was equipped in the same manner, such knowledge on his part would prevent a recovery on account of any supposed deficiency in equipment in this respect. *Baltimore and Ohio R. R. Co. v. State*, 41 Md., 263. 1874.

297. — A brakeman injured by coupling a damaged car cannot secure exemption from the consequences of a custom which required the car to be marked "out of order," which was done in the particular case, by showing his inability to read. *Watson v. Houston and Texas Central R'y Co.*, 58 Tex., 434, 1883; 11 Amer. & Eng. R. R. Cases, 213.

298. — A charge of the court assuming as matter of law that the placing of a car on a side-track, or marking on it "out of order," was sufficient to charge an ordinary man engaged in coupling it with notice of its damaged condition and the consequent extra risk of coupling it, is erroneous. *Ib.*

299. — Under the pleadings and proofs it was for the jury to say in this case whether the insufficiency of employes, the dangerous character of the frog and brake-beam, being known to the injured party, were defects so glaringly dangerous that a man of prudence would not have undertaken the work, or whether he might reasonably suppose himself able to do the work safely by the exercise of great care and caution. *Stoddard v. St. Louis, Kansas City and Northern R'y Co.*, 65 Mo., 514. 1877.

300. — The general rule is that if the employe knows of the defects and continues in the service, he is deemed to have assumed the risks, and the maxim is that he who consents cannot complain. But if a person of ordinary prudence would not have be-

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lieved the defects dangerous, he may disregard them without losing his right to complain, if he suffers from the defect while pursuing his ordinary course. *Colorado Central R. R. Co. v. Ogden*, 3 Colo., 499. 1877.

301. Latent defects. It is the duty of a master to provide his servants with suitable and safe machinery, but there is no implied warranty of fitness or soundness; neither will the master be liable for injuries arising from hidden defects, unless the master has notice of such defects, or might have had by the exercise of ordinary diligence. *Chicago and Northwestern R. R. Co. v. Scheuring*, 4 Bradwell (Ill.), 533. 1879.

302. — It is error to charge that a railroad company is bound to protect its servants from injury by reason of latent or unseen defects, so far as human care and foresight can accomplish the result. *Missouri Pacific R. R. Co. v. Lyde*, 57 Tex., 505, 1882; 11 Amer. & Eng. R. R. Cases, 188.

303. — It is not negligence in the employer if the tool or machine breaks, whether from an internal original fault, not apparent when the tool or machine was at first provided, or for an external apparent one, produced by time and use, not brought to the master's knowledge. *Baker v. Allegheny Valley R. R. Co.*, 95 Pa. St., 211, 1880; 8 Amer. & Eng. R. R. Cases, 141.

304. — A different rule, however, prevails where the tool or machinery is perishable. The master is bound to know that such tool or machinery will only last a limited time, and it is his duty to renew instruments of this character at proper intervals. *Ib.*

305. — Plaintiff, a brakeman for defendant, was injured by the breaking of an eye-bolt connecting the chain with the rod of a brake. In a suit to recover damages it appeared that the eye-bolt was defective in not having been properly welded. There was no evidence of notice of the defect to defendant or any of its agents, nor was it shown that the defect could have been discovered by inspection; there was no evidence that the maker of the bolt could have discovered the defect by bending it while hot and in other ways, but it did not appear whether the eye-bolt was made by the company or purchased; and no want of care,

the exercise of which would have discovered the defect, was shown. *Held*, that the plaintiff failed to make out a case, so far as it rested upon the imperfection referred to. *Painton v. Northern Central R'y Co.*, 83 N. Y., 7, 1880; 5 Amer. & Eng. R. R. Cases, 454.

306. — There was evidence, however, that the eye-bolt was smaller than those used by defendant at the time of trial; that the breaking of the chains had formerly been of frequent occurrence. The eye-bolt in question, and one of the eye-bolts adopted since the accident, were produced, and submitted to the inspection of the jury. *Held*, that while the proof of negligence on the part of defendant was slight, it was sufficient to justify the submission of the question to the jury. *Ib.*

307. — It is not incumbent upon the servant to search for latent defects in machinery or implements furnished him by his employer, but he has, without any investigation, the right to assume that they are safe and sufficient for the purpose. *Porter v. Hannibal and St. Joseph R. R. Co.*, 71 Mo., 66, 1879; 2 Amer. & Eng. R. R. Cases, 44.

308. — In an action against a railway company by a brakeman, who had been injured by the breaking of a brake-shaft or rod, the jury found specially that the defendant was negligent in not having applied a proper and sufficient test to the rod. It appears that the rod broke near the platform, under the cog-wheel, from an old crack or flaw constituting a latent defect; defendant's evidence tended strongly to show the exercise of great care on its part in the inspection of its cars, and the selection and testing of the materials used therein; and there was no contrary testimony. *Held*, that there was no evidence to support the finding; and a judgment based thereon is reversed. *Smith v. Chicago, Milwaukee and St. Paul R'y Co.*, 42 Wis., 520, 1877; 15 Amer. R'y Rep., 168.

309. Lighting of train. Where a station agent and switchman was, while in the discharge of his duty, and without negligence on his part, on a dark night, struck by a car and killed in attempting to get to the switch in obedience to a signal, and it appeared that the switch from its construction was attended with danger, that the company had

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adopted no rules and regulations in respect to the switch, which could only be used by making a "flying-switch," and that the flat-cars sought to be switched off, the front one of which struck the deceased, were not properly furnished with brakes, there only being one good brake on the four, and there was no light on the front car, as is usual of a dark night, it was held that the company was liable for causing the death, as it was guilty of negligence in not having the train properly lighted and the cars furnished with sufficient brakes, and which neglect was the cause of the accident. *Chicago and Northwestern R'y Co. v. Taylor*, 69 Ill., 461. 1873.

810. Notice to company. A statement made by the mechanic in charge of the shops where the defendant procured its repairs to be made, in reply to complaints made to him of a defective car, that it ought not to be made use of for coupling with the coupler on the other cars, is not evidence of assurances by defendant that its use would be discontinued, and has no tendency to make out a case of negligence on the part of the defendant towards its employees. *Fort Wayne, Jackson and Saginaw R. R. Co. v. Gildersleeve*, 33 Mich., 133, 1876; *Botsford v. Michigan Central R. R. Co.*, ib., 256, 1876.

811. — It is the duty of a servant of a railway company to see that the machinery which he uses is in repair, and when it is not, to report the fact to the company, and it is negligence on his part to fail to do so; and the company will not be liable for any injury sustained by him, occasioned by such machinery being out of repair. *Toledo, Wabash and Western R'y Co. v. Eddy*, 72 Ill., 138, 1874; *Patterson v. Pittsburgh and Connellsville R. R. Co.*, 76 Pa. St., 389, 1874; 9 Amer. R'y Rep., 381.

812. — It was a question of fact whether a train-master charged with the duty of examining for defects, etc., in machinery, etc., actually knew or could have known the defect causing his own death. His duty as employe does not, as matter of law, relieve the company employing him from responsibility for negligence in the use of defective machinery. *International and Great Northern R. R. Co. v. Kindred*, 57 Tex., 491, 1882; 11 Amer. & Eng. R. R. Cases, 649.

813. — A brakeman was injured in the

course of his employment, while coupling two sections of a train; and there was evidence tending to show that the injury was caused by the use of a defective switch-engine. The engine-driver whose duty it was, had several times previously notified the foreman of one of the company's repair shops of the defective condition of the engine. The foreman had charge of all the men employed in the repair shop, and was the person to whom such defect should have been reported, and it was his duty to see it repaired. Another person, known as the master-mechanic, had general supervision of all repairs of the motive power, tools and machinery of the company, and general charge of all the men employed in the locomotive department, including the power to employ men in or discharging them from service in that department; while such foreman had no such power to employ or discharge men without the master-mechanic's consent. Held, that an instruction to the effect that notice to such foreman of the defect was notice to the company, was correct. *Brabbitts v. Chicago and Northwestern R'y Co.*, 38 Wis., 289. 1875. The foreman being the person designated by the company, to whom notice of any defect in the engine was to be given, and whose duty it was to repair it, his negligence in that behalf was the negligence of the company, for which the company is liable. *Ib.*

814. — If an injury occurs to an employe through a defect or insufficiency in the machinery furnished to the employes by the company, knowledge of the defect or insufficiency must be brought home to the company, or it must be proved that it was ignorant of the same through its own want of care, before the company can be made liable. *Columbus, Chicago and Indiana Central R'y Co. v. Troesch*, 68 Ill., 545. 1873.

815. — On the trial of an action for damages for an injury received by the plaintiff while coupling cars, the court declined to charge the jury that "if they believed that the plaintiff knew, or had reasonable grounds for believing, that the engine used by defendant prior to the time of the injury complained of was not controllable by the engine-driver, and that the road-bed was in a dangerous condition, and the plaintiff was

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injured thereby, then the plaintiff was guilty of contributory negligence and the defendant was not liable; and that this was so whether the defendant knew or was ignorant of the condition of the engine or road-bed." *Held*, that the instruction should have been given. *Crutchfield v. Richmond and Danville R. R. Co.*, 78 N. C., 300, 1878; 16 Amer. R'y Rep., 212.

316. — The fact that the employer had notice of the defect in the engine is proved, and from this and other circumstances connected with it in evidence, the court is of opinion the presumption fairly arises that the deceased was induced by the employer's servants to believe the defect would be speedily obviated, and continued in the employment for that reason. *Morris v. Indianapolis and St. Louis R. R. Co.*, 10 Bradwell (Ill.), 389. 1882.

317. — Where an employe of a railway company sues for an injury caused by a defective car, there must be an averment that the car was defective when placed upon the road, or, if it subsequently became defective, that notice of the defect was brought home to the company. *Kidwell v. Houston and Great Northern R'y Co.*, 3 Woods (U. S. C. C.), 313. 1877.

318. Orders of superior. The fact that an employe knowingly undertook to use a dangerously defective tool under the immediate command of a superior employe will not give him a right to recover. *Baker v. Western and Atlantic R. R. Co.*, 68 Ga., 699. 1882.

319. Passing trains. An employe of a railroad company, who is engaged in mending the track of the road, who, whilst he might get further off, stands near enough to the railroad track to be struck by a train, if perchance there should be an increase of speed or a change of cars, is guilty of the grossest imprudence and negligence. No man is justified in placing himself near a passing train upon any idea or presumption that there would be no such increase of speed or change of cars, and for an injury sustained by so doing he or his representative cannot recover. So *held*, where a Pullman sleeping car had been attached, and the train changed from an accommodation train to an express train, without the

knowledge of the injured person; the greater oscillation and width of the car taking more space than the former train had done. *Baltimore and Ohio R. R. Co. v. Whittington*, 30 Grattan (Va.), 805. 1878.

320. Patent defect. Where a laborer upon a railway engaged in driving spikes is furnished by the section boss with an iron maul known by the section boss to be defective, and is injured in consequence of such defect, the company is liable although the defect was patent and would have been known to the servant had he inspected the maul. *Guthrie v. Louisville and Nashville R. R. Co.*, 11 Lea (Tenn.), 372. 1888.

321. Promise to repair. Where a master has expressly promised to repair a defect in the machinery used by the servants in his employment, the servant may recover for an injury caused thereby within such a period of time after the promise as would be reasonable to allow for its performance. *Parody v. Chicago, Milwaukee and St. Paul R'y Co.*, 15 Federal Reporter, 205, 1882; *Hough v. Railway Co.*, 100 U. S., 218, 1879; 21 Amer. R'y Rep., 451.

322. Push-cars. Where push-cars are furnished by a railway company to be used in carrying materials, and to be propelled by pushing, it is not negligence in the company to fail to supply them with brakes or other means of controlling their movement. *Miller v. Union Pacific R'y Co.*, 17 Federal Reporter, 67. 1888.

323. Tumbling-rod. Although the statute relating to the use of machinery connected with tumbling-rods makes a party who shall use such tumbling-rods, without being properly boxed or secured, liable to a person injured thereby, yet in such cases the rule of contributory negligence prevails, as in other cases; and if the party injured is guilty of contributory negligence, he cannot recover. *Wabash, St. Louis and Pacific R'y Co. v. Thompson*, 10 Bradwell (Ill.), 271. 1881.

324. Turn-table. The plaintiff was employed by defendant to operate a turn-table by a crank that was stationary upon and revolved with the turn-table, and a track was laid in such proximity to the turn-table that while an engine was on the turn-table, being turned by the plaintiff, it was struck by an

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engine passing upon the track, causing the crank to strike the plaintiff by a reverse motion, inflicting the injury complained of. *Held*, that whether the defendant was guilty of negligence in the construction and use of the track and turn-table, and whether the plaintiff was chargeable with contributory negligence, were questions properly left to the jury. *Lake Shore and Michigan Southern R'y Co. v. Fitzpatrick*, 31 Ohio St., 479. 1877.

325. Unloading cars. Where an employe, in removing freight from one car into another, used a common car door made of pine boards, which was laid from one car door to another, and while taking down a bale of wool he and his fellow-servant let the same fall upon a truck on the door, which caused the door to break, giving him a fall and inflicting a severe personal injury, and the proof showed that such servant had been long engaged in the business, and had frequently used such a door for a platform, and knew the danger in its use, there being other platforms in the yards of better and stronger construction which might have been used, and the employer not knowing that such a one was used at the time of the accident, the negligence of the servant in continuing to use such a platform, knowing the same to be unsafe, is of such a character as to defeat a recovery by him against the employer. *Pennsylvania Co. v. Lynch*, 90 Ill., 333. 1878.

3. Other defects.

326. Awning over track; knowledge of defect by employe. A master is bound to furnish safe machinery, etc. So the building or permitting of an awning on the track at an elevator, at such a height as to be dangerous to employes operating the train, is negligence for which the company is liable. But if an employe enters upon employment with a knowledge of such defect, or remains in the service of the corporation with a knowledge of such defect, the company is not liable therefor. *Clark v. St. Paul and Sioux City R. R. Co.*, 23 Minn., 128; 2 Amer. & Eng. R. R. Cases, 240. 1881. The same principle held to apply to a case of defective rules and defective brakes. *Goltz*

v. Winona and St. Peter R. R. Co., 22 ib., 55. 1875.

327. Bridges over railway. There is no legal obligation on the part of a railroad company to build its bridges over public roads with an elevation so great that one of its employes, standing upright on the top of a car, will not be endangered; and, consequently, if an employe, while thus standing in the course of his business, be struck by one of such bridges, he cannot recover for such injury. *Baylor v. Delaware, Lackawanna and Western R. R. Co.*, 40 N. J. Law, 23. 1878.

328. — If a brakeman knows that a foot-bridge over the railroad upon which he is employed is too low to permit a man standing erect on the top of a freight car to pass under it in safety, and nevertheless remains in the service of the company, and, while passing under the bridge on the top of a freight car, stands erect, and is killed by coming in contact with the bridge, the company is not liable. *Rains v. St. Louis, Iron Mountain and Southern R'y Co.*, 71 Mo., 164, 1879; 5 Amer. & Eng. R. R. Cases, 610. See *Nelson v. Atlantic and Pacific R. R. Co.*, 68 Mo., 593. 1878.

329. — An employe, having continued in service with the knowledge that a bridge, in view of the height of the cars, was dangerous for persons on top of the cars, was held to have assumed the risk. *Baltimore and Ohio R. R. Co. v. Stricker*, 51 Md., 47. 1878. The same principle applied to an employe injured by a defective trip-hammer. *Hanrathy v. Northern Central R'y Co.*, 46 Md., 280, 1876; 18 Amer. R'y Rep., 188.

330. — Where a railway was crossed by another company's line by means of an overhead bridge, and one of the former company's employes was injured by reason of the bridge being too low, *held*, that the employer was not liable for the injury, the bridge not being within its control. *Gibson v. Midland R'y Co.*, 2 Ontario Rep., 658. 1883.

331. — Where it was shown that a brakeman, who was knocked from the top of a freight car by a bridge, had been employed on the same portion of the road for several years, and knew the height of the bridges, but remained in the service without protest,

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it was held that he thereby waived the negligence of the company in that regard. *Wells v. Burlington, Cedar Rapids and Northern R'y Co.*, 56 Ia., 520, 1881; 2 Amer. & Eng. R. R. Cases, 243.

332. Cars loaded with timbers; project-ing ends. Where a railroad company is in the habit of receiving from other lines cars loaded with timbers which project over the ends of the cars so as to make it dangerous for any one except a careful and skilful person to attempt to couple the cars, it is not negligence for the company to order and permit such a person, who has been in its employ doing that kind of business for about five months, to attempt to make such a coupling, where the attempt is to be made in daylight, although it may be raining at the time. *Atchison, Topeka and Santa Fe R. R. Co. v. Plunkett*, 25 Kans., 188, 1881; 2 Amer. & Eng. R. R. Cases, 127.

333. — An experienced brakeman was ordered by the conductor to couple a car loaded with lumber, which projected forward, and compelled him to stoop in making the coupling. In doing so, he delayed a little and his fingers were caught in the coupling-link and hurt. *Held*, that he could not recover against the railway company, as he fully understood the difficulty to be guarded against, and the conductor was not shown to have been in fault in any way. *Day v. Toledo, Canada Southern and Detroit R'y Co.*, 42 Mich., 523, 1880; 2 Amer. & Eng. R. R. Cases, 126. See as to negligent custom in loading timbers, *Hamilton v. Des Moines Valley R. R. Co.*, 36 Ia., 31, 1872.

334. Cattle chutes. Where a railway company erects "cattle chutes" in such close proximity to its track as to endanger the lives of its employes, in the proper operation of its trains, it is negligence. If the "chutes" are constructed so as to be reasonably safe for employes operating trains in a reasonable and prudent manner, the company is not chargeable with negligence. *Allen v. Burlington, Cedar Rapids and Northern R'y Co.*, 57 Ia., 623, 1882; 5 Amer. & Eng. R. R. Cases, 620.

335. — If plaintiff knew, or ought reasonably to have known, the danger to him of the cattle chute, and still continued in his employment, he might be held to have

assumed the extraordinary risk thus created; but this consequence of acquiescence must rest upon positive knowledge, or reasonable means of such knowledge, and not on vague surmise of the possibility of danger. And, upon the evidence, it was for the jury to determine whether the plaintiff had, or ought to have had, such knowledge. *Dorsey v. Phillips and Colby Construction Co.*, 42 Wis., 583, 1877; 15 Amer. R'y Rep., 143.

336. Coal chute. Where a baggageman sued for damages for an injury caused by being struck by a coal chute, and evidence was introduced showing that after the accident the track was changed, giving more room between the track and the chute, *held*, that this evidence was competent and admissible. *Atchison, Topeka and Santa Fe R. R. Co. v. Retford*, 18 Kans., 245, 1877; 15 Amer. R'y Rep., 278.

337. Collision with cattle; insufficient fences. In an action for an injury caused by the failure of a railway company to maintain a proper fence along its line, whereby cattle escaped and got upon the track, it is necessary to show that the cattle got upon the track through the fence at a place where it was defective and insufficient to prevent stock from getting upon the road. It is not sufficient to show that the fence on each side of the road was generally poor and defective. *Wabash R'y Co. v. Brown*, 2 Bradwell (Ill.), 516, 1878.

338. Defective tools. There is no implied warranty on the part of a master that the tools furnished his servant are sound and fit for the purposes intended. He is only bound to use proper care in providing them. *Little Rock and Ft. Smith R. R. Co. v. Duffey*, 35 Ark., 602, 1880; 4 Amer. & Eng. R. R. Cases, 637.

339. — That a master might have known, by the use of ordinary care and diligence, that a tool furnished an employe for use was defective, is not sufficient to make him liable for the injury resulting from its use, irrespective of any probability of harm or danger in using it. *Id.*

340. Depot grounds; obstructions. The evidence for plaintiff showed that he was employed to work in defendant's car-shops; that it was his duty, when required by the yard-master, to assist in moving cars upon

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the side-tracks; that there was, and had been for more than a year, a small pile of lumber, eighteen inches or two feet high, so near one of the side-tracks that a person engaged in pushing a car along that track could not pass between the car and the pile, but must either pass over the top of the pile or leave his position at the side of the car and fall behind it; that plaintiff had worked for defendant about a month, and had assisted in moving cars, but whether on this particular track, did not appear; that at the time of the accident the boards which covered the pile to protect it from rain had slipped partly off; that a slight snow had recently fallen; that plaintiff, by order of the yard-master, was assisting to move a car on said track, and was pushing hard, with his head down and shoulder against a stake, at the side of the car; that the persons engaged could hardly move the car, and were hallooing to push harder, etc.; that he did not see the pile of lumber until he came upon it; that, in attempting to pass over the pile, he stepped upon a misplaced board, which gave way, and he was thrown down and his foot carried under the car and crushed; that, besides the yard-master and foreman of the shops, there was a superintendent, who was frequently in and about the shops and the yard. *Held*, that, upon this evidence, the questions of defendant's negligence, and plaintiff's contributory negligence, were for the jury. *Besser v. Chicago and Northwestern R'y Co.*, 45 Wis., 477, 1878; 18 Amer. R'y Rep., 58.

341. Depot platform. Negligence in regard to the proper construction of a depot platform and its position with reference to the track is a question for the jury. *Chicago, Rock Island and Pacific R. R. Co. v. Clark*, 11 Bradwell (Ill.), 104. 1882.

342. Depot roof. The deceased, a conductor of a freight train at the time of the injury, was climbing over the top of a car when the train was under way, it having just started from the station. It did not appear that his doing so had any necessary connection with his duties as conductor. *Held*, that the evidence established contributory negligence, he having been injured by a projecting depot roof. *Gibson v. Erie R'y Co.*, 63 N. Y., 449, 1875; reversing *Same v. Same*, 5 Hun (N. Y.), 31, 1875.

343. Handling heavy freight. In performing the duties of his place, a servant is bound to take notice of the ordinary operation of familiar laws of gravitation, and to govern himself accordingly. If he fails to do so the risk is his own. If the instrumentalities furnished by the master for the performance of the servant's duties are defective, and the servant is aware of this, he is bound to use his eyes to see that which is open and apparent, and, if he fails to do so, he cannot charge the consequences upon his master. *Walsh v. St. Paul and Duluth R. R. Co.*, 27 Minn., 367, 1880; 2 Amer. & Eng. R. R. Cases, 144.

344. Leased lines. Defendant had running powers over the line of another company. In an action by the guard of defendant's railway for an injury sustained by him through his head coming in contact with a post on the servient railway, while looking out in the reasonable performance of his duty, the jury having found that the position of the post was such as to be dangerous to a guard who is to keep a lookout reasonable for the safety of the train, *held*, that the servient railway company was liable. *Graham v. North Eastern R'y Co.*, 18 Common Bench (N. S.), 229; 114 E. C. L., 229. 1865.

345. Loose cars in yard. The mere fact that in a railway company's private yard, where cars are loaded and unloaded and trains made up, such cars are permitted to move along the tracks unattended by a brakeman, cannot be held negligence as matter of law, as against the company's servants employed in such yard. *Kelley v. Chicago, Milwaukee and St. Paul R'y Co.*, 53 Wis., 74, 1881; 5 Amer. & Eng. R. R. Cases, 469.

346. Manner of loading cars. A., an employe, while engaged in coupling cars from the top of which certain bridge irons projected, was caught by the head between the ends of said bridge irons and crushed to death. It was customary upon the railway to load cars in that manner; and A. had knowledge both of this fact and also that they were so loaded in this particular instance. The regulations of the company required its employes to stoop in coupling below the body of the cars. A. knew of this regulation, but had failed to comply with it.

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Had he done so, he could have effected the coupling with safety. In an action by A.'s widow and minor children against the company to recover damages for his death, *held*, that there was no evidence that the risk run by decedent was extraordinary in its nature, and that therefore it was error to submit that question to the jury. *Northern Central Ry Co. v. Husson*, 12 Amer. & Eng. R. R. Cases (Pa.), 241. 1892.

347. Obstruction on track; push-car. While a railway company is bound to use great care in order to keep its tracks clear for the safety of its passengers, and for its employes, it is not responsible for the unlawful act of some third party in placing obstructions upon the track without its knowledge or consent, unless it be in a case where it had by its conduct done some act which it might reasonably have anticipated would lead to the placing of the obstruction upon the track. *Harris v. Union Pacific R. R. Co.*, 13 Federal Reporter, 591, 1832; 4 McCrary, 454.

348. Projecting depot roof. P., plaintiff's intestate, a conductor of a freight train of defendant, while upon his train, was struck and killed by a projecting roof of a depot building. P. had lived for many years at the place of the injury, and had been long familiar with the road, passing over it daily. It did not appear that any change had been made in the building or in the road after he entered upon his employment. *Held*, that as the peculiar character of the roof and its near approach to passing cars was as patent to the deceased as to defendant's officers or agents, he assumed the risk when he entered upon the employment, and defendant was not liable. *Gibson v. Erie Ry Co.*, 68 N. Y., 449, 1875; reversing *Same v. Same*, 5 Hun (N. Y.), 81, 1875.

349. Signal-post. In a suit brought by an employe against a railway company for an injury caused by his head striking a signal-post by the side of a track, and three feet and eight inches therefrom, while leaning outside of the locomotive and looking back to get a signal from the conductor, it appeared that the plaintiff knew of the signal-posts, but had not noticed the one in question before the accident, though, before looking back, he had looked ahead, but saw no ob-

struction, and that there were many other structures on the line of the road at the same distance from it. *Held*, that the action could not be maintained. *Lovejoy v. Boston and Lowell R. R. Co.*, 125 Mass., 79. 1878.

350. Telegraph pole. A railway company permitted a telegraph pole to stand for a period of some three years so near to a side track that it was within eighteen inches of freight cars passing on such track, so that a brakeman in descending from the top of a freight car while in motion, in the performance of his duty, came in collision with the pole, and was thrown from the car and killed. It was held to be culpable negligence in the railroad company to permit, for so long a time, such an obstruction to be in such close proximity to its track. *Chicago and Iowa R. R. Co. v. Russell*, 91 Ill., 298. 1878.

351. — The pole had stood at the same place for about three years. *Held*, from the length of the time that the pole had stood where it did, as shown by the evidence, the jury were warranted in finding that the company knew of it—that it ought to have known of it, and so might be considered as having notice. *Ib.*

352. — Under the circumstances of this case, whether the railroad company was guilty of negligence in allowing a telegraph pole to remain so near to its track that an employe, while in the discharge of his duty, was injured by colliding therewith, is a question for the jury, and the demurrer should be overruled. *Hall v. Union Pacific Ry Co.*, 16 Federal Reporter, 744. 1883.

353. Water tank. A fireman, or wood-passer, having been killed while engaged in his business on the train, and his death having resulted from striking his head against some part of the fixtures of a water-tank, situated on the roadside—most probably against an iron pipe projecting from the tank and reaching within a short distance of the train,—his widow cannot recover of the railroad company damages for the homicide, if her husband, though the pipe projected too far, could have passed it in safety by using due diligence on his part in the manner of prosecuting the business in which he was engaged. *Atlanta and West Point R. R. Co. v. Webb*, 61 Ga., 586. 1878.

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354. — A declaration in an action by an employe alleged, in brief, as follows: Plaintiff was a baggage-master on defendant's train, and in addition it was his duty to look after the condition of the cars, and generally to do everything in his power to preserve the safety of the trains and passengers. On the day of his injury he was notified that new wheels had been put under one of the cars, and that he should look out for them. Soon after leaving Atlanta the new wheels became hot, and made a noise; he went to the side door of the baggage car to see if they were in a condition to endanger the safety of the train, and while thus looking out, without fault or negligence on his part, he was stricken by the spout of a tank of defendant, resulting from the negligence of the latter in placing such tank or spout so near as to strike him while discharging his duty and looking out of said car in an ordinary and usual manner. It was his duty and necessary for him to be in the position he was in at the time of the accident, and he did not and never had known that the tank was so near the track. *Held*, that a case was substantially made by this declaration, and the court properly refused to dismiss it on general demurrer. *Atlanta and Charlotte Air Line R. R. Co. v. Woodruff*, 63 Ga., 707. 1881.

355. — A railway company is responsible for an injury resulting to an employe by reason of a tank projecting over the road so as to make it unsafe for trainmen. *Houston and Texas R'y Co. v. Oram*, 49 Tex., 341. 1878.

356. — Where the evidence tended to show that a brakeman, in looking from a car window, received an injury from a water-tank left recently by widening of the track at an unsafe distance from the side of the car, and who was in the performance of a duty arising out of the circumstances of his employment, the question whether he exercised due care and caution, and conducted himself in the usual way that similar acts are done by persons in like employment, and other considerations of like character, do not fall within the range of ordinary observation and experience, and should be submitted to the judgment and experience of the jury, under proper instructions from

the court. *Walsh v. Oregon R'y and Navigation Co.*, 10 Ore., 250. 1882.

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357. Clearing ash-pan. Appellee was injured while clearing the ash-pan underneath his engine. It was not necessary that it should have been done at that particular time, and the place where the engine was stopped was one of especial hazard. The court is of opinion, from all the circumstances of the case, that the injury was caused by appellee's own negligence, and hence he is not entitled to recover. *Union R'y and Transit Co. v. Leahy*, 9 Bradwell (Ill.), 353. 1881.

358. Connecting lines. Plaintiff, an employe of a railway company, was, while engaged in inspecting the cars of defendant, a connecting railway company, upon the premises of defendant, injured by one of its trains. *Held*, that whether plaintiff was acting as the employe of his own or the common employe of both companies, he assumed all risks incident to his employment, and defendant was not liable for such injury. *Cruty v. Erie R'y Co.*, 3 Thompson & Cook (N. Y. Supreme Ct.), 244. 1874.

359. — The principle that an employe assumes the risks of the negligence of his co-employes does not apply as to the employes of a connecting line. *Philadelphia, Wilmington and Baltimore R. R. Co. v. State*, 58 Md., 372; 10 Amer. & Eng. R. R. Cases, 792. 1882.

360. Damaged cars. Where a railroad company is in the habit of constantly taking damaged cars from one station to another for repair, and a person is employed to couple and switch such cars, and while so engaged he is injured in attempting to couple a car to the train, by reason of the broken condition of the car, *held*, that the presumption is that he undertook the employment subject to all of the risks incident to the place, and that this was one of the risks he expected to incur when he accepted the employment. *Chicago and Northwestern R. R. Co. v. Ward*, 61 Ill., 130, 1871; 12 Amer. R'y Rep., 434.

361. Digging well. An employe engaged in digging a well held to assume the risks of

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his employment. *Galveston, etc., R. R. Co. v. Lempe*, 11 Amer. & Eng. R. R. Cases, 201 (Tex.). 1883.

362. Extra hazardous duty. Where a brakeman, on going into the employment of a railway company, signs a contract binding him to obey all orders, rules and regulations, but in which the general language applies equally to all classes of employes, the contract to obey all orders must be construed to apply to all which are issued to him in the line of duty in which he is employed; and it does not empower the company to assign him to other duties wholly disconnected therewith and differing therefrom. And while the clause binding him to use care and caution applies to anything he may undertake to do, it is for the jury to decide whether he has violated it. *Jones v. Lake Shore and Michigan Southern R'y Co.*, 49 Mich., 573; 8 Amer. & Eng. R. R. Cases, 221. 1888.

363. Foggy weather. A section hand assumes the risk of his employment, and where such an employe is injured by collision with an extra train, running in foggy weather without a headlight, the corporation is not liable, unless there has been negligence in the selection of the employes in charge of the train. *Pennsylvania R. R. Co. v. Wachter*, 60 Md., 395. 1888.

364. Gravel pits. Where the undisputed evidence showed that the plaintiff, before and at the time of receiving the injury complained of (from the falling of a bank of earth under which he was excavating gravel for defendant), was fully informed of the danger to himself of the service in which he was engaged, and voluntarily remained in the dangerous position which he was occupying, there was no error in rendering a judgment of non-suit. *Naylor v. Chicago and Northwestern R'y Co.*, 53 Wis., 661, 1881; 5 Amer. & Eng. R. R. Cases, 480.

365. Insufficient number of employes. If a servant of a railway company remains in the employment of the company, when he knows the performance of the duties required of him will expose him to danger from the want of a watchman on the rear car of trains in the yard where he is engaged in making up trains, etc., or for the want of a sufficient number of hands to operate

trains, it will be presumed he voluntarily assumed the risk, and waived whatever, if any, obligation rested on the company in that respect, and if injury ensues, he must be held to be without a remedy. *Chicago and Northwestern R'y Co. v. Donahue*, 75 Ill., 106. 1874.

366. — The plaintiff was a guard in the service of the defendant, and his duty was to attach certain carriages to the engine of a goods train, and to dispatch the same within a certain time, so as to avoid collision with a passenger train. In consequence of the plaintiff's not having had another person to assist him, the engine started, threw him upon the rails, and a truck passed over his arm. The plaintiff for three months previously had done the same work without any assistance, and without making any objection. *Held*, in an action by the plaintiff against the defendant for compensation for the injury, that the plaintiff, having voluntarily undertaken the duty, was not entitled to recover. *Skip v. Eastern Counties R'y Co.*, 24 Eng. Law & Equity, 896; 23 Law Jour. Rep., N. S. (Exch.), 23. 1853.

367. Minors. A minor who accepts employment from a railway company is bound by the same rules as an adult. This rule, however, would not apply to a child of tender years. *Houston and Great Northern R. R. Co. v. Miller*, 51 Tex., 270. 1879.

368. Negligence of co-employees. When a person enters into the service of a railroad company, he thereby undertakes to run all the ordinary risks incident to the employment, including his own negligence or unskillfulness and that of his fellow-servants engaged in the same line of duty, or incident thereto, provided such other servants are competent to discharge the duties assigned them. *Toledo, Wabash and Western R'y Co. v. Durkin*, 76 Ill., 895. 1875.

369. Running arrangements. An employe knowing of a change in running arrangements, whereby the risk is increased, should object thereto or he cannot complain of an injury occasioned thereby. *Robinson v. Houston and Texas Central R'y Co.*, 43 Tex., 540, 1877; 13 Amer. R'y Rep., 303.

370. Snow train. Plaintiff, while going as a snow shoveler for the defendant upon a train engaged in the business of removing

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snow from the track, was injured by the overturning of the car in which he rode, by reason of an unsuccessful attempt of the conductor to remove a snow-bank from the track by means of the snow-plow alone, aided by the momentum of the train. *Held*, upon all the facts set out in the complaint, that a recovery by plaintiff is precluded by the facts that such overturning of his car was one of the perils of the business which he assumed, and that the conductor and others whose negligence is alleged, were co-employees engaged in the same employment. *Howland v. Milwaukee, Lake Shore and Western R'y Co.*, 54 Wis., 226, 1882; 5 Amer. & Eng. R. R. Cases, 578.

371. — "bucking" snow. One of the acts of negligence relied upon was the order of defendant to plaintiff's intestate to couple two engines together, tender to tender, and use them in "bucking" snow off the road, this being claimed to be a dangerous practice. This was the general practice of the defendant and other roads in the state, well understood by all railroad engineers, including the defendant. *Held*, that, under these circumstances, the dangers incident to such a practice must be held to have been assumed by the deceased as included in the ordinary risks of his employment. *Morse v. Minneapolis and St. Louis R'y Co.*, 30 Minn., 465, 1883; 11 Amer. & Eng. R. R. Cases, 168.

372. Usage; damaged cars. An employee is bound by an established usage or custom of the company in regard to the duties required of him. If the usage in a particular case imposes on him a duty extra hazardous, and in its performance he sustains injury, the burden is on him to show that the existence of this usage had been concealed from him by the company. *Watson v. Houston and Texas Central R'y Co.*, 58 Tex., 434, 1888; 11 Amer. & Eng. R. R. Cases, 213.

373. — The duty of removing damaged cars to the repair shops of a railway company may be imposed on any employee who will assume the risk. If a brakeman accepts service from a company whose usage and custom it is to require of its brakeman to couple defective or broken cars, so that they may be removed for repairs, he will be held to have assumed the risk incident to such employment. *Ib.*

374. What risks are assumed. An employee cannot recover for an injury resulting from one of the usual risks or hazards connected with the business into which he has entered, and which the law will consider that he assumed when undertaking the duties of the position. *Woodworth v. St. Paul, Minneapolis and Manitoba R'y Co.*, 18 Federal Reporter, 282, 1883; *Schultz v. Chicago and Northwestern R'y Co.*, 44 Wis., 638, 1878; 18 Amer. R'y Rep., 146; *Indianapolis, Bloomington and Western R. R. Co. v. Flanigan*, 77 Ill., 365, 1875; *Fort Wayne, Jackson and Saginaw R. R. Co. v. Gildersleeve*, 33 Mich., 133, 1876; *Botsford v. Michigan Central R. R. Co.*, *ib.*, 256, 1876; *Little Rock and Ft. Smith R. R. Co. v. Duffey*, 35 Ark., 602, 1880; 4 Amer. & Eng. R. R. Cases, 637.

375. — One who undertakes an employment with full knowledge of the rules and methods pursued by the employer in the business cannot recover from the employer for an injury happening in consequence of such methods. *Kelley v. Chicago, Milwaukee and St. Paul R'y Co.*, 53 Wis., 74, 1881; 5 Amer. & Eng. R. R. Cases, 469.

376. — If an employee, knowing the hazards of his employment, as the business is conducted, is injured while engaged therein, he cannot maintain an action against the master for such injury merely on the ground that there was a safer mode for conducting the business, the adoption of which would have prevented the injury. *Naylor v. Chicago and Northwestern R'y Co.*, 53 Wis., 661, 1881.

377. — An employee who enters upon any service assumes all the ordinary hazards arising from the performance of the duties of his voluntary engagement, and the employer will not be liable to him for an injury caused without his fault, when he does nothing to render the service more dangerous than it was known to be by the employee before he engaged in it. *Clark v. Chicago, Burlington and Quincy R. R. Co.*, 92 Ill., 43, 1879.

IV. EMPLOYEES AS PASSENGERS.

378. — When an employee in service of the company is traveling as a passenger, but in his employment, and is injured through the

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negligence of the employes managing the train, the company is not liable for the injury. *Hutchinson v. York, Newcastle and Berwick R'y Co.*, 5 Welsby, Hurlstone & Gordon (Exchequer), 343, 1850; 6 Eng. R. R. & Canal Cases, 580.

379. Rights of employe. A person in the employment of a railway company, riding from his home to his employment in a caboose car attached to a freight train, without paying fare, according to the custom and the understanding of the parties, from which car and train all persons except employes of the company are excluded, of which exclusion such person has full knowledge, is not a passenger but only an employe of the company. *Kansas Pacific R'y Co. v. Salmon*, 11 Kans., 83. 1873.

V. NEGLIGENCE AS BETWEEN EMPLOYEES.

380. Belief of injured person. The reasonable belief of a party that he will not sustain an injury in doing acts which, but for such belief, would be negligence, does not exonerate him from the charge of negligence. *Muldowney v. Illinois Central R'y Co.*, 36 Ia., 462. 1873.

381. Climbing upon moving car. The complaint alleged that it was the duty of the deceased, as an employe of the defendant, to take care of its cars in a certain yard, and it then alleged that, seeing an unattended car upon a track in the yard approaching another car so that it would collide with the latter unless it was stopped, the deceased, in order to prevent a collision, and "without fault or negligence on his part," undertook to climb upon the top of the approaching car by an outside ladder thereon, and that, while he was so climbing, the two cars collided, causing the injury. *Held*, on demurrer, that the court cannot, on these averments, determine that the deceased was guilty of negligence. *Kelley v. Chicago, Milwaukee and St. Paul R'y Co.*, 50 Wis., 381, 1880; 2 Amer. & Eng. R. R. Cases, 65.

382. Collision; engine-driver remaining at his post. In determining whether an engine-driver, injured by a collision while running a train, was guilty of negligence in

remaining at his post and not jumping off before the collision, the standard of ordinary care and prudence on his part must be fixed with reference to the peculiar responsibilities of his employment. *Cottrill v. Chicago, Milwaukee and St. Paul R'y Co.*, 47 Wis., 634, 1879; 21 Amer. R'y Rep., 66.

383. — The mere facts that such employe, after seeing a signal to stop, and after reversing his engine, might, with probable safety to himself, have gotten off from his engine before its collision with another train then approaching, and that he remained at his post grasping the reversing lever and throttle until the collision occurred, will not justify the court in holding, as matter of law, that he was negligent. *Id.*; *Pennsylvania Co. v. Roney*, 89 Ind., 453. 1883.

384. Comparative negligence. Where an engine-driver who, by his gross negligence in running the train at much greater rate of speed than his written instructions required, over a part of the road known by him to be in bad condition, was injured, his own negligence contributing to the injury, if not producing it, it was held no recovery could be had by him of the company, even if it was also guilty of negligence. *Illinois Central R. R. Co. v. Patterson*, 93 Ill., 293. 1879.

385. Construction train; sudden stoppage. Where an employe upon a construction train, consisting of an engine, two cabooses and four or five flat cars, with the engine coupled on to the caboose, with the flat cars in the rear, all slowly backing at the rate of about four miles an hour, is directed by the conductor in charge of the train to pick up a crow-bar lying crosswise near the rear end of the rear flat car, and while in the act of stooping to pick up the bar, falls off and is killed by being run over by the cars, and the fall is caused by a sudden concussion or jerk of the cars from reversing the engine by the engine-driver to stop the train on account of cattle near to the track at the rear of the train, and neither the statute, the rules of the company nor the custom on the trains, requires any preliminary signal or warning to the laborers upon the train to enable them to hold fast, or otherwise secure themselves to the cars, before reversing the engine or stopping the

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cars under such circumstances,— *held*, that, upon these facts, the engine driver was not guilty of culpable negligence in failing to ring the bell. *Missouri Pacific R'y Co. v. Haley*, 25 Kans., 35, 1881; 5 Amer. & Eng. R. R. Cases, 594.

336. Contributory negligence. Negligence is peculiarly a question for the jury. While, therefore, in a suit against a railroad by an employe, if negligence on his part is plainly shown, the court may correct an erroneous finding in his favor, or may grant a non-suit where there is no conflict in the evidence, yet, where the fact of the negligence is doubtful, it should be submitted to the jury. *Central R. R. Co. v. Freeman*, 66 Ga., 170. 1880.

337. — An employe held guilty of contributory negligence in not avoiding collision with the rear part of a freight train where a moving train had been separated. *Haley v. New York Central and Hudson River R. R. Co.*, 7 Hun (N. Y.), 84. 1876.

338. — Under the facts in a particular case, *held*, that the plaintiff was guilty of contributory negligence. *Martensen v. Chicago, Rock Island and Pacific R. R. Co.*, 11 Amer. & Eng. R. R. Cases (Ia.), 233. 1883.

339. — Facts considered which were held not to constitute contributory negligence in a railway employe. *Berry v. Central R'y Co. of Iowa*, 40 Ia., 564. 1875.

390. — In an action to recover for the injury of an employe of a railroad, it is not necessary for the plaintiff to show by direct and positive evidence that such employe was at the time of the injury in the line of his duty, and exercising proper care, but it is sufficient if such is the reasonable inference from the facts proven. Such inference cannot be drawn, however, where the facts are simply not inconsistent with it. *Perigo v. Chicago, Rock Island and Pacific R. R. Co.*, 55 Ia., 326. 1880.

391. — When an employe leaves his post of duty and goes to a place of danger (he knowing it to be such), and there receives an injury, he is guilty of contributory negligence. *Sammon v. New York and Harlem R. R. Co.*, 38 N. Y. Superior Ct., 414, 1874; 62 N. Y., 251, 1875; 49 Howard's Practice (N. Y.), 348, 1875.

392. — Notice to the master by the em-

ploye, of defects in associates or material, does not necessarily fix the master's liability for injury to the employe. It is incumbent on the latter to show that there was no want of due and reasonable care on his part; he is not exempt from the operation of the rule that one cannot recover from an injury which is the proximate result of his own failure to exercise ordinary care. *Colorado Central R. R. Co. v. Ogden*, 3 Colo., 499. 1877.

393. — After charging that any contributory negligence of plaintiff, at the time of the accident, would prevent a recovery, the court did not err in refusing to charge that if plaintiff had as good opportunity of knowing the defect as defendant had, but overlooked it, this was negligence which would prevent a recovery. *Wedgewood v. Chicago and Northwestern R'y Co.*, 44 Wis., 44, 1878; 19 Amer. R'y Rep., 393.

394. — It is the settled law of Wisconsin that while a slight want of ordinary care on plaintiff's part will defeat an action for personal injury, it will not be defeated by "slight negligence" on his part; that phrase properly denoting a want of extraordinary care. *Ditberner v. Chicago, Milwaukee and St. Paul R'y Co.*, 47 Wis., 138, 1879; 21 Amer. R'y Rep., 37.

395. — Although, as to travelers about to cross a railroad track, it is negligence, as matter of law, not to look in both directions, in order to see whether a train is approaching, such rule cannot be applied to persons employed in performing certain work in and upon the tracks and road-bed. *Ominger v. New York Central and Hudson River R. R. Co.*, 4 Hun (N. Y.), 159. 1875.

396. — While it is true that an employe, while working in a dangerous place, where he is required to give his attention to the work in hand, is entitled to rely on the fact that the employer, knowing such to be the fact, will exercise due care to protect the employe from danger not directly arising from said work, yet this rule will not apply in the case of an employe who, walking across a track to get his tools, is run over by an approaching train, for the reason that, the act of walking being automatic, it is not such an act as would engross a man's attention to such an extent that with ordinary care and

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diligence he would not see or hear an approaching train. *Holland v. Chicago, Milwaukee and St. Paul R'y Co.*, 18 Federal Reporter, 243. 1883.

397. — It does not constitute negligence for an employe of a railway company to step on the track, in the course of duty, in the way of a train backing down toward him, if he has reason to believe the train will be stopped before reaching him. *Steele v. Central R. R. Co. of Iowa*, 43 Ia., 109. 1876.

398. — A laborer employed by a contractor who had been engaged by a railway company to lay water-pipes along its right of way, in going home, after his day's work was done, made his way along the tracks to a point where trains were constantly passing in both directions, and although there was enough room between the tracks, he was run over by one train while apparently trying to avoid another. He was not employed upon the road, and might have gone home without going along the track, but his employment enabled him to know the locality, the risk and the need of watchfulness to avoid injury. *Held*, that no action would lie for his death. *Bresnahan v. Michigan Central R. R. Co.*, 49 Mich., 410, 1882; 8 Amer. & Eng. R. R. Cases, 147.

399. — In cases of unexpected and immediate danger, calculated to affect the judgment of him who is to meet it, a mistake made in his movements is not negligence. *Stevenson v. Chicago and Alton R. R. Co.*, 18 Federal Reporter, 493. 1883.

400. — An employe of a railway company, to recover of the company for a personal injury growing out of alleged negligence on the part of the company, must have used ordinary care on his part, considering his surroundings,—that is, such care as men of ordinary prudence would usually exercise under the same or like circumstances. *Wabash R'y Co. v. Elliott*, 98 Ill., 481, 1891; 4 Amer. & Eng. R. R. Cases, 651.

401. — Where a brakeman in uncoupling a combination car to be left on a switch, which had a railing, instead of remaining on the car, as it was his duty, got upon a flat car next to it, and in consequence of the jerk caused by putting on steam to start the train, was thrown off and run over, his own

negligence was held such as to preclude him from recovering for the injury. *Chicago and Alton R. R. Co. v. Rush*, 84 Ill., 570. 1877.

402. — A brakeman, while proceeding to couple cars in motion, was warned by the bystanders that the attempt would be perilous to his safety, and, disregarding the warning, received injuries for which his administrator sought to recover. It was held that a disregard of the warning, where circumstances showed that the duty would be one of imminent danger from causes apparent in the exercise of ordinary care, would constitute contributory negligence and defeat a recovery. *Muldowney v. Illinois Central R. R. Co.*, 39 Ia., 615, 1874; 8 Amer. R'y Rep., 487.

403. — A., in the employ of a railway company as yard-man, while engaged as such, attempted to board the switch-engine, with which he was working, by standing in the middle of the track and stepping on the rear foot-board of said engine, which was approaching him, tender first, at a rate of from one to three miles an hour, but, in the attempt, fell, was run over by the engine, and died from the effect of his injuries. The hand-rail on the rear end of the engine, which was approaching the deceased, had been torn off the previous night, and had not been replaced, and the rear foot-board of the engine in question was partly broken at one end. Suit was brought by the administratrix to recover the sum of \$5,000. The jury returned a verdict of \$1,000 in favor of the plaintiff. Before the jury left the jury box a motion was made by the defendant to set aside the verdict. *Held*, that the act of so attempting to board the engine was clearly a case of gross contributory negligence on the part of the deceased, and the verdict should be set aside. *Cunningham v. Chicago, Milwaukee and St. Paul R. R. Co.*, 17 Federal Reporter, 882. 1883.

404. — Where a brakeman was injured by being thrown from a moving train while uncoupling the engine and tender, and it appears that he was not required to attempt such uncoupling while the train was in motion, but that the rules of the company forbade such attempt, this is such evidence of contributory negligence on his part as justi-

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fied a compulsory non-suit in an action for the injury. *Lockwood v. Chicago and Northwestern R'y Co.*, 55 Wis., 50, 1882; 6 Amer. & Eng. R. R. Cases, 151.

405. — The act of the intestate in going between the cars to uncouple them, while they were moving at an improper and unusual rate of speed, after having signaled the engine-driver to slacken speed, was not necessarily contributory negligence. *Beems v. Chicago, Rock Island and Pacific R. R. Co.*, 53 Ia., 150, 1882; 10 Amer. & Eng. R. R. Cases, 658; again reported, 6 Amer. & Eng. R. R. Cases, 222.

406. — Contributory negligence on the part of an employe will not relieve a railway company from liability for injuries sustained by him where his negligence was known to other employes, and no effort was made to prevent the injury. *McKean v. Burlington, Cedar Rapids and Northern R'y Co.*, 55 Ia., 192. 1880.

407. — car repairer; switching. Deceased was a car repairer of some years' experience, in the service of another company, and was familiar with defendant's freight yard, and knew that the work of switching and making up trains was constantly going on there. He also knew the customary mode of doing this work. Defendant had in its yard a repair track, and, separate from it, a track known as a transfer track, which was specially set apart for cars whose contents were to be transferred to other roads. On the day of the accident defendant's car repairer was engaged in inspecting a car standing on this transfer track, when deceased happened to pass by. He called to deceased to look at some work that had been done upon the car. Deceased was in the act of complying with this request, and was probably standing or stooping on the track at one end of the car, when another car switched down on the track from the opposite direction in the usual manner, struck the first and sent it forward several feet, running over him and inflicting the injuries of which he died. Defendant's car repairer (who was the only eye-witness) testified that the accident happened almost the instant he spoke to deceased. The evidence tended strongly to show that there was a brakeman in charge

of the colliding car, but that it would have been impossible for him, if he was on the lookout, to see deceased. *Held*, that plaintiff was not entitled to recover. *Hallihan v. Hannibal and St. Joseph R. R. Co.*, 71 Mo., 113, 1879; 2 Amer. & Eng. R. R. Cases, 117.

408. Contributory negligence of co-employe. The plaintiff, in the course of his employment as an engine-driver for the defendant, was injured by the collision of the train on which he was with another train of the company. *Held*, that the court did not err in charging the jury that the company, if its negligence had a share in causing the injuries of the plaintiff, was liable, notwithstanding the contributory negligence of his fellow-servant. *Grand Trunk R'y Co. v. Cummings*, 108 U. S., 700, 1882; 11 Amer. & Eng. R. R. Cases, 254.

409. Coupling cars. Whether or not it is negligent for a brakeman to stand facing the draw-bar, while making a coupling, is a question of fact for the jury. *Belair v. Chicago and Northwestern R'y Co.*, 43 Ia., 662, 1876; 14 Amer. R'y Rep., 575.

410. Detached cars. An employe whose duty required him to go a distance of about four hundred feet along the line of the track, and across the same, after waiting until a train had passed, stepped upon the track behind it, walking in the same direction it was moving, and was run over and killed by cars which had become detached and were following the train; *held*, that he was not guilty of contributory negligence. *Farley v. Chicago, Rock Island and Pacific R. R. Co.*, 56 Ia., 337, 1881; 2 Amer. & Eng. R. R. Cases, 108.

411. — Where a caboose and two cars, a half-mile or more from the point where they became detached from the remainder of the train, ran over and killed the plaintiff's intestate, it was held that the conductor and brakeman, who were in the cupola of the caboose, were negligent in not sooner discovering the fact that they were detached, and in not being upon the tops of the cars where they could control their motions, and give warning of danger. *Ib.*

412. Imminent danger; error of judgment. Where there are two or more lines of action, any one of which may be taken,

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and an employe, with ordinary skill, in the presence of imminent danger, is compelled immediately to choose one of them, and does so in good faith, the mere fact that it is afterwards ascertained by the result that his choice was not the best means of escape, is not sufficient to charge him with negligence. *Gumz v. Chicago, St. Paul and Minneapolis R'y Co.*, 52 Wis., 672, 1881; 5 Amer. & Eng. R. R. Cases, 583.

413. Jumping from train. Where a baggage-master upon a train, in imminent danger of collision, jumps therefrom, it is no defense to an action for injuries sustained, that the conductor ordered him not to jump. When a collision is inevitable such action becomes one of reasonable precaution. *Georgia R. R. and Banking Co. v. Rhodes*, 56 Ga., 645. 1876.

414. — An engineer having jumped from his engine and been killed, and the question being whether or not he was without fault, the necessity for jumping, his ability to jump, and the safety with which he could do so, are all for the consideration of the jury, and it was error for the judge to charge that "the fact that he jumped is proof that he thought jumping the safest course." *Central R. R. Co. v. Roach*, 64 Ga., 635, 1880; 8 Amer. & Eng. R. R. Cases, 79.

415. Minors. An employe can be held to no higher degree of intelligence and capacity than his youth, inexperience and want of judgment, as known to his employer, would warrant. *St. Louis and South Eastern R'y Co. v. Vulirius*, 56 Ind., 511, 1877; 18 Amer. R'y Rep., 116.

416. — It is a fact tending to show gross negligence in a railroad company for it to employ an inexperienced person in any hazardous business, knowing such person to be unacquainted with the business, unless said company make known and explain fully the hazard and danger connected with such business; and youth is an evidence of inexperience, and greater strictness of the rule should be required in the employment of minors than of persons of mature years, even when employed by and with the consent of the parent or guardian. *Id.*

417. — Where a master places an employe of tender years at work in a dangerous place, the former is bound to give to the lat-

ter due caution and instruction. And if the employe, whilst so employed, be injured, the fact that he could have seen that such place was dangerous is not sufficient evidence to hold such employe accountable for contributory negligence. The question of negligence is for the jury to determine from all the facts. *Hill v. Gust*, 55 Ind., 45. 1876.

418. Neglect of co-employees. A brakeman cannot hold his employer responsible for the failure of fellow-servants to take peculiar precautions. *Day v. Toledo, Canada Southern and Detroit R'y Co.*, 42 Mich., 533, 1880; 2 Amer. & Eng. R. R. Cases, 126.

419. Neglect of co-employees; insufficient number of employes. Although an insufficient number of employes are engaged to carry on the business of a railway company, the company will not on this ground be held liable for an accident resulting from inattention of an employe, such inattention being the cause of the accident. *Harvey v. New York Central and Hudson River R. R. Co.*, 88 N. Y., 481, 1882; 8 Amer. & Eng. R. R. Cases, 515.

420. Orders of superior. If a master or other servant, standing toward the servant injured in the relation of superior or vice-principal, orders the latter into a situation of danger, and he obeys and is thereby injured, the law will not charge him with contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even under orders from one having authority over him. *Miller v. Union Pacific R'y Co.*, 12 Federal Reporter, 600, 1882; 4 McCrary, 115.

421. — An employe cannot recover damages for injuries sustained by him on account of the negligence of a co-employe, unless without fault himself, even though in performing the act which resulted in the injury he was acting under the orders of a superior. *Western and Atlantic R. R. Co. v. Adams*, 55 Ga., 279. 1875.

422. Rate of speed. T., an engine-driver on the M. and C. R. R., was in charge of a train that ran off at a switch, and seriously injured him. At the time of the accident the train was running at the rate of ten miles an hour. The rules of the company required all trains to slacken their speed to six miles an hour when passing a switch.

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Held, that T., the engine-driver, directly contributed to the accident by which he was injured, and cannot recover damages for his injury. *Memphis and Charleston R. R. Co. v. Thomas*, 51 Miss., 637. 1875.

423. — The negligence of the engine-driver, in running the train too fast, being the negligence of a co-employee, would give to the plaintiff no right of action. *Moran v. New York Central and Hudson River R. Co.*, 67 Barbour (N. Y.), 96. 1874.

424. — Although a railway company may suffer its track to be out of proper repair, yet if a servant, an engine-driver of the company, drives his engine at a negligent or high rate of speed, which materially contributes to an injury received by him, he cannot recover of the company. *Illinois Central R. Co. v. Patterson*, 69 Ill., 650. 1873.

425. — When it was charged in the declaration that the plaintiff's husband had been killed by reason of a defective switch on the railroad, and one of the defenses was that the deceased, who was the engineer running the train, was in fault, in that he was violating the rules of the company by running at a higher speed than he was directed, when passing a switch, it was error in the court to charge the jury, that, if this increased speed was caused by the fault of other employees of the company, they should find for the plaintiff. *Georgia R. R. and Banking Co. v. Oaks*; 52 Ga., 410. 1874.

426. **Riding on engine; brakeman.** The head brakeman of a freight train, while riding on the engine, was killed by an accident happening to the train. It appeared from the evidence that the duties of deceased called him to every part of the train, including the engine, and that he had on previous occasions ridden with the superintendent of the road and with another general officer of the company to whom deceased was subordinate, on the engines of the company, without objection. *Held*, that riding on the engine was not negligence *per se* on part of deceased, and this was not affected by the circumstance that a regulation of the company forbade engineers to allow any person to ride upon the engines without express authority, it not having been shown that deceased had personal knowledge of such regulation. *Sprong v. Boston and*

Albany R. R. Co., 3 Thompson & Cook (N. Y. Supreme Ct.), 54, 1874; *Same v. Same*, 58 N. Y., 56, 1874; 9 Amer. R'y Rep., 475.

427. — The employe of a railway company who voluntarily leaves his post and is injured while upon another part of the train where the exposure is greater, is guilty of negligence contributing to the injury, and cannot recover therefor. So held where a brakeman was injured while riding in the locomotive. *O'Neill v. Keokuk and Des Moines R'y Co.*, 45 Ia., 546. 1877.

428. — Evidence showing that the employes of a railway company were accustomed to thus act in violation of a rule of the company is not admissible to establish a waiver of the rule, unless it is shown that a knowledge of the custom was known to the officer charged with the enforcement of the rule. *Id.*

429. **Riding on pilot of engine.** The plaintiff was employed by the defendant in excavating, and was sent with others to the place of work on an engine provided by the company for that purpose. The tender being full of wood, he, with one or two others, sat on the front of the engine, with his feet over the pilot. While proceeding to his work in that position, the engine ran into another engine, and the plaintiff received the injuries for which he seeks damages. On motion to the court to instruct the jury to find a verdict for the defendant, upon the ground, with others, that the evidence showed contributory negligence which would bar a recovery, the court sustained the motion. The plaintiff being of age, and able to see and know the risks of the position, even the fact that he had been invited and authorized by the defendant to ride upon the engine would not justify him in his negligence in placing himself in a position of apparent great risk and danger. *Kresanowski v. Northern Pacific R'y Co.*, 18 Federal Reporter, 229. 1883. See, also, *Smith v. Memphis and L. R. R. Co.*, 18 ib., §04, 1883; *Railroad Co. v. Jones*, 95 U. S., 429, 1877; 14 Amer. R'y Rep., 333.

430. **Section hand; evidence.** In a suit under § 2 of the Damage Act (Wagn. Stat., 519-20), it appeared that the employe was run over by an express train passing at the usual hour — about seven in the evening; that the night was moonlight, but at the site of the ac-

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cident, owing to a cut and curve in the road, deceased could not have been seen on the track more than two hundred and fifty yards, and there was no proof that the engine-driver saw him at all, or that he might, with proper care, have seen him; and on the other hand it was shown that deceased, for fourteen years, had lived in a house standing on the company's right of way, and presumably knew of the time of the passage of the train, and might have seen it coming in time to get off the track. *Held*, that plaintiff made out no case for a jury, and should have been non-suited. *Maher v. Atlantic and Pacific R. R. Co.*, 64 Mo., 267. 1876.

431. Signal. It is for the jury to determine whether the failure of the engine-driver to ring the bell while backing cars toward the plaintiff was negligence. *Ditberner v. Chicago, Milwaukee and St. Paul R'y Co.*, 47 Wis., 138, 1879; 21 Amer. R'y Rep., 37.

432. — Although the law does not require a train to sound a whistle or regulate its speed at a certain place, where a collision occurs, the court is inclined to hold the company guilty of negligence, if its servants knew, or had reasonable grounds to believe, there was a person on the track, or danger of a collision, and that sounding a whistle or slackening the speed of the train could have prevented the injury. *Illinois Central R. Co. v. Modglin*, 85 Ill., 481. 1877.

433. — Where a brakeman attempted to pick a coupling pin from the track as a train was slowly backing toward him, having first signaled the fireman, who was in charge of the locomotive, to stop, and was injured by the failure of the fireman to obey the signal, he was held to be free from contributory negligence depriving him of the right to recover. *Steele v. Central R. R. Co. of Iowa*, 43 Ia., 109. 1876.

434. Switchman; engine foot-board. It was gross carelessness on the part of the plaintiff to attempt to get upon a moving engine by stepping upon the front foot-board, especially in the night-time; and this is so, independent of an express rule of the company forbidding it, which rule the plaintiff took the responsibility of disregarding. *Lake Shore and Michigan Southern R'y Co. v. Roy*, 5 Bradwell (Ill.), 82. 1879.

435. Wilful wrong. An employer is not responsible for a positive wrong intentionally or recklessly done by his servant, beyond the scope of business; that is the personal trespass or tort of the employe. *Chicago and Northwestern R'y Co. v. Bayfield*, 37 Mich., 205. 1877.

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See INJURIES CAUSING DEATH.

436. Collision; pleading. In an action of damages against a railway company by an administrator, for injuries causing the death of his intestate, an averment in the complaint that the intestate received the injuries from which he died by a collision of the defendant's trains, through the carelessness of its engine-driver in charge of one of them, is not subject to demurrer for an insufficient statement of facts. *Ala. and Fla. R. R. Co. v. Waller*, 48 Ala., 450.

437. Evidence. An action cannot be maintained against a railway company for personal injuries suffered by a brakeman in its employ, by falling from a moving train, and resulting in death, if the evidence wholly fails to show how he fell, what he was doing at the time, whether his death was instantaneous, or whether he endured any conscious suffering before his death. *Corcoran v. Boston and Albany R. R. Co.*, 133 Mass., 507. 1882.

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438. Bridge building. Evidence in relation to the injury of an employe engaged in bridge building examined. *McCune v. Northern Pacific R'y Co.*, 18 Federal Reporter, 875. 1884.

439. Burden of proof. Although the burden of proof is on the railway company to show due care on its part, yet the injured party must also show that the injury was received without fault on his part. Code, §§ 2053, 3033, 3036. *Campbell v. Atlanta and Richmond Air Line R. R. Co.*, 53 Ga., 488, 1874; *Thompson v. Central R. R. and Banking Co.*, 54 ib., 509. 1875.

440. — If the mere fact that the car upon which an injured employe was engaged at

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the time of his injury was then off the track creates a presumption of negligence on the part of the company or some of its employes, it seems that such presumption is rebutted where it has been shown positively that the track was in good order, the engine, cars, etc., in good repair, and the train properly manned, and not run at a dangerous speed; and it is then incumbent on the plaintiff to make further proof of negligence on the part of the company. *Lockwood v. Chicago and Northwestern R'y Co.*, 55 Wis., 50; 6 Amer. & Eng. R. R. Cases, 151. 1882.

441. — To maintain an action for damages caused by the negligence of the defendant, when there is no wilful tort, it is incumbent upon the plaintiff to show that the deceased was in the exercise of ordinary care to avoid the injury at the time of the occurrence. *Chicago and Northwestern R'y Co. v. Thorson*, 11 Bradwell (Ill.), 631. 1882.

442. **Cattle chute.** Where witnesses for the plaintiff had testified that a certain "cattle chute" was constructed dangerously near the track, the evidence offered by the defendant, that persons had frequently ridden past it holding to the side of the car, was proper and should have been received. *Allen v. Burlington, Cedar Rapids and Northern R'y Co.*, 57 Ia., 623, 1882; 5 Amer. & Eng. R. R. Cases, 620.

443. **Change of machinery after accident.** The admission of evidence to show that after an accident a railroad company changed the character of its switch is error. *Salters v. Delaware and Hudson Canal Co.*, 3 Hun (N. Y.), 338. 1874.

444. **Collisions.** It is not error for the court to admit testimony tending to show incompetency on the part of conductors and engine-drivers of colliding trains. *Kansas Pacific R'y Co. v. Salmon*, 14 Kans., 512. 1875.

445. — The evidence considered in relation to negligence in causing a collision. *Sheehan v. New York Central and Hudson River R. R. Co.*, 91 N. Y., 332; 12 Amer. & Eng. R. R. Cases, 235. 1883.

446. **Collision; railway crossing.** The evidence considered in relation to an injury to an engine-driver, by collision at a railway crossing, and held sufficient to support a verdict in favor of his estate. *Wood v. N.*

Y. Central and Hudson River R. R. Co., 70 N. Y., 195, 1877; 18 Amer. R'y Rep., 548.

447. **Contributory negligence.** Under the evidence the question of contributory negligence held to be for the jury to pass upon. *Hatfield v. Chicago, Rock Island and Pacific R. R. Co.*, 11 Amer. & Eng. R. R. Cases (Ia.), 153. 1883.

448. **Damages.** The opinion of the plaintiff that the damage from the crushing of his hand, caused by the coupling of cars, was in round numbers \$10,000 — the sum he had sued for, — was improperly admitted as evidence to the jury. What influence it may have had upon the jury, in making their verdict, cannot be estimated. That it had some influence is certainly quite probable, though the verdict of the jury was only \$3,000, and though no witness but the plaintiff made an estimate of the damage. *Central R. R. and Banking Co. v. Kelly*, 58 Ga., 107, 1877; 16 Amer. R'y Rep., 114.

449. **Dead-woods.** In an action against a railway company for damages alleged to have been received through the use of cars with double dead-woods, it was competent to introduce evidence tending to show the advantages or disadvantages of the use of cars constructed in this manner. *Baldwin v. Chicago, Rock Island and Pacific R. R. Co.*, 50 Ia., 680. 1879.

450. **Declarations of employes.** An employe of a railway company who saw another employe killed by the cars cannot affect the company by his declarations made immediately after the occurrence, to the effect that the disaster was caused by the negligence of those in charge of the train, the speaker himself not being one of the number. *Marsh v. South Carolina R. R. Co.*, 56 Ga., 274. 1876.

451. — In an action by a brakeman against the railway company for an injury received while doing dangerous work for which he had not been hired, he can show what he said on being ordered to perform it, and that he protested against the requirement. *Jones v. Lake Shore and Michigan Southern R'y Co.*, 49 Mich., 573, 1883; 8 Amer. & Eng. R. R. Cases, 221.

452. — In an action by a brakeman for injuries received while engaged in more dangerous work, which he had been re-

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quired to do, it is proper to allow a competent witness to show what the actual duties of a brakeman were in practice, in order to find how the additional duties differed therefrom. But where the witness himself was hired as train baggageman, and, like plaintiff, had been ordered to take part in the extra work, a question as to whether, in his opinion, the order called him out of the line of his duty, was immaterial. *Ib.*

453. Defective machinery. Neither the amendment to the plaintiff's declaration, nor the evidence offered in support thereof, takes it without the ruling when it was before on appeal, and consequently the judgment refusing a new trial must be reversed. Evidence held insufficient to entitle plaintiff to recover on account of defective machinery. *Central R. R. Co. v. Kenney*, 8 Amer. & Eng. R. R. Cases (Ga.), 155. 1879.

454. — Where an employe seeks to recover damages of the company on the grounds that it was guilty of culpable negligence in furnishing for use an engine so unmanageable and so ill-constructed as to be unfit for business, and in employing and retaining in its service an engine-driver who was unskilful, imprudent and reckless, alleging that these facts were known to the company, or could have been by the exercise of diligence, but of which the plaintiff was totally ignorant, and by reason of one or the other of the negligent acts charged, he was injured while in the exercise of due care, it was held that he was bound to show the negligent acts charged by a preponderance of evidence, and that the company knew the facts, or could have known them by the exercise of diligence. *Columbus, Chicago and Indiana Central R'y Co. v. Troesch*, 68 Ill., 545. 1873.

455. — Where the sufficiency or safety of a switch which is claimed to have caused the accident is in issue, evidence of similar accidents resulting from the same cause is competent. Such facts are in the nature of experiments to show the actual condition of the instrument. *Morse v. Minneapolis and St. Louis R'y Co.*, 30 Minn., 465, 1883; 11 Amer. & Eng. R. R. Cases, 168.

456. — It is not error to admit evidence as to what the superior employe said, or what was said to him, prior to an accident, con-

cerning the insufficiency of the machinery. Such evidence is proper for the purpose of showing that the superior employe knew that the machinery was unsafe. *Kansas Pacific R'y Co. v. Little*, 19 Kans., 267. 1877.

457. Duty of brakeman. In an action for personal injuries sustained by a brakeman while getting off a moving train to turn a switch, it was error for witnesses to be allowed to testify that it was "in the line of his duty" for a brakeman to get off over the side of the car while the car was in motion. *Allen v. Burlington, Cedar Rapids and Northern R'y Co.*, 57 Ia., 623, 1882; 5 Amer. & Eng. R. R. Cases, 620.

458. Engine running backwards. The injury being received while the locomotive was running backward, the testimony of an experienced engine-driver respecting the rate of speed of a locomotive running in that manner which was usually considered safe, was held to be competent. He was also properly permitted to testify respecting the effect of striking an animal upon the track by a locomotive running backward. *Cooper v. Central R. R. Co. of Iowa*, 41 Ia., 134. 1876.

459. Experts. In an action to recover for personal injury received by the plaintiff while coupling cars, upon the question whether the plaintiff used due care, or acted imprudently, it is error to admit in evidence the opinions of witnesses engaged in the same business, as no question of science, skill or trade is involved. The facts only should be proved in such a case, and leave the jury to determine whether due care was used, uninfluenced by the opinions of others. *Hopkins v. Indianapolis and St. Louis R. R. Co.*, 78 Ill., 32. 1875.

460. Family and poverty of injured party. It is error to admit evidence that the plaintiff had a family and was unable to support them by his labor since the injury. *Pittsburgh, Ft. Wayne and Chicago R'y Co. v. Powers*, 74 Ill., 841. 1874.

461. — Although the plaintiff may show the nature of his business and the value of his services in conducting it as grounds for estimating damages, yet his wealth or poverty is an immaterial issue. *Missouri Pacific R. R. Co. v. Lytle*, 57 Tex., 505, 1892; 11 Amer. & Eng. R. R. Cases, 189.

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462. Flagging train. Evidence considered in relation to negligence in flagging a train. *Mann v. Delaware and Hudson Canal Co.*, 12 Amer. & Eng. R. R. Cases, 199; 91 N. Y., 495. 1888.

463. Incompetence of employee. Where an employer has shown due care in the selection of his employees, no presumption of unfitness of the latter arises afterwards; but if it appears that an employee has been repeatedly guilty of carelessness or incompetency, it is for the jury to determine whether the employer knew of it, or would have known of it if he had exercised ordinary care. *Michigan Central R. R. Co. v. Gilbert*, 46 Mich., 176, 1881; 2 Amer. & Eng. R. R. Cases, 280.

464. — Evidence of prior acts and conduct of the employee on specific occasions, showing negligence and carelessness on his part, is proper in connection with proof charging the general agent with knowledge thereof. *Baulec v. New York and Harlem R. R. Co.*, 59 N. Y., 356. 1874.

465. — A recovery was sought on the grounds only that defendant employed an engine-driver who was old, near-sighted, and unacquainted with the road, and by reason of such defects incompetent, and that a brake upon one of the cars was defective, which incompetency and defect were alleged to have caused the injury complained of. *Held*, to be error to have allowed proof of the fact that, after the action complained of had occurred, the engine-driver ran his freight train without a brakeman a distance of several miles, and ran the engine off the track. *Ransier v. Minneapolis and St. Louis R'y Co.*, 30 Minn., 215, 1888; 11 Amer. & Eng. R. R. Cases, 617.

466. — In a suit against a railway company for the death of an engine-driver in consequence of a collision resulting from the yard-master's negligence in sending him out when a coming train was past due, it was held that, as bearing upon the competency of the yard-master, questions as to the number of tracks in the yard, the number of engines ordinarily employed in switching, the average number of freight trains in the yard, and like questions, were relevant as tending to show the character and importance of the work the yard-master had charge of,

and the need of experience and skill. *Michigan Central R. R. Co. v. Gilbert*, 46 Mich., 176, 1881; 2 Amer. & Eng. R. R. Cases, 280.

467. — Evidence that an employee is hasty, passionate and excitable does not of itself necessarily show that he is unfit for the position of yard-master; nor does the mere fact that he has sent an engine upon the track when a coming train was overdue conclusively show that the company was negligent in keeping him in its service, since he might have had information showing that the train would not arrive for some time. *Ib.*

468. — An engine-driver's opinion that if he had obeyed the order of the yard-master to place his engine on the main line when a coming train was overdue, he would have gotten into trouble, is inadmissible to show that the company was negligent in keeping the yard-master in its employment, unless the case had been brought to the knowledge of the company officers. *Ib.*

469. — **habits of intoxication.** In an action to recover damages for the death of an employee caused by the negligence of A., a co-employee, competent at the time of his employment, but who subsequently became unfitted to discharge his duties in consequence of habits of intoxication, evidence was received, under objection, that the division superintendent of the road, at one time, speaking of A., said that he must quit drinking; also the said superintendent was permitted to testify that he at one time told A. he had heard that he had been off on a spree drinking, which A. did not deny, and the witness reprimanded him for it. *Held*, no error; that the former evidence was proper as showing notice or knowledge, and the latter as the declaration of an agent within the scope of his agency. *Chapman v. Erie R'y Co.*, 55 N. Y., 579, 1874; 7 Amer. R'y Rep., 357.

470. Life-tables. Tables proved to have been used by life insurance companies by one who had been in the business for years, though not claiming to be an expert as to the tables, are admissible to show the probabilities of the duration of life. *Central R. Co. v. Richards*, 62 Ga., 306. 1879.

[See EVIDENCE, p. 404.]

471. Malice. In a suit for damages for personal injuries, brought by a brakeman

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against a railway company, in which the unskillfulness and incompetency of the engineer were charged as causes of the injury, the court admitted in evidence the declarations of the engineer to the plaintiff, to the effect that he would as soon run over him as not. *Held*, that the evidence was admissible, as a circumstance showing the want of care on the part of the company in the selection of its engineer, but it should have been so restricted by appropriate instructions to the jury. The personal malice indicated by the declaration, if the cause of the injury, would not render the company liable for actual damages thus inflicted on a fellow-servant, and the jury should have been so instructed. *Houston and Texas Central R. R. Co. v. Willie*, 53 Tex., 318, 1880; 5 Amer. & Eng. R. R. Cases, 541.

472. Negligence. The fact that the plaintiff was hurt without his own fault or negligence does not of itself entitle him to recover, as it must further appear that the defendant is legally chargeable with the injury. *Henry v. Lake Shore and Michigan Southern R'y Co.*, 49 Mich., 495, 1882; 8 Amer. & Eng. R. R. Cases, 110.

473. — It is error to submit a question of negligence to the jury where the evidence does not tend to show such negligence. *Booth v. Boston and Albany R. R. Co.*, 67 N. Y., 598, 1876.

474. — The nature of the business determines whether the degree of care exercised by employes is such as the law requires. *Michigan Central R. R. Co. v. Gilbert*, 43 Mich., 176, 1881; 2 Amer. & Eng. R. R. Cases, 230.

475. Opinions. In an action by an employee to recover from a railway company for personal injuries, the opinions of witnesses as to whether certain acts of the plaintiff were negligent, or as to what he ought to have done under certain circumstances, are not competent. Evidence to establish contributory negligence should be confined to showing the custom of employes, or the danger of attending a certain course of action. *McKean v. Burlington, Cedar Rapids and Northern R'y Co.*, 55 Ia., 192, 1880.

476. Overloading grain floor. Evidence of negligence in overloading a floor with

grain, whereby it fell and injured the plaintiff, considered, and held wholly insufficient. *Dillon v. Sixth Avenue R. R. Co.*, 49 N. Y. Superior Ct., 283, 1882. For plea of compromise in the case, see *Same v. Same*, 46 ib., 21, 1880.

477. Parent and child. In a suit for damages against a railway company by a mother for killing her minor son, whilst in its employment as a brakeman, the court excluded her testimony to the effect that she remonstrated with the son about his acting as brakeman, and also her answer to a question what she said on that subject. *Held*, that the mother having already testified that she had not at any time consented to his employment, what she said to him would have been immaterial as to the fact of the consent, and inadmissible to charge the company with notice of her objection, because not made in the presence or with the knowledge of any of its officers. *Hamilton v. Galveston, Harrisburg and San Antonio R'y Co.*, 54 Tex., 556, 1881; 4 Amer. & Eng. R. R. Cases, 528.

478. Running switch. Where, in an action against a railway company for damages for personal injuries, a rule of the company prohibiting running switches was permitted to be introduced, and the evidence showed that the injury was not caused by an attempt to make a running switch, *held*, that, under the circumstances, the introduction of the rule constituted prejudicial error. *Jeffrey v. Keokuk and Des Moines R. R. Co.*, 51 Ia., 439, 1879.

479. Sufficiency. Sufficiency of the evidence to sustain the verdict determined. *Bunnell v. St. Paul, Minneapolis and Manitoba R'y Co.*, 29 Minn., 305, 1882; *Hays v. Pennsylvania R. R. Co.*, 42 N. J. Law, 446, 1860; *Lake Erie and Western R'y Co. v. Everett*, 86 Ind., 229, 1882; 11 Amer. & Eng. R. R. Cases, 221.

480. — Evidence held sufficient to justify the direction of a verdict for defendant. *Skellenger v. Chicago and Northwestern R'y Co.*, 12 Amer. & Eng. R. R. Cases (Ia.), 206, 1882; *Williams v. Atchison, Topeka and Santa Fe R. R. Co.*, 22 Kans., 117, 1879.

481. — Where there is evidence in any degree tending to establish the cause of action, the case must be left to the determina-

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tion of the jury. *Way v. Illinois Central R. R. Co.*, 35 Ia., 585, 1872; 5 Amer. R'y Rep., 399.

482. — An action cannot be maintained against a railway company for personal injuries occasioned to a brakeman in its employ, by falling from a moving train, and resulting in death, if the evidence wholly fails to show how he fell, what he was doing at the time, whether his death was instantaneous, or whether he endured any conscious suffering before his death. *Corcoran v. Boston and Albany R'y Co.*, 12 Amer. & Eng. R. R. Cases, 226, 1883; 133 Mass., 507.

483. — Evidence considered, and held sufficient to sustain a verdict for the plaintiff, who was injured in hurriedly attempting to get upon a gravel train. *Boyle v. Chicago, Rock Island and Pacific R. R. Co.*, 56 Ia., 765, 1881; 2 Amer. & Eng. R. R. Cases, 234.

484. Warning to employe. Where the question is in respect to the fault of the husband of plaintiff, for whose homicide she sued, or that of the engine-driver, warnings of the engine-driver to the conductor, who was the deceased husband, in regard to his imprudence in transactions similar to that which resulted in his death, are admissible in evidence. *Central R. R. and Banking Co. v. Sears*, 59 Ga., 436. 1877.

VIII. PLEADING.

485. Company located in two states. The plaintiff brought suit for damages resulting from injuries received on the Memphis and Charleston Railroad, which was chartered in Tennessee, and lies partly in that state and partly in others. The declaration avers a substantial cause of action under the Tennessee statute, but fails to allege that the injuries were committed in Tennessee. Held, that it was not necessary to allege that the accident occurred in Tennessee. The court knows judicially that the road lies partly in Tennessee; and if the accident occurred in another state, it may be shown on the trial. *Hobbs v. Memphis and Charleston R. R. Co.*, 9 Heiskell (Tenn.), 873, 1872; 12 ib., 526, 1873. See 19 Amer. R'y Rep., 381.

486. Contributory negligence. The averments of a petition to recover for personal injuries considered, and held not to show contributory negligence. *Luby v. Chicago, Rock Island and Pacific R. R. Co.*, 52 Ia., 168. 1879.

487. — Pleading examined, and held not to show contributory negligence. *Hulehan v. Green Bay, etc., R'y Co.*, 12 Amer. & Eng. R. R. Cases, 208 (Wis.). 1883.

488. — To an action brought by the administratrix of a servant, against his employers, for injuries sustained through the defendants' negligence, the defendants pleaded "that the wounding and bruising were caused in part by the negligence of the said servant." Held, a bad plea. The plea should have averred that the servant's neglect contributed to the injury. *Vaughan v. Cork and Youghal R. R. Co.*, 12 Irish Common Law, 297. 1860.

489. — A complaint which fails to allege that there was no negligence on the part of the injured employe is bad on demurrer. *Hildebrand v. Toledo, Wabash and Western R'y Co.*, 47 Ind., 399, 1874; *Jackson v. Indianapolis and St. Louis R. R. Co.*, 47 ib., 454. 1874.

490. Decreased ability to labor. Where a declaration in a suit against a railway company on account of a physical injury alleged that plaintiff was employed as a train-hand on the defendants' freight train, that by the negligence of other employes the accident occurred (describing it), by which his fingers and a portion of his hand were so mashed as to necessitate amputation, and that his capacity to labor and earn money was thereby permanently diminished one half, evidence as to plaintiff's age and capacity to labor was admissible without more specific allegations in regard to them. *Atlanta and West Point R. R. Co. v. Johnson*, 66 Ga., 259. 1881.

491. Defective machinery. In an action against a railway company by an employe, to recover for an injury sustained by the use of defective machinery, the burden of proof, when the complaint is denied, is upon the plaintiff, not only to prove negligence on the part of the company, but to prove the want of it on his own part; therefore, no error is committed in sustaining a demurrer to

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special paragraphs of an answer which allege matters merely tending to show contributory negligence, as such matters may be proved under the general denial. *Louisville and Nashville R. R. Co. v. Orr*, 84 Ind., 50, 1882; 8 Amer. & Eng. R. R. Cases, 94.

492. — An allegation that the defendant's officers and agents negligently directed plaintiff to make a coupling between cars of a different height, which required for the purpose a crooked link, without providing such link, as he had requested them to do for the proper discharge of his duties, set out, in connection with an averment of plaintiff's own care and diligence, shows a cause of action against the defendant. *Conway v. Illinois Central R. R. Co.*, 50 Ia., 465, 1879.

493. Defective roadway. Where an action for damages against a railroad company is grounded on an alleged defect in construction of the engine, plaintiff cannot recover for an injury resulting from a defect in the track. *Buffington v. Atlantic and Pacific R. R. Co.*, 64 Mo., 246, 1876. See, also, *Waldhiser v. Hannibal and St. Joseph R. R. Co.*, 71 ib., 514, 1880; *Price v. St. Louis, Kansas City and Northern R'y Co.*, 72 ib., 414, 1880.

494. — A petition which alleges that defendant, a railroad company, negligently and carelessly permitted a loose iron rail to remain upon the path along-side the track used by switchmen in the necessary discharge of their duties, is not defective by reason of the omission to allege that defendant had knowledge, or by ordinary attention to its duties would have known, that the rail lay upon the path. The omitted statement is substantially contained in the allegation made. *Hall v. Missouri Pacific R'y Co.*, 74 Mo., 298, 1881; 8 Amer. & Eng. R. R. Cases, 106.

495. Laws of sister state. Where, in an action brought in Ohio against a master by a servant, for an injury sustained in another state through the negligence of a superior servant while engaged in the same service, and the answer merely stated that, by the law of that state, the servant has no action against the master for the negligence of his fellow-servant, *held*, that the answer fails to meet the case, in not stating what the law of that state was, when the negligence com-

plained of is that of a superior servant, and that a demurrer to the answer may, for that reason, be sustained. *Pittsburgh, Ft. Wayne and Chicago R'y Co. v. Lewis*, 38 Ohio St., 196, 1877.

496. Neglect of co-employees; water carrier. A person employed on a construction train to carry water for the men working with the train, and to gather up tools and put them in the caboose or tool car, is within the statute making railroad companies liable to their employes for injuries resulting from the negligence of co-employees. *Missouri Pacific R'y Co. v. Haley*, 25 Kans., 35, 1881; 5 Amer. & Eng. R. R. Cases, 594.

497. Negligence. A complaint against a railway company for injury to the person of an employe, charging the negligence by which the plaintiff was injured directly upon the defendant, and not merely upon its employes, is sufficient on demurrer; and evidence may be introduced thereunder of any acts or circumstances of negligence on the part of the defendant, in the running of the engine causing the injury. *Ohio and Mississippi R'y Co. v. Collarn*, 73 Ind., 261, 1881; 5 Amer. & Eng. R. R. Cases, 554.

498. Sufficiency. Pleadings, in an action by an employe, examined. *Fugh v. Winona and St. Peter R. R. Co.*, 29 Minn., 390, 1882; 8 Amer. & Eng. R. R. Cases, 182.

499. — A complaint against a railway company, in an action for personal injury to an employe, causing death, which charges that the company itself, by its negligence and unskilfulness in the management, etc., of its engines and cars, etc., caused the injury complained of, without any fault of the deceased, does not raise the question of the liability of the company for the negligence of its employes by which a fellow-servant is killed or injured, and is good on demurrer. *Hildebrand v. Toledo, Wabash and Western R'y Co.*, 47 Ind., 399, 1874.

500. — The declaration alleging that plaintiff, "in his body, was violently and grievously bruised, mangled and broken, to wit, in and upon his head, arms, legs and body, and particularly as to the serious injury and wounding of his internal vital organs," such allegation is sufficient to permit testimony of injury to kidneys, urinary organs, bloody urinal discharges, and injury

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to the nervous system. *Central R. R. Co. v. Mitchell*, 63 Ga., 173, 1879; 1 Amer. & Eng. R. R. Cases, 145.

501. Uncertainty. Uncertainty in the allegation of negligence in a complaint is a defect that cannot be reached by demurrer, but by motion to make specific. *Ohio and Mississippi R'y Co. v. Collarn*, 73 Ind., 361, 1881; 5 Amer. & Eng. R. R. Cases, 554.

502. — In an action for damages for injuries to the person, by a carpenter employed by a railway company, the allegation in the petition that the injury was received while riding on a "push-car or hand-car" is not sufficient. Such petition is defective for uncertainty, and a demurrer to it will be sustained. *Miller v. Union Pacific R'y Co.*, 2 McCrary (U. S. C. C.), 87. 1880.

503. Variance. In a suit brought by an employee of a railway company, to recover for injury sustained while in the discharge of his duty, the negligence charged was the moving of a car under which the plaintiff was at work, without notice or warning. The proof showed that the negligence in not giving notice or warning of the moving of the car was attributable to the foreman under whose control the plaintiff was working and not to those engaged in moving the car. Held, that the case was not one of a failure of proof, under § 133 of the Code, but, at most, of variance, under §§ 131 and 132. *Lake Shore and Michigan Southern R'y Co. v. Lavalley*, 36 Ohio St., 221, 1880; 5 Amer. & Eng. R. R. Cases, 549.

504. — Where a petition claimed to recover of a railway company for a personal injury caused by the negligent acts of co-employees, which acts were set out, it was held erroneous to refuse to instruct the jury that negligence must be proved in the manner alleged to authorize a recovery. *Manuel v. Chicago, Rock Island and Pacific R. R. Co.*, 56 Ia., 655, 1881; 5 Amer. & Eng. R. R. Cases, 588.

505. — Where the allegation in a petition is that the plaintiff received the injuries complained of through the negligence of the company in having and using defective machinery, and in running and managing its railway and cars, and the proof is that the injury was occasioned by a broken frog, the

plaintiff cannot recover. *Waldhier v. Hannibal and St. Joseph R. R. Co.*, 2 Amer. & Eng. R. R. Cases (Mo.), 146, 1880; 71 Mo., 514.

IX. STATUTORY LIABILITY.

506. Colorado. The rule of the common law, that an employee assumes all the ordinary risks of his service, including those risks which arise from the negligence of other employees of the same master in the same employment, is not abrogated by the statute (General Laws, p. 342); and held, that the words "any person" do not include employees of the same master injured by the negligence of a co-employee while acting in the common employment. *Atchison, Topeka and Santa Fe R. R. Co. v. Farrow*, 6 Colo., 498, 1883; 11 Amer. & Eng. R. R. Cases, 239.

507. Georgia. If it appears that both parties were guilty of negligence, and that the person injured could not, by ordinary care and diligence, have avoided the consequences to himself of the negligence of the company or its agents, he may recover, but the jury should lessen the damages in proportion to the negligence and want of ordinary care of the injured party. Code, §§ 2083, 3034. *Atlanta and Richmond Air Line R'y Co. v. Ayers*, 53 Ga., 12. 1874.

508. — A workman employed by a railroad company to do the work of an ordinary laborer on its track, and who is injured while he is being carried on a train of the company from the place of his work to the camp where he stays at night, comes within the provisions of §§ 2083 and 3034 of the Code, so far as his right to recover damages for the injury is affected by the question of negligence on his part. *Ib.*

509. — The presumption of negligence under the statute applies equally to all the employees of the corporation, including the employee who has been injured. *Atlanta and Richmond Air Line R'y Co. v. Campbell*, 56 Ga., 586. 1876.

510. — If an employee of a railway company be injured without fault or negligence on his part, through the negligence of another employee, he may recover under the Georgia Code. *Baker v. Western and At-*

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lantic R. R. Co., 68 Ga., 699, 1882; *Georgia R. R. and Banking Co. v. Goldwire*, 56 ib., 196, 1876.

511. — A railway company is liable for injuries to the person of an employe by the negligence or misconduct of other employes of the company, whether such injuries are connected with the running of trains or otherwise. *Thompson v. Central R. R. and Banking Co.*, 54 Ga., 509. 1875.

512. — The presumption of law, that the plaintiff's husband, being an employe, is without fault, arises only when he is disconnected with duties about the particular business which resulted in his hurt; if he himself was engaged in the very act which resulted in his death, no such presumption will arise, but the *onus* is upon the plaintiff to show either that her husband was without fault, or that the company's other employes were at fault, before the *onus* is shifted on the company to defend. *Central R. R. and Banking Co. v. Sears*, 59 Ga., 436, 1877; 18 Amer. R'y Rep., 100.

513. Great Britain. H., who was in the employ of the railway company as a "capstan-man," without giving the usual warning, propelled a series of trucks along a line of rails in a goods station, and injured the plaintiff, who was engaged in similar work at the other end of the line about one hundred yards off. The capstan was set in motion by hydraulic power communicated to it by H. from a stationary engine at a distance. *Held*, that there was evidence to warrant the jury in finding that H. was a person who had the charge or control of "a train upon a railway" under s. 1, sub-s. 5, of the Employers' Liability Act, 1880 (43 and 44 Vict., c. 42). *Cox v. Great Western R'y Co.*, Law Reports, 9 Queen's Bench Division, 106, 1882; 6 Amer. & Eng. R. R. Cases, 485.

514. — An employe engaged in the signal department, whose duty it was to clean, oil and adjust the points and wires, is not an employe "having charge or control," within the meaning of the Employers' Liability Act of 1880. The corporation is not therefore liable to an engine-driver for the negligence of such employe. *Gibbs v. Great Western R'y Co.*, Law Reports, 11 Queen's Bench Division, 22, 1883; 11 Amer. & Eng. R. R. Cases, 235.

515. Iowa. The provisions of § 1307 of the Code, rendering railway companies liable to their employes for injuries resulting from the negligence of their co-employes, apply only to accidents growing out of the use and operation of their roads. *Schroeder v. Chicago, Rock Island and Pacific R. R. Co.*, 41 Ia., 344, 1875; 14 Amer. R'y Rep., 359.

516. — Whether or not the character of plaintiff's employment brings him within the provisions of that section is a question of fact for the jury. *Ib.*

517. — The statute rendering railway companies liable for accidents caused by the negligence of co-employes does not extend beyond persons engaged in the business of operating railways, and is not intended to embrace all persons who are employed by the corporation, without regard to their employment. *Potter v. Chicago, Rock Island and Pacific R. R. Co.*, 46 Ia., 399, 1877; 16 Amer. R'y Rep., 57.

518. — Whether or not the negligence of the superintendent of a repair shop was the negligence of the company was a mixed question of law and fact to be determined by the jury, under proper instructions of the court. *Ib.*

519. — The opening and shutting of the doors of a round-house is not connected with the use and operation of a railway within the meaning of § 1307 of the Code. *Malone v. Burlington, Cedar Rapids and Northern R'y Co.*, 11 Amer. & Eng. R. R. Cases (Ia.), 165. 1883.

520. — A person employed as a section hand, whose duty it is, with others, to keep a certain distance of the railway in repair, and to go with them on the track in a hand-car for that purpose, is within the statute making the railway companies liable to their employes for injuries resulting from negligence of co-employes. *Frandsen v. Chicago, Rock Island and Pacific R. R. Co.*, 33 Ia., 372. 1873.

521. — To entitle an employe of a railway company to recover for personal injuries inflicted through the negligence of a co-employe, it must be shown that his employment was connected with the operation of the railway. Code, § 1307. Where plaintiff's petition failed to aver, and the evidence failed to

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show, that he was anything more than a section hand, and that, when injured, he was engaged in loading a car, *held*, that this service did not pertain to the operation of the road, and that he could not recover for injury caused by the negligence of his co-employee. *Smith v. Burlington, Cedar Rapids and Northern R'y Co.*, 59 Ia., 73, 1882; 6 Amer. & Eng. R. R. Cases, 149.

522. — An employee who stands in the relation of vice-principal to the men under his control is an employee within the meaning of § 1307 of the Code, and can recover of a railway company by reason of the negligence of the men selected by himself, and whom he may discharge or retain in his employment (or the employment of the company), as he sees fit. It is not provided that the negligent and the injured employee shall be co-employees in the same general employment in the sense that they must be equal in power and authority. All that is required is that both shall be employees of the corporation. *Houser v. Chicago, Rock Island and Pacific R. R. Co.*, 8 Amer. & Eng. R. R. Cases (Ia.), 500, 1892.

523. — gravel pits. Where, in an action for damages for personal injuries, it was shown that the plaintiff was employed in removing earth from the foot of a bank, a large mass of which fell upon him and caused bodily harm, and it appeared that, just prior to the accident, levers had been unsuccessfully introduced to detach the mass, *held*, that those in charge of the work were negligent in not using proper precaution to prevent the accident. *Held*, also, that negligence could not be imputed to plaintiff. *Deppe v. Chicago, Rock Island and Pacific R. R. Co.*, 38 Ia., 592, 1874.

524. — It is the duty of the workman in charge to examine his works wherever danger would be likely to arise, and the fact that the attempt to dislodge a mass of earth from a bank by means of levers had failed, would not relieve him from the duty of inspection where the attempt had been made. *Ib.*

525. — Plaintiff being justified in relying upon the inspection of all points of danger by his superior, would not be negligent in remaining at work, if the danger which existed could not be seen by him. *Ib.*

526. — The act of 1882 provides that "every railroad company shall be liable for all damages sustained by any person, including employees of the company, in consequence of any neglect of its agents or by any mismanagement of its engineer or other employees of the company." *Held*, while the statute should be limited to employees engaged in the hazardous business of operating the road, that it would, nevertheless, include an employee engaged in connection with a dirt train, and who was injured while loading a car, by the falling of an impending bank. *Deppe v. Chicago, Rock Island and Pacific R. R. Co.*, 36 Ia., 52, 1872.

527. — private detective. The plaintiff alleged that he was employed by defendant, as a private detective, and that while walking upon the track of defendant's road in the performance of his duties as such employee, and in obedience to the orders of his principal, he was injured, without negligence on his part, through the negligence of the engineer of a passing train. *Held*, on demurrer, that the facts alleged were sufficient to bring the plaintiff within the provisions of § 1307 of the Code, and entitle him to maintain an action for injuries received through the negligence of a co-employee. *Pyne v. Chicago, Burlington and Quincy R. R. Co.*, 54 Ia., 223, 1880; 21 Amer. R'y Rep., 229.

528. Kansas. The statute having been adopted by the legislature of Kansas from the statute of Iowa, the judicial construction given to the statute in that state follows it to this state; therefore, within the Iowa decisions, it embraces only those persons engaged in the hazardous business of railroad-ing. *Missouri Pacific R'y Co. v. Haley*, 25 Kans., 35, 1881; 5 Amer. & Eng. R. R. Cases, 594.

529. Kentucky. The General Statutes, ch. 57, § 3, give a cause of action to the widow of decedent for the wilful neglect of a railway company, or its agents and employees, which resulted in his death, although he was an employee of the company. *McLeod v. Ginther*, 80 Ky., 399, 1882; 8 Amer. & Eng. R. R. Cases, 162.

530. Missouri. When a laborer employed by a railroad company is killed in consequence of the use of defective apparatus, a

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cause of action accrues to his widow under § 3 of the Damage Act (Wagn. Stat., p. 520), and not under § 2; and the measure of damages will not be the sum of \$5,000, as provided in § 2, but a sum not exceeding that amount, as provided in § 3. *Holmes v. Hannibal and St. Joseph R. R. Co.*, 69 Mo., 536. 1879.

531. — Section 2 of the Damage Act, properly construed in its context, gives the representative of a deceased railroad employee no right of action against the company for death caused by the negligence and unskillfulness of a co-employee, except where his selection or retention is attributable to the want of care in the company. The phrase "any person," as used in that section, does not include fellow-servants. *Proctor v. Hannibal and St. Joseph R. R. Co.*, 64 Mo. 112, 1876; 9 Amer. R'y Rep., 440.

532. — The representatives of an employee killed by a train can recover against the company, where the death was caused by the negligence of fellow-servants, without regard to the question whether the company exercised proper care and prudence in selecting and retaining such fellow-servants. Damage Act, § 2. *Connor v. Chicago, Rock Island and Pacific R. R. Co.*, 59 Mo., 285, 1875; 8 Amer. R'y Rep., 417.

533. Statute of sister state. The statute of Iowa allowing employes to recover damages from their employer for negligence of their co-employees engaged in operating a railway will be respected by the courts of Minnesota and enforced in that state where the injury complained of was received in Iowa. *Herrick v. Minneapolis and St. Louis R'y Co.*, 11 Amer. & Eng. R. R. Cases (Minn.), 256. 1883.

534. — The local law of a state, rendering a railway company liable for the injury to an employe by the neglect of a co-employee, has no force outside such state. Actions for personal injuries are governed by the *lex fori*. *Anderson v. Milwaukee and St. Paul R'y Co.*, 37 Wis., 321. 1875.

535. — A collision occurring in Tennessee, by which an employe is killed, must be determined by the laws of Tennessee. An omission of some duty in another state into which the railway runs will not increase the responsibility of the company. *Chicago, St.*

Louis and New Orleans R. R. Co. v. Doyle, 60 Miss., 977. 1883.

536. — Where an employe is injured in Texas, and a suit for such injury is brought in Kansas, the law of Texas will be applied to the case, rather than that of Kansas. *Atchison, Topeka and Santa Fe R. R. Co. v. Moore*, 29 Kans., 682, 1883; 11 Amer. & Eng. R. R. Cases, 243.

537. Tennessee. The statute in relation to a lookout, etc., does not apply as between employes about the depot yards of railway companies. *Louisville and Nashville R. R. Co. v. Robertson*, 9 Heiskell (Tenn.), 276, 1872; 20 Amer. R'y Rep., 9.

538. Wisconsin. A railway company is liable for injuries suffered in Wisconsin by one of its agents or servants from negligence of any other agent or servant thereof, without contributory negligence on his part (§ 1816, R. S.); and in case of his death from such injury the action may be brought by his personal representative. *Gumz v. Chicago, St. Paul and Minneapolis R'y Co.*, 52 Wis., 672, 1881; 5 Amer. & Eng. R. R. Cases, 583.

539. — Ch. 173 of 1875 (making each railway company of Wisconsin liable for damages sustained by an agent or employe thereof, while in the line of his duty as such, caused by the negligence of any other agent or employe in respect to his duty as such, where the negligence of the person so injured does not materially contribute to the result), is valid, although it does not impose a similar liability upon other corporations or persons. This statute is not confined to injuries incurred in the operation of railways, but extends to other work of such employes. *Ditberner v. Chicago, Milwaukee and St. Paul R'y Co.*, 47 Wis., 138, 1879; 21 Amer. R'y Rep., 37.

540. — Prior to ch. 173 of 1875 plaintiff was injured by a defective pile-driver while in defendant's employ as one of a crew engaged in working such machine under L., defendant's foreman in charge of the driver, who had full authority to have it repaired and to hire and discharge the crew, and who knew that the machine was in a dangerous condition, in time to have it repaired before the injury. *Held*, that the foreman's negligence was the negligence of the defendant,

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and rendered it liable for the injury. *Schultz v. Chicago, Milwaukee and St. Paul R'y Co.*, 48 Wis., 375. 1879.

X. GENERAL MATTERS.

541. Board of injured employee; contract by agent. The general agent of a railroad company is authorized, by virtue of his position as such general manager of the company's affairs, to employ a hotel keeper to furnish board and attendance, at the expense of the company, to a brakeman injured while working for such company. A mere station-agent of a railroad company, by virtue of his position as such agent, has not the like authority. *Atlantic and Pacific R. R. Co. v. Reisner*, 18 Kans., 458, 1877; 16 Amer. R'y Rep., 36.

542. Care to be taken of injured employee. Held, that an injured employee, in relation to his transportation from the Point of Rocks to Frederick, after the injury, occupied the position of a stranger to the company, in like condition. It was not bound to carry him gratuitously, nor to procure a physician, or any one to accompany and attend to him on the way. So held where a conductor was carried upon the tender of the engine, after his injury, to a station, and there treated by a surgeon and placed in a baggage car to be carried to Frederick, where he arrived in a dying condition from hemorrhage occurring during the passage. *Baltimore and Ohio R. Co. v. State*, 41 Md., 268. 1874.

543. — Held, further, that the duty and responsibility of the company to take care of the injured man ceased when he was attended to, and placed at a hotel in charge of a physician. *Ib.*

544. Collision. Where a railway company, through its proper agent, gave the conductor of an extra freight train orders to leave a certain station and run to the next ahead of a passenger train, and failed to notify the conductor of the passenger train of such fact, and restrain its speed, whereby a collision occurred, resulting in the death of the conductor of the freight train, this was held to be negligence on the part of the company. *Chicago, Burlington and Quincy R. Co. v. McLallen*, 84 Ill., 109, 1876; 16 Amer. R'y Rep., 425.

545. — A freight train, drawn by a defective engine, laden beyond its capacity, fell behind its time near four hours on its way from Lexington to Louisville, and when endeavoring to ascend a grade near Lagrange at night, with no signals or lights behind, was run upon by an extra train which had been ordered from Midway to Lagrange by the train dispatcher of the company, whose duty it was to regulate the running of delayed and extra trains, no notice having been given to the extra train at any of the stations of the delay of the other. In the collision the engine-driver of the extra train was killed, without his fault or the fault of any one on his train. Held, that the train dispatcher and the conductor of the freight train were guilty of gross negligence, and the company was liable to the personal representative of the deceased engine-driver in damages for the loss of his life. *Louisville, Cincinnati and Lexington R. R. Co. v. Cavens*, 9 Bush (Ky.), 559. 1873.

546. — presumption. As between the company and one of the employees of the company, the mere naked and unexplained fact of a collision of two trains of cars operated by the same company raises no presumption of negligence on the part of the company. *Kans. Pacific R. R. Co. v. Salmon*, 11 Kans., 83. 1873.

547. — telegrams. Where one train is ordered to run upon the time of another train by telegraphic order, every reasonable precaution must be taken to communicate the orders directly to the conductors and engine-drivers. *Sheehan v. N. Y. Central and Hudson River R. R. Co.*, 91 N. Y., 332. 1883. See *Dana v. Same*, 92 N. Y., 639. 1883.

548. — If the engine-driver is injured in the collision and sues the railway company, it is not a bar to the action that the telegrams sent by him were not reduced to writing, as required by the printed rules of the road, of which he had knowledge; but this is evidence for the jury upon the question of contributory negligence, and, in reply, it is competent for him to prove a usage of the road to do as he did. *Deverson v. Eastern R. R. Co.*, 53 N. H., 129. 1877.

549. — When an irregularity exists in the running of railroad trains, and a collision occurs, and the negligence of the engineer and

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train dispatcher is alleged as causing it, the telegraphic correspondence between the two, upon the subject, just prior to the collision, is competent as a part of the *res gestæ*, and if not in writing may be proved by a listener. *Ib.*

550. — Although the conductor and deponent agreed in misconstruing a dispatch which seems to have caused the collision, yet, if the language and figures contained in it were such as to mislead, a cause of action would arise against the railway company. *McLeod v. Ginther*, 80 Ky., 399, 1882; 8 Amer. & Eng. R. R. Cases, 162.

551. Collisions with cattle. The statute makes failure to fence, etc., negligence *per se*. In the case of injury to a fireman in the employ of a railroad company in consequence of the throwing a train from the track by running over a cow which had come upon the track, through the lack of a fence, the general liability of the company for damages under the statute is subject to the qualification that it is competent for an employe to assume the risks of the company's service as he finds it. So that, if he enters and continues in such service, knowing that the road is not fenced, he cannot recover for an injury of the kind mentioned. *Fleming v. St. Paul and Duluth R. R. Co.*, 27 Minn., 111. 1890.

552. — action against owner of cattle for collision causing death of fireman. Plaintiff's intestate was a fireman employed on the L. L. and G. R. R., and while engaged in running a freight train, the train struck a steer belonging to defendant, which had strayed upon the track, the engine and tender were thrown from the track, and plaintiff's intestate so injured that he died. The right of way at the place of the injury was owned in fee simple by the railroad company, which had obtained a deed therefor from the defendant, the latter owning the land on both sides of the right of way. The railroad was unfenced. Defendant was in the habit of turning his cattle loose on his own lands, and they frequently strayed on and across the railroad track. *Held*, that plaintiff had no cause of action against the defendant. *Sherman v. Anderson*, 27 Kans., 333. 1882.

553. Conductor performing duty of brakeman. Where an emergency is relied

upon as justifying a conductor in going out of his sphere and taking upon himself the duty and hazards of a subordinate, and it is alleged that the emergency was occasioned by the train being behind time, it is incumbent upon the conductor, or those claiming through him, to make it clearly appear by evidence that the delay of the train was not caused by his fault or negligence. So held where a conductor was killed in coupling a train. *Central R. R. Co. v. Sears*, 61 Ga., 279. 1878.

554. Connecting lines. Whatever effect an agreement between the several companies owning connecting lines of railroad may have upon the parties thereto, it cannot have any upon strangers to it, nor alter or change the relations of either of them towards third parties, nor have the effect of making those who were employed and paid wages by either of the contracting parties, the co-employees of the agents and workmen of other parties, or make the others liable, either severally or jointly, for any loss or damage caused by the neglect of any one of them, even were the agreement silent in this respect. *Philadelphia, Wilmington and Baltimore R. R. Co. v. State*, 58 Md., 372. 1892.

555. — Where an injury to the employe of one of such companies occurs on the road of another of the companies, and is caused by the imperfect condition of said road, the principle that every employe assumes the risk of the negligence of his co-employees is not applicable to him. *Ib.*

556. Construction train; laborer; thrown from train by sudden jerk of engine. The plaintiff was employed by the defendant on a construction train, and in the discharge of his duty he walked to the rear of the train while in motion; when within five feet of the rear end of the last flat car in front of the caboose the latter was uncoupled by the conductor, who warned the plaintiff to stop, and at a signal the engineer increased the speed of the train with a sudden jerk, which threw the plaintiff from the car and he was run over and injured. In an action to recover damages for such injury, it was held that a verdict for the plaintiff was supported by the evidence. *Jeffrey v. Keokuk and Des Moines R.*

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R. Co., 56 Ia., 546, 1881; 5 Amer. & Eng. R. R. Cases, 508.

557. Contract limiting liability. Where an employe of a railroad company agrees to assume all risk incident to his employment, the fact that he was running over another railroad at the time of the injury does not release him from such agreement. If, while running over such other road, he is in the employ of the former company so as to make it liable for the injury, his agreement remains binding. *Galloway v. Western and Atlantic R. R. Co.*, 57 Ga., 512. 1876.

558. — An employe may, by contract, limit the liability of a railway company, except so far as it may relieve the company from criminal neglect. *Western and Atlantic R. R. Co. v. Bishop*, 50 Ga., 465. 1873. In case of the death of the employe such contract is binding upon his representatives. *Western and Atlantic R. R. Co. v. Strong*, 52 Ga., 461, 1874; *Hendricks v. Western and Atlantic R. R. Co.*, ib., 467, 1874.

559. Contractors. When a railroad company permits other companies or persons to exercise the franchise of running cars drawn by steam over its road, the company owning the road, and to which the law has intrusted the franchise, is liable for any injury done, as though the company owning the road were itself running the cars. *Macon and Augusta R. R. Co. v. Mayes*, 49 Ga., 355, 1873.

560. — The plaintiff was an employe of a contractor engaged in building railway fences. The contractor had been, as a matter of convenience, permitted to carry his tools on the train, and was thus carrying two crow-bars to Port Hope. As the train passed the spot the contractor dropped one of the bars out and defendant's baggage-master threw the other out, injuring the plaintiff. *Held*, that the baggage-master was not acting in the line of his employment and the railway company was not liable. *Cunningham v. Grand Trunk R'y Co.*, 31 Upper Canada (Queen's Bench), 350. 1871.

561. — The plaintiff was working for a contractor making repairs to a railway. He was at a crossing where a train might have been seen for a mile and a half. He knew no signal of the approaching train. *Held*, that the question of contributory negligence

was for the jury. *Held*, also, that a contract between the contractors and the company, that the defendant should not be liable for injuries to the contractors' employes, would not relieve the defendant, as the plaintiff had not assented to such a contract. *Ominger v. N. Y. Central and Hudson River R. R. Co.*, 6 Thompson & Cook (N. Y. Supreme Ct.), 493. 1875.

562. — One L. contracted to build an arch culvert for defendant on its road. Defendant agreed to furnish "centers" over which the arch was to be constructed. Not enough centers having been furnished to complete the work, L. requested one F., in the employ of defendant as foreman of carpenters, to take down one of the centers which had been used. H., plaintiff's intestate, an employe of defendant, was engaged, under the direction of F., in aiding to remove the center, when the arch fell in consequence of the mortar not having sufficiently set to justify such removal, and H. was killed. *Held*, that, conceding defendant had not performed its contract, this was not the natural or proximate cause of the accident; that it was the result simply of the negligent acts of L., or F., in removing the center; and that for such acts defendant was not liable. *Hofnagle v. New York Central and Hudson River R. R. Co.*, 55 N. Y., 608, 1874; 6 Amer. R'y Rep., 233.

563. — The defendant made a contract with one M., by which he was to take entire charge and control of defendant's freight business at the St. Louis station, loading and unloading cars, switching them back and forth in the yard, making up freight trains, and doing all other yard service necessary in the transaction of defendant's freight business. He was also, when requested, to haul freight from the levée for defendant; to prepare, execute and receive all necessary freight bills; to keep all necessary books of account, collect freight money, and generally act as, and discharge all the duties of, a station agent. To enable him properly to discharge his duties, he was to have control over the grounds, yards and buildings, engines and cars of defendant at the station. Defendant was to furnish the necessary engines and keep them in repair and supplied with fuel, etc., and to employ the en-

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gineers and firemen, who were to be under M.'s control, and were to be paid by him. For his services M. was to be paid monthly at the rate of fifteen cents for each ton of freight received or delivered, and fifty cents for each car hauled from the levee. The contract was to continue for five years. The business was to be done under the control of defendant's superintendent, and defendant could revoke the contract on twenty-four hours' notice, if dissatisfied. M. performed no service for any other person than defendant. In an action to recover damages for injuries alleged to have been occasioned through the negligence of trainmen in the employ of M., *held*, that M. was not an independent contractor, but stood in the relation of servant to the defendant. *Speed v. Atlantic and Pacific R. R. Co.*, 71 Mo., 303, 1879; 2 Amer. & Eng. R. R. Cases, 77.

564. Custom. In an action against a railway company for injuries to plaintiff received in coupling a car loaded with timber projecting over the end thereof, the defendant asked the court to instruct the jury that "if the car which hurt plaintiff was loaded as loads of timber had been usually and commonly loaded, and carried over defendant's and other railways, then it was not negligence in defendant to carry the timber upon which plaintiff was hurt." *Held*, that the instruction was properly refused, on the ground that if the manner of carriage was negligent, the habit of defendant or other lines in that respect would not relieve defendant from liability. *Hamilton v. Des Moines Valley R. R. Co.*, 36 Ia., 31. 1872.

565. — Where the custom of the railway company was to allow links to be scattered about the yard for any employe to pick up when needed for use in coupling cars, failing to affix the link to the tender was negligence of the company and not of a fellow-servant of the employe. *Gravelle v. Minneapolis and St. Louis R'y Co.*, 11 Federal Reporter, 569; 3 McCrary (U. S. C. C.), 352. 1882.

566. — If the customary and usual way of doing the work of coupling cars in the yard was negligent and wrong, although permitted by the company, the plaintiff, being for the time in command of the train and in part responsible for the custom, can-

not be heard to complain. *Ferguson v. Central Iowa R'y Co.*, 58 Ia., 293, 1882; 5 Amer. & Eng. R. R. Cases, 614.

567. — An established custom in the management of a depot yard, that, in switching cars therein, it is not the company's duty to have a brakeman or other person upon each group of cars, or single car, separately in motion to give warning of its approach to men at work in the yard, but that the men in such cases must look out for themselves, would not relieve a brakeman actually in charge of a moving car, who should see that it was approaching a workman upon the track, from the duty of stopping it or warning him of its approach; and therefore it would not relieve the company from liability to such workman for an injury thus caused (ch. 173 of 1875). *Berg v. Chicago, Milwaukee and St. Paul R'y Co.*, 50 Wis., 419, 1880; 2 Amer. & Eng. R. R. Cases, 70.

568. — *running switch.* Where it was the custom of employes to switch cars from the main track to a side track while the train is running, and to make such switches on the order of the conductor, without his personal supervision, as required by a rule of the company, *held*, that an employe, who accepted service on the train subordinate to the conductor, with full knowledge of such custom, or continued in the service after acquiring such knowledge, without any objection, and acquiesced in the custom, waives all right he might have against the company arising from such mode of doing the business, or from the neglect of the conductor in not personally superintending it, as required by the rule of the company; and if he be injured in making such customary switch through his own neglect or that of a fellow employe on the train having no control over him, no recovery therefor can be had against the company. *Lake Shore and Michigan Southern R'y Co. v. Knittel*, 33 Ohio St., 468. 1878.

569. Damages. An employe, who has been injured by the employer's negligence, without fault on his part, may recover general damages on account of pain, physical injury and general depreciation of power to labor, although no proof of the value of his services as such employe, or in other business, may

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be made. *Georgia Southern R. R. Co. v. Neel*, 68 Ga., 609. 1882.

570. — In an action which has been pending in the courts for nearly nine years before the verdict, where the plaintiff seeks to recover for personal injuries resulting in the loss of a right hand at the wrist, and such plaintiff at the time of the injury was only twenty-five years of age, and engaged in an employment which has a regular system of promotions, and two juries have returned substantially the same amount of damages, and the verdict has been approved by the trial court, *held*, that a verdict of \$10,000, under all the circumstances of the case, is not so flagrant as to compel a reviewing court to disturb the same solely on the ground of its being excessive. *Union Pacific R'y Co. v. Young*, 19 Kans., 488, 1878; 19 Amer. R'y Rep., 52.

571. — In a suit for damages by an employe of a railway company for injuries sustained, which permanently disabled him, the jury were instructed that, if they found for plaintiff, to find no greater sum than a sum which, put at interest, would produce annually a sum equal to the difference between what plaintiff could earn before his injury, and what his ability would be restricted to earning, in consequence of the injury. *Held*, error. *Houston and Texas Central R. R. Co. v. Willie*, 53 Tex., 318, 1880; 5 Amer. & Eng. R. R. Cases, 541.

572. — The rule of damages for injuries inflicted by negligence, not wilful or malicious, is loss of time during the cure, and expenses incurred in respect of such cure, and the pain and suffering undergone by plaintiff, and any permanent injury, especially when it causes a disability from future exertion and consequent pecuniary loss. *Chicago, Burlington and Quincy R. R. Co. v. Avery*, 10 Bradwell (Ill.), 210. 1881.

573. — medical attendance. To recover for medical services and medicines in actions for personal injuries, the value thereof must be established by proof; and where no value is shown, an instruction including reasonable compensation therefor is erroneous. *Reed v. Chicago, Rock Island and Pacific R. R. Co.*, 57 Ia., 23, 1881; 8 Amer. & Eng. R. R. Cases, 180; *Reed v. Chicago, Rock Island and Pacific R. R. Co.*, 12 Amer. &

Eng. R. R. Cases, 107, 1883; 57 Ia., 23, 1881; *Missouri Pacific R. R. Co. v. Lyde*, 57 Tex., 505, 1882; 11 Amer. & Eng. R. R. Cases, 188.

574. Depot grounds; speed; signals. Where an employe, engaged in removing ashes, etc., from a side-track in depot grounds, was injured by a train set off upon said track, *held*, in an action against the company for the injury, that plaintiff had a right to act upon the belief that the train would be operated as other trains had been uniformly operated and run there; and where there was proof that the bell was usually rung before starting a train at that place, and no proof that trains were run there habitually at an unlawful speed, and there was evidence tending to show that the train in question was run at an unlawful speed, and without ringing the bell at starting or giving the plaintiff other warning, the question of defendant's negligence was for the jury. *Schultz v. Chicago and Northwestern R'y Co.*, 44 Wis., 638, 1878; 18 Amer. R'y Rep., 146.

575. Elevators. The signal adopted and habitually used at a certain elevator to notify the laborers engaged in loading and unloading railroad cars of the incoming of a train was a cry by one of the employes of the elevator company: "The cars are coming." The evidence showed that this was a safer signal at that place than the ringing of a bell or sounding of a whistle would have been. In an action brought against the railroad company by a laborer who had been at work at the elevator for some weeks and knew the accustomed signal, to recover damages for an alleged negligent wounding by an incoming train, *held*, that the failure to ring or whistle was not negligence. *Speed v. Atlantic and Pacific R. R. Co.*, 71 Mo., 303. 1879.

576. Employe in service of two companies. One who is in the joint service of two employers, and is injured in such service, has his election to sue either or both. V. was in the general employment of the C. and N. W. R. Co., his duty being to attend to the switches and couple and uncouple its cars and those of defendant at a station where they used a common track. His wages were paid by both companies, although he received them from the former.

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He was injured while coupling the cars of defendant. *Held*, that he was at the time defendant's servant, and could maintain an action against it for injuries caused by its negligence. *Vary v. B., C. R. and M. R. R. Co.*, 42 Ia., 246. 1875.

577. Extraordinary service. Damages cannot be recovered for injuries alleged to have been received by an employe while in the performance of a service not within the scope of his duty, if his opportunity for observing the danger was equal to that of the company; nor is the company guilty of negligence if the performance of an unusually dangerous service was required for good reasons, as for the safety of the passengers. *Houston and Texas Central R'y Co. v. Fowler*, 56 Tex., 452, 1882; 8 Amer. & Eng. R. R. Cases, 504.

578. — obedience to orders. If the employe is taken from his work for the company by his superior, and is directed to perform an individual service for the latter, the company is not liable for an accident occurring while he is in the performance of such service; but if he simply be taken from one place of employment to another, in the company's service, it is liable for the results of its negligence therein. *Hurst v. Chicago, Rock Island and Pacific R. R. Co.*, 49 Ia., 76. 1878.

579. Hand-car. In case of a collision of an engine, in a city, with a hand-car, resulting in the death of a laborer, where the engine was running at a speed prohibited by ordinance, and no bell was rung or whistle sounded, and the hand-car had been in the habit of coming into the city at the hour the accident occurred, and the approach of the engine was concealed from the view of those on the hand-car on account of a curve and trees and buildings, it was held that the negligence of the company was gross, and that of the deceased, if any, was slight. *Toledo, Wabash and Western R'y Co. v. O'Connor*, 77 Ill., 391. 1875.

580. — The plaintiff was an employe of the Union Trust Co., then operating and controlling the Missouri, Kans. and Tex. R'y, as a trackman. The "section gang" were furnished by the company with a hand-car, operated by the men of the "gang," which enabled them to rapidly transport

themselves and their tools from one portion of the track to another. A place was appointed at station S., in which, when not in use, the hand-car and tools were kept; and at the close of the day's labor, it was the duty of the men to transport the hand-car and tools to this station, and there dispose of them. On April 30, 1878, the plaintiff, at the close of his work, was ordered by his foreman to put his tools on the hand-car and get on himself, which order he obeyed — the employes occupying three hand-cars, and the plaintiff riding on the middle car. On the way to the station, the rear car was propelled so fast by the men upon it that it was thrown against the middle car, which could not escape, in consequence of the nearness of the forward car, and thereby the middle car was thrown from the track, and the plaintiff seriously hurt. *Held*, that the plaintiff was injured while in the line of his duty, and that he was entitled to recover. *Union Trust Co. v. Thomason*, 25 Kans., 1, 1891; 5 Amer. & Eng. R. R. Cases, 589.

581. — Where an employe of a railway company, while in charge of a hand-car on the track, was injured by a collision with a construction train, and it appeared he knew of the approach of the train in time to have got off the track before the accident, and had reason to know the time such train would approach, it was held that his negligence was such as to preclude a recovery, and that the company was not negligent in not sounding a whistle and slackening the speed of the train, as its servants had a right to expect the hand-car would be taken from the track before it was reached. *Illinois Central R. R. Co. v. Modglin*, 85 Ill., 481. 1877.

582. — An employe stopped upon the track to avoid a runaway team, and was struck and injured by a hand-car; one of the men on the hand-car saw him before the car struck him and gave the alarm, which was disregarded until he was seen by the foreman, who then gave the order for the brakes to be applied; *held*, that there was evidence of negligence to sustain a verdict for the plaintiff. *Moore v. Central R. R. Co. of Iowa*, 47 Ia., 688. 1878.

583. — Ordinary care required those running the hand-car to check its speed if it

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threatened danger to the plaintiff, even though he was not at the time upon the track but was only approaching it. *Ib.*

584. — It is not necessarily negligence to run a hand-car over a railway when a train is past due, even though more than ordinary danger is incurred thereby. The measure of care must be estimated with a view to the safety of the employes operating the hand-car, and of the passengers upon the train, and determined by the facts of each particular case. *Campbell v. Chicago, Rock Island and Pacific R. R. Co.*, 45 Ia., 76. 1876.

585. — **detective.** Plaintiff, having been often employed by defendant as a detective in cases of property stolen from its cars, was requested by defendant's agent, duly authorized for that purpose, to go from one station on defendant's road to another to aid in discovering certain thieves at the latter station, and the means of conveyance furnished by defendant was a *hand-car*. *Held*, that the defendant was liable for any injury to plaintiff while riding upon the car, caused either by the unfitness of such means of conveyance or by any negligence of defendant's employes in running the same, as by carelessly running it at a dangerous rate of speed. *Pool v. Chicago, Milwaukee and St. Paul R'y Co.*, 53 Wis., 657, 1881; 3 Amer. & Eng. R. R. Cases, 332.

586. — The complaint averred that plank had been negligently placed at a highway crossing between the rails, so that instead of lying level with the grade, they were loose, warped and sticking up four or five inches above the proper level, so as to injure plaintiff by hitting his heels as he was riding on the car. *Held*, that the court could not say as a matter of law that this did not show a defect in the road, constituting actionable negligence. *Ib.*

587. — The complaint alleged that plaintiff, in sitting upon the hind end of the hand-car, with his feet hanging down, acted upon the advice of the person in charge of the car, and without being aware of the danger of the position. *Held*, on demurrer, that this did not show contributory negligence. *Ib.*

588. — **headlight.** Although it is gross negligence for a railway company to run its trains in the dark without a headlight, yet

one who, knowing the time for a train to pass, attempts to pass over the road in a hand-car, at a time when the train, if on time, will meet and collide with him, is guilty of such negligence as will prevent a recovery by him. *Burling v. Illinois Central R. R. Co.*, 85 Ill., 18. 1877.

589. — **signal.** Where a hand-car upon which an employe was riding was overtaken by another running at a high rate of speed, and the employe was injured, the brakeman of the second car failing to apply the brakes, although signaled to do so by the person in charge of the car, *held*, that when the signal was not understood it was the duty of the foreman to have spoken to the brakeman, and that his failure to speak constituted negligence giving the injured employe a right of action. *Lombard v. Chicago, Rock Island and Pacific R. R. Co.*, 47 Ia., 494. 1877.

590. **Insufficient number of employes.** It is the duty of a railway company to see that there are a sufficient number of brakemen upon a train when it starts upon its trip; if this duty is neglected the company is liable for resulting injury, although the immediate negligence in starting the train without sufficient brakemen was that of a co-servant. Where the negligence of an engine-driver of a train, in running it, is contributory with that of the company in not sending a sufficient number of brakemen, and both together cause an injury to an employe, the negligence of the engineer does not relieve the company from liability. *Booth v. Boston and Albany R. R. Co.*, 73 N. Y., 38. 1878.

591. — The plaintiff, who was in the employment of the defendants, a railway company, his duty being to attach the carriages of the luggage trains to the locomotive engine, was thrown under the carriages and severely injured. There was evidence that the company's staff for the performance of this work was not sufficient, but the plaintiff had been employed in this particular service for several months prior to the accident, and had not made any complaint on the subject to the company. *Held*, that the company was not liable. Under such circumstances, it is not a question for the jury whether the number of servants employed by the company is sufficient for the performance of the

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work. *Skip v. Eastern Counties R'y Co.*, 9 Welsby, Hurlstone & Gordon (Exchequer), 223. 1853.

592. — The evidence considered, and held that the question of negligence in not employing a sufficient number of employes was for the jury. *Harvey v. New York Central and Hudson River R. R. Co.*, 26 Hun (N. Y.), 556. 1879.

593. — Upon the trial the plaintiff offered to prove that the switchman employed at the time of the accident had complained to his superiors that the services required of him were too much for one man to do, and that he had not the requisite experience to perform them. *Held*, that it was error for the court to refuse to admit the evidence. *Harvey v. New York Central and Hudson River R. R. Co.*, 19 Hun (N. Y.), 556. 1880.

594. **Leased lines.** Where an employe has been injured by an accident caused by a defective track, the company employing him cannot escape liability by showing that the track is owned by another company, and only used by the employer under a contract which binds the owner to make repairs to be paid for jointly by the two companies. In contemplation of the law of master and servant it is the track of the master, no matter what the source or extent of his title. *Smith v. Memphis and L. R. R. Co.*, 18 Federal Reporter, 304. 1883.

595. — Where a railroad company leases of another company its track, the trains of the lessee being allowed to run over such track, subject to the control, rules and orders of the lessor, by virtue of an agreement to that effect between the two companies, the lessor will be regarded as the common master of the servants of the lessee while running its trains upon the leased track, and the employes of the two companies as fellow-servants of the lessor. *Chicago, Burlington and Quincy R. R. Co. v. Clark*, 2 Bradwell (Ill.), 596, 1878; *Same v. Van Hagen*, ib., 602, 1878.

596. — A person engaging in the service of a railway company as an engine-driver, who receives an injury while in the discharge of his duties, by a collision with a train of another company using the same part of the road under a lease from his employer,

through the negligence and recklessness of the employes of the lessee company in running the train in violation of the reasonable rules of the lessor company, cannot recover damages of the company employing him, such an accident being one of the ordinary perils of the service, and not attributable to any negligence on the part of the employer. *Clark v. Chicago, Burlington and Quincy R. R. Co.*, 92 Ill., 43. 1879.

597. **Minors.** A railway company contracted with a boy fifteen years old for his services as brakeman on its railway without the consent of the mother, his only living parent. *Held*, that the employment was a wrong done the mother. Unless the boy had sufficient discretion to comprehend and guard against the dangers of the employment, when fully explained to him, as they should have been, the contract with him would not place him in the position of an employe or preclude a recovery for injuries suffered from the negligence of co-employes. *Hamilton v. Galveston, Harrisburg and San Antonio R'y Co.*, 54 Tex., 556, 1881; 4 Amer. & Eng. R. R. Cases, 528.

598. **Nitro-glycerine.** A railway company which undertakes to accommodate another company by switching over its track a car loaded with dangerous merchandise, has a right to assume that the consignor has exercised due care in packing it. *Foley v. Chicago and Northwestern R'y Co.*, 48 Mich., 623, 1832; 6 Amer. & Eng. R. R. Cases, 161.

599. — A manufacturer of nitro-glycerine contracted with a railway company for the carriage of a quantity, and the latter requested another railway company to move the car loaded therewith some distance over its track. The company so requested sent a switchman to perform the service, and he was killed by the explosion of a can while it was being loaded. The loading was done by employes of the manufacturer, and the switchman had no control or authority over them. He however knew the dangerous character of the work. *Held*, that there was no ground of action against the company which employed the switchman for the fatal injury to him. *Id.*

600. **Obedience to orders.** Where the employer places one employe under the con-

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trol and direction of another, and the latter, in the exercise of the authority so conferred, orders the former into a place of unusual danger, and thus exposes him to extraordinary peril, of the existence and extent of which he is not advised, the employer is liable. *Thompson v. Chicago, Milwaukee and St. Paul R'y Co.*, 14 Federal Reporter, 564. 1883.

601. — If the danger is apparent, and is as well known to the employe as to the employer, the former takes the risk of it; but if the employer knew, or by the exercise of ordinary care might have known, that the employment was hazardous to a degree beyond what it fairly imports, he is bound to inform the latter of such fact. *Ib.*

602. — The servant may obey the order of his superior and perform his duty, unless the danger in doing so is so apparent that a man of ordinary prudence would refuse to undertake it, even under the orders of his employer. *Ib.*

603. — The bare fact that an employe is directed by his superior in charge to perform an act at a time and under such circumstances as that a person would reasonably apprehend danger therefrom, would not justify his disobedience of such orders; hence to assume such position of danger in obedience to such direction is not, of itself, negligence. *Frandsen v. Chicago, Rock Island and Pacific R. R. Co.*, 36 Ia., 372. 1873.

604. — While an employe would have no cause of action for injuries received in such case, since he was employed for and paid for assuming such position of danger, yet, if the danger was created by reason of the prior negligence of co-employees, or if, by reason of their negligence, the injury was caused to him, then he may recover. *Ib.*

605. — Where an action is brought against a railway company by one of its employes to recover damages for injuries sustained by the enforcement of an order made by the superintendent of the company, as to the management of a particular train, which order was unreasonable, and the enforcement of the same was dangerous to such employe, the fact that the negligence of a fellow-servant of the injured person, while executing such order, contributed in produc-

ing the injury, affords no defense to the action. *Railway Co. v. Henderson*, 37 Ohio St., 549, 1882; 5 Amer. & Eng. R. R. Cases, 529.

606. — A fireman upon a locomotive, while in the discharge of his duties as such, may properly be found to have been acting under the immediate control of the engineer. *Cooper v. Central R. R. Co. of Iowa*, 44 Ia., 134. 1876.

607. Rules. A railway company should make and publish sufficient and necessary rules for the government of its employes. *Cooper v. Central R. R. Co. of Iowa*, 44 Ia., 134. 1876.

608. — A servant in the employment of the E. L. Company, engaged in repairing a carriage in a siding at a station in the joint occupation of the E. L. Company and the L. and Y. Company, was killed by an engine of the L. and Y. Company being shunted in to the siding at which he was at work. It appeared that the rules for the regulation of the station were published, headed in the joint names of the two companies; and that the servants employed in shunting the engines were the joint servants of the two companies, but the engine-driver and persons employed, as the deceased was, in repairing the carriage, were the separate servants of each company. It was found that the rules as to the precautions to be taken before shunting trains into sidings had been observed, and that there had been no negligence on the part of the deceased, the shuntsman, pointsman or engine-driver, but that the accident was occasioned by the rules being defective. *Held*, that the L. and Y. Company was liable to an action at the suit of the administratrix of such servant. *Vose v. Lancashire and Yorkshire R'y Co.*, 2 Hurlstone & Norman (Exchequer), 728. 1858.

609. — It is the duty of a railway company to make all reasonable regulations for the safety of its employes. This being an affirmative fact, it devolves on the company to show an observance of the duty. On such a showing the presumption will be that the negligent act was done in violation of its rules, and the company will not be liable for the act of its servants, disobeying such regulations. *Pittsburgh, Ft. Wayne and Chicago R'y Co. v. Powers*, 74 Ill., 341. 1874.

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610. — It is the duty of railway companies to their employes to furnish a sufficient number of hands to operate their trains with safety. But where an employe, whose duty it was to turn switches, couple cars and give signals, was run over and injured by the backing of a train on the private grounds of the company, while he was engaged in his duty, it was held that the company was not guilty of negligence or liable to the servant in not providing rules whereby a watchman should have been kept on the rear end of the train that produced the injury, the proof showing there was a watch or lookout kept from the engine. *Chicago and Northwestern R'y Co. v. Donahue*, 75 Ill., 106. 1874.

611. — Where the engineer is the plaintiff, and he permitted a brother engineer of the company to ride upon the engine with him from Bolingbroke to Macon (the rule prohibiting), and the disaster and damage was caused by the falling in of an embankment near Macon, and it was made to appear from the testimony of both engineers that everything possible was done to avert the catastrophe, and that the presence of the passenger engineer did not in the slightest degree contribute to the disaster, but that the same was caused solely by the falling in of the embankment, the recovery of the plaintiff will not be defeated by his suffering the other engineer to ride on the engine with him. *Central R. R. Co. v. Mitchell*, 63 Ga., 173; 1 Amer. & Eng. R. R. Cases, 145. 1879.

612. — An engine-driver who, in running a train, is injured while he is disregarding the instructions which the company had issued for his guidance, and is therein guilty of gross negligence contributory to the injury, cannot recover damages of the company. *Lyon v. Detroit, Lansing and Lake Michigan R. R. Co.*, 31 Mich., 439. 1875.

613. — When the official printed schedule, furnished to conductors and engine-drivers, prescribes a given hour and minute for leaving the starting terminus, and no provision is made in the rules and regulations for starting at any other time, to enter on the trip fifteen minutes after the prescribed time has expired is to vary from the schedule; and if done without express authority from the superintendent or other proper general officer, it is a breach of orders, and in case of a

collision the employe thus violating orders cannot recover. *Ga. R. R. and Banking Co. v. McDade*, 59 Ga., 73, 1877; 18 Amer. R'y Rep., 183.

614. — Under the evidence, and the law applicable thereto as heretofore expounded by this court in this same case, the grant of a new trial, on even a third verdict for the plaintiff, followed legally and logically. It would have been an improper exercise of discretion not to grant it. *McDade v. Ga. R. R. Co.*, 60 Ga., 119. 1878.

615. — Where there was posted in the cab of an engine a notice that "No one is allowed to ride on the engine except the engineer and fireman," and the plaintiff was riding there when injured, *held*, that, if the plaintiff knew of the rule, and was there in violation of it, he could not recover, unless the jury found that the regulation did not apply to plaintiff, under the circumstances of this case, or had been waived by non-enforcement against him and other employes engaged about the engine as a switch-engine. *Smith v. Memphis and L. R. R. Co.*, 18 Federal Reporter, 304. 1893. See, also, *Kresnowski v. Northern Pacific R'y Co.*, 18 ib., 229. 1883.

616. — *coupling stick.* If an employe enters into or remains in the service of a railway company with a knowledge of its rules and regulations, he must be held as undertaking to acquiesce therein; and if he is afterward injured by reason of his violation of such rules and regulations, he cannot claim that their reasonableness is a question to be decided by a jury, in an action by him to recover damages for the injury thus occasioned. This principle applied to a rule requiring brakemen to use a coupling stick. *Wolsey v. Lake Shore and Michigan Southern R. R. Co.*, 33 Ohio St., 227. 1877.

617. — An employe is not bound by a rule of the company which has not been properly published or brought to his attention, and which it has habitually neglected to enforce. This principle applied to a rule forbidding coupling by hand. *Fay v. Minneapolis and St. Louis R'y Co.*, 30 Minn., 231, 1883; 11 Amer. & Eng. R. R. Cases, 193.

618. *Speed of train.* There is no error in refusing to submit to the jury the question

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whether the defendant was negligent in running its train at the rate of eight or ten miles an hour on a certain curve, where all the evidence in the case, as well as common experience, shows that trains are daily run with safety at a much higher speed over similar curves, and where it appears conclusively that the track was in good condition. *Lockwood v. Chicago and Northwestern R'y Co.*, 55 Wis., 50, 1882; 6 Amer. & Eng. R. R. Cases, 151.

619. Spur track owned by private persons; defective roadway. Where a railway company uses for the running of its trains a track belonging to another person, it is liable for injuries to its employees resulting from the unfitness of the track for such use. *Stetler v. Chicago and Northwestern R'y Co.*, 46 Wis., 497, 1879; 21 Amer. R'y Rep., 402.

620. — If defendant's use of the track alleged to have been insufficient was only occasional and for special purposes, and under special instructions to those in charge of trains as to the manner of running thereon, it is liable only in case it was negligence to use the track in that manner and for those purposes. *Ib.*

621. — The injury having been received in Illinois, the court erred in taking from the jury the question whether the injury was caused by negligence of the defendant company or by that of plaintiff's co-employee, the conductor of the train, there being evidence for the jury on that question. Under the laws of Illinois defendant was compelled to operate the track. *Ib.*

622. — If, however, the injury was caused by neglect of the defendant, a recovery will not be defeated by the merely contributory negligence of a co-employee, but only by that of plaintiff himself or of some person for whose acts he is responsible. *Ib.*; *Stetler v. Chicago and Northwestern R'y Co.*, 49 Wis., 609, 1880; 21 Amer. R'y Rep., 89.

623. — Afterwards held in the same case that neither under § 12, art. XI, of the constitution of Illinois, nor under § 82, ch. 114, of the Revised Statutes of that state (of 1874), is it made the duty of a railway company to run its cars upon spur tracks owned by other persons, for the purpose of receiving or delivering any other merchandise

than wheat; and if such duty were imposed, it would still not be the duty of the company to run upon any such track that was not reasonably safe. *Stetler v. Chicago and Northwestern R'y Co.*, 49 Wis., 609, 1880; 21 Amer. R'y Rep., 89.

624. — Where the owners of a private railway track occasionally employed by a railway company for a special use have negligently suffered it to remain in a dangerous condition for such use, though trains are run upon it slowly and carefully, the company voluntarily running its trains thereon is liable for an injury to one of its own employees caused proximately by such negligence. *Ib.*

625. Telegraph employee; construction of telegraph line. One of the railroad company's engine-drivers running upon the company's road is still its servant while in its pay and while liable to be discharged by it, though in running its locomotive and cars he may be temporarily subject to the orders of a telegraph company, represented in the immediate control of the train by one of its employees, and though the train, with the railroad company's permission, be engaged, for the time being, solely in transporting materials for the telegraph company, with a force of attendants employed by the latter company to handle the materials and discharge them from the cars. Except as to acts and omissions dictated by express orders referable to the telegraph company, the engine-driver must observe the general law of diligence applicable to his vocation; and his failure to do so is negligence imputable to his master (the railroad company), who is liable for a personal injury resulting therefrom to one of the servants of the telegraph company rightfully upon the train as an attendant laborer. *Coggin v. Central R. R. Co.*, 62 Ga., 685. 1879.

626. Two companies using the same track. The defendant is a railway company, chartered by the state of Virginia, and uses the track of a Washington R. R. Co. by agreement. The plaintiff while flagging defendant's train over the road of the Washington Company, must, for the time, be considered the servant of the defendant, and is not entitled to recover for any injury occasioned by the negligence of another servant,

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without showing that the defendant was guilty of negligence in selecting the servant by whose fault the accident happened. *Mills v. Orange, Alexandriu and Manassas R. R. Co.*, 2 MacArthur (Dist. of Columbia), 314. 1875. *Contra, Same v. Same*, 1 ib., 288. 1874.

627. — An employe of a railway company lawfully using its tracks, over which another company has a right of way, has a right to act upon the presumption that the latter company will conform to the rules, such as to giving signals, etc., prescribed by the company by permission from which it uses such tracks. *Roll v. Northern Central R'y Co.*, 15 Hun (N. Y.), 496. 1878.

628. — A railway company is liable in damages for injuries caused by the fault of a signalman in its employment to the guard of a train belonging to another company while passing over a portion of the line of the former company. *Calder v. Caledonian R'y Co.*, 9 Scotch Session Cases (3d series), 833. 1871.

629. — If a train of cars of one railroad company, running on the road of another company, be under the exclusive control of the servants of the latter, the latter is liable for all damages occurring through negligence. But if the servants of both companies jointly control the train, both companies are liable. *Nashville and Chattanooga R. R. Co. v. Carroll*, 6 Heiskell (Tenn.), 347; 12 Amer. R'y Rep., 20. 1871.

630. — When one railway company has a right, by contract, to run its trains over the track of another company, the latter company is liable for injuries, caused solely by the negligence of its own switchman in not properly attending to his duty, to an engineer of the former company while operating his engine on said track; and, also, to the other company for damage to its property. *Merrill v. Central Vt. R. R. Co.*, 54 Vt., 200. 1881.

631. — Where a main trunk railway company furnishes the motive power, engineers and conductors to transport the cars of another intersecting railway company on its road, it is responsible for an injury done to a brakeman employed by and on the cars of the intersecting company, through the negligence of its engineer. Such brakeman is

not a servant or employe of the first-named company so as to protect it from responsibility. The proper test of service is to consider who employs, pays, and has the right to discharge such brakeman. *Smith v. Northern Central R'y Co.*, 1 Pearson (Pa.), 243. 1861.

632. — Two companies were occupying the same line. The deceased, a fireman, was injured by the neglect of the station-master of the other company. The engine-driver, on the same train with the deceased, and also another co-employe of the deceased, were guilty of contributory negligence. It was held that the representatives of the deceased had a valid cause of action against the company whose station-master caused the accident, and that the action was not barred by the contributory negligence of his own co-employees. *Hobbs v. Glasgow and South Western R'y Co.*, 3 Scotch Session Cases (4th series), 215. 1875.

633. — Where two or more persons or corporations are operating a railway, their liability to an employe for an injury resulting from defective machinery furnished by them for use in the course of his employment is several as well as joint. An action is maintainable against one of them. *Kain v. Smith*, 80 N. Y., 458, 1880; 2 Amer. & Eng. R. R. Cases, 545.

634. **Unaccountable accident.** Where, upon plaintiff's evidence, the accident appeared unaccountable, and defendant's evidence, so far as it accounted therefor, showed that it arose from an occult risk incident to the employment, or that, if there was negligence, it was that of the plaintiff, it was error to submit the question of defendant's negligence to the jury. *Steffen v. Chicago and Northwestern R'y Co.*, 46 Wis., 259, 1879; 21 Amer. R'y Rep., 385.

635. **Verdict; negligence.** A verdict that the death of the deceased "was caused by the gross negligence of the defendants, without any fault" of said deceased, is substantially an affirmative finding that the deceased, during the whole transaction resulting in his death, exercised due care and diligence to protect himself from injury and to do his duty toward his employer. *Kansas Pacific R'y Co. v. Salmon*, 14 Kans., 512. 1875.

Injuries Received in Getting On and Off the Cars.

INJURIES TO PASSENGERS.

See ARBITRATION; EVIDENCE; INDICTMENT; INJURIES CAUSING DEATH; INJURIES TO EMPLOYEES; INJURIES TO PERSONS GENERALLY; LEASED LINES; LIMITATIONS; NEGLIGENCE; STREET RAILWAYS; SUNDAY LAWS; TICKETS.

(For damages caused by delay, see PASSENGERS.)

- I. INJURIES RECEIVED IN GETTING ON AND OFF THE CARS.
 - 1. *Getting on the cars.*
 - 2. *Getting off the cars.*
- II. INJURIES CAUSED BY DEFECTIVE ROADWAY, MACHINERY, ETC.
- III. INJURIES RECEIVED AT DEPOTS AND ON DEPOT GROUNDS.
- IV. NEGLIGENCE.
 - 1. *Of carrier.*
 - 2. *Of passenger.*
- V. ASSAULT AND BATTERY.
- VI. EXPULSION OF PASSENGERS FROM THE CARS.
- VII. DAMAGES.
 - 1. *Death.*
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- VIII. GRATUITOUS PASSENGERS.
- IX. LIMITATION OF LIABILITIES.
- X. INJURIES RECEIVED AT CAR WINDOW.
- XI. COLLISIONS AND RUNNING OFF THE TRACK.
 - 1. *Collision of trains.*
 - 2. *Collision with cattle or teams.*
 - 3. *Running off the track.*
- XII. JOINT OCCUPATION OF RAILWAYS, AND CONNECTING LINES.
 - 1. *Connecting lines.*
 - 2. *Two companies running same track.*
 - 3. *Crossing of two railways.*
- XIII. FREIGHT TRAINS.
- XIV. EVIDENCE.
- XV. PLEADING.
- XVI. GENERAL MATTERS.

I. INJURIES RECEIVED IN GETTING ON AND OFF THE CARS.

1. *Getting on the cars.*

1. **Freight train.** If the plaintiff had sufficient time to get aboard the caboose, he was not justified in getting on a freight car,

and as this question was properly submitted to the jury, the judgment below for the defendant is affirmed. *Player v. Burlington, Cedar Rapids and Northern R. R. Co.*, 12 Amer. & Eng. R. R. Cases (Ia.), 112. 1883.

2. **Length of stoppage.** Railway trains are bound to stop at stations a reasonable length of time to enable passengers to get on. *Swigert v. Hannibal & St. Joseph R. R. Co.*, 75 Mo., 475, 1883; 9 Amer. & Eng. R. R. Cases, 322; *Wabash, St. Louis and Pacific R'y Co. v. Rector*, 104 Ill., 296, 1883; 9 Amer. & Eng. R. R. Cases, 264.

3. — It is not necessarily negligence to attempt to get on a train which has started from a station. The rate of speed, and whether the train was stopped a sufficient length of time to enable passengers to get on, are circumstances to be considered in deciding the question. *Swigert v. Hannibal and St. Joseph R. R. Co.*, 75 Mo., 475, 1883. 9 Amer. & Eng. R. R. Cases, 322.

4. — While plaintiff, a passenger on a train, was about to alight at a station the train began to move slowly. B., another passenger, endeavored to assist plaintiff, who had some packages in her hands. While doing this B., who had hold of plaintiff, was turned around and compelled to step off the train backward, in which he pulled plaintiff off with him, whereby she was injured. It was shown that the train did not stop long enough to allow passengers to leave. *Held*, that plaintiff was not necessarily guilty of contributory negligence, but that it was for the jury to determine. *Burrows v. Erie R'y Co.*, 3 Thompson & Cook (N. Y. Supreme Ct.), 44. 1874. *Held*, on appeal, that the company was not responsible for the negligence of any one assisting the plaintiff, and that plaintiff was not justified in exposing herself while the cars were in motion. *Burrows v. Erie R'y Co.*, 63 N. Y., 556. 1876.

5. **Making up train.** Trains should stand at the stations a reasonable time before their departure, to permit passengers to enter them; usually twenty or thirty minutes is more than can reasonably be demanded; but until it becomes necessary to put them in position to await passengers, there is no negligence in moving them back and forth as the convenience of the company, in mak-

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ing up and stationing other trains, may require. *Flint and Pere Marquette R'y Co. v. Stark*, 38 Mich., 714. 1878.

6. Misleading announcements. A railway company may be liable for damages resulting from misleading announcements whereby passengers are led to attempt to get upon the wrong train. *Ib.*

7. Moving train. A plaintiff who arrives at the depot before the cars, with plenty of time to go upon the platform, but who waits upon the ground on the opposite side of the track, and when the cars come along attempts to get on from that side, and especially after dark, and is thrown off by the cars starting before she is securely on, cannot be said to be free from negligence contributory to the result. *Michigan Central R. R. Co. v. Coleman*, 28 Mich., 440, 1874; 12 Amer. R'y Rep., 59. See, also, *Harvey v. Eastern R. R. Co.*, 116 Mass., 269, 1874; 7 Amer. R'y Rep., 463.

8. — The fact that the railway company is violating the law in not stopping its train for five minutes at a station will not excuse a passenger in attempting to get upon the train while it is in motion. *Galveston, Harrisburg and San Antonio R. R. Co. v. Le Gierse*, 51 Tex., 189. 1879.

9. Platform. If the company has constructed and maintained a platform at a convenient and suitable place, by which passengers can safely and securely enter the cars when the train is placed in position for the reception of passengers when the cars are not in motion, it has fulfilled its duty to the passenger so far as the platform is concerned. *Chicago and Northwestern R'y Co. v. Scates*, 90 Ill., 586. 1878.

10. Signals. It is the duty of a railroad company, through its agents, to give reasonable signals of the departure of its trains from its stations and depots; such signals as would ordinarily attract the attention of passengers and those interested in the movements of the cars of the railroad company. Should a passenger needlessly linger about a depot or station, and neglect to board a train, then the company, as to such passenger, is only bound to ordinary diligence; and it would be the duty of the passenger to use caution in observing signals which might be given by the agents of the com-

pany. *Perry v. Central R. R. Co.*, 66 Ga., 746. 1881.

11. — These principles applied to a case where plaintiff, who was standing on the platform, was going to Savannah to get married, and saw the train moving from the platform, and in his haste in trying to get upon the train, which had moved off, as he claimed, without signal, he was run into by another engine and severely injured. *Held*, that his own negligence was a question for the jury. *Ib.*

12. — In giving signals to tardy passengers who have needlessly neglected to board the train, the purpose is to prevent them from being left in consequence of their own want of promptitude. Ordinary diligence as to such signals, according to what is usual on like occasions, in like circumstances, is required on both sides — on the side of the company in giving them, and on the side of the passengers in looking, listening or observing. What kind of signals will come up to such ordinary diligence, by what means to be made, and with what degree of loudness or distinctness, are questions for the jury and not for the court. *Central R. R. and Banking Co. v. Perry*, 58 Ga., 461, 1877; 16 Amer. R'y Rep., 122.

13. Starting of train. The fact that the conductor of a train about to leave a station is induced by the conduct and conversation of a person on the station platform to believe that he does not intend to take passage on the train, will not relieve the company from liability for injuries received by such person in consequence of the train being started without giving him time to get on, if the conductor actually sees him attempting to get on when he gives the order to start. *Swigert v. Hannibal and St. Joseph R. R. Co.*, 75 Mo., 475, 1882; 9 Amer. & Eng. R. R. Cases, 322.

14. Stepping off the platform. A lady passenger in getting on the cars in the night stepped off the platform and was injured. She sued the company, claiming that the accident was caused by insufficiency of light on the cars. *Held*, that the accident was not one ordinarily attributable to the neglect of the carrier. Proof of want of care must be shown. *Chicago, St. Louis and*

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New Orleans R. R. Co. v. Trotter, 60 Miss., 442, 1882.

15. Who is a passenger. One who has a railroad ticket and is present to take the train at the ordinary point of departure is a passenger, though he has not entered the cars. In duties toward him, directly involving his safety, the company is bound to extraordinary diligence, and in those touching his convenience or accommodation, to ordinary diligence. *Central R. R. and Banking Co. v. Perry*, 58 Ga., 461, 1877; 16 Amer. R'y Rep., 122.

16. Wrong side of train. The duties of conductors of night trains, when stopping or starting, in looking out for the safety of passengers entering or leaving the cars, examined, and held that they are not required to be on the lookout for passengers getting on from both sides of the train, and are not at fault for not discovering a passenger attempting to get on from the wrong side. *Michigan Central R. R. Co. v. Coleman*, 28 Mich., 440, 1874; 12 Amer. R'y Rep., 59.

2. Getting off the cars.

17. Announcement of station. A railway company should have its stations announced in time to give passengers an opportunity to alight. *Dawson v. Louisville and Nashville R. R. Co.*, 11 Amer. & Eng. R. R. Cases, 134 (Ky.), 1883.

18. Children. It appeared that plaintiff, an infant twelve years of age in the care of her parents, was a paying passenger upon defendant's cars. As the train approached the station where she was to alight, the conductor called out the name of the station and the cars stopped. It was evening and dark. Plaintiff and her parents arose to leave, but before they got out of the car the train started and moved slowly by the station. They, knowing the train was in motion, passed out on to the platform of the car, and while the train was still moving, and after it had passed the platform of the station, plaintiff's father took her under his arm, stepped from the car, fell, and she was injured. Held, that plaintiff, as matter of law, was chargeable with contributory negligence. *Morrison v. Erie R'y Co.*, 56 N. Y.,

302, 1874. See, also, *Ohio and Mississippi R'y Co. v. Stratton*, 78 Ill., 88, 1875.

19. Comparative negligence. Where a jury has found, from the evidence, that the act of a passenger in alighting from a train, at the time and under the circumstances appearing, was slight negligence, and the negligence of the servants of the railroad company in starting its train, when compared with that of the passenger, was gross, and such finding is sustained by the appellate court, it is conclusive on the supreme court, and cannot be re-examined. *Chicago and Alton R. R. Co. v. Bonifield*, 104 Ill., 223, 1882; 8 Amer. & Eng. R. R. Cases, 493.

20. Crossing track. Plaintiff's intestate was a passenger on a western bound train for Otisville, of which place he was a resident; passengers arriving there from the east are compelled to alight upon a platform between the tracks and cross the eastern track, in order to reach the station. Plaintiff's intestate stepped from the smoking car, at the end nearest the locomotive, upon the platform, and from thence upon the eastern track, when he was struck and killed by a train of coal cars going east, the engine of which had been switched off. There was no brakeman on the forward end of the coal cars, nor was any signal given of its approach. The defendant claimed that the plaintiff's intestate was guilty of contributory negligence, as there was no evidence to show that he looked to the west before stepping on the track. Held, that the question of contributory negligence was, under the circumstances of the case, a question for the jury, and that it was error to direct a nonsuit. *Green v. Erie R'y Co.*, 11 Hun (N. Y.), 333, 1877.

21. Darkness. In a suit for damages brought by a passenger for injuries resulting from the negligence of the company, the petition alleged that it neglected to provide "proper lights and accommodations for passengers at its freight depot;" that plaintiff, being unable from the darkness of the night to see when he alighted from the car, fell, and injuries to his person were occasioned by the neglect. Held, that on general demurrer the petition was sufficient. *Stewart v. International and Great Northern R. R. Co.*, 53

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Tex., 289, 1880; 2 Amer. & Eng. R. R. Cases, 497.

22. — It may be carelessness, according to circumstances, in a railway company to notify passengers in the night-time that a station was at hand, and then stop the train short of such station. *Cent. R. R. Co. of New Jersey v. Van Horn*, 38 N. J. Law, 133, 1875; 13 Amer. R'y Rep., 36.

23. — The plaintiff was a traveler on the defendant's line by a train which arrived at the station for which the plaintiff was bound at night. The part of the platform at that station at which passengers could alight was of sufficient length for the whole train to have been drawn up alongside of it, but in addition to that part the platform extended some distance, gradually receding from the rails. When the train drew up the body of it was alongside the platform, but the last carriage, in which plaintiff rode, was opposite the receding part of the platform and about four feet from it. The night was very dark, and the place where the last carriage stopped was not lighted, though the rest of the station was well lighted with gas. There was no express invitation given to the plaintiff by the company's servants to alight, but the train had been brought to a final standstill and did not move on again until it started on its onward journey. No warning was given to the plaintiff that the carriage was not close to the platform or that care would be necessary in alighting. The plaintiff opened the carriage door and, stepping out, fell into the space between the carriage and the platform, and sustained injuries, for which she brought an action against the company. *Held*, that there was evidence of negligence on the part of the defendant's servants to go to the jury. Bringing a railway carriage to a standstill at a place at which it is unsafe for a passenger to alight, under circumstances which warrant the passenger in believing that it is intended he shall get out, and that he may do so with safety, without any warning of his danger, amounts to negligence on the part of the company, for which, in the absence of contributory negligence on the part of the passenger, an action may be maintained. *Cockle v. London and South Eastern R'y Co.*, Law Reports, 7 Common. Pleas Cases, 321; 2

Eng. (Moak), 648, 1872; *Same v. Same*, Law Reports, 5 Common Pleas Cases, 457, 1870.

24. — The plaintiff was set down at T. after dark on the side of the line opposite to the station and place of egress. The train was detained more than ten minutes at T., and from its length blocked up the ordinary crossing to the station which is on the level. The ticket collector stood near the crossing with a light, telling the passengers, as they delivered their tickets, to "pass on." The plaintiff passed down the train to cross behind it, and from the want of light stumbled over some hampers put out of the train and was injured. The practice of passengers had been to cross behind the train, when long, without interference from the railway company. *Held*, that these facts disclosed evidence for the jury of negligence on the part of the company. *Nicholson v. Lancashire and Yorkshire R'y Co.*, 3 Hurlstone & Coltman (Exchequer), 584. 1865.

25. **Drunkenness.** An injury to which the intoxication of the passenger has contributed will not render the carrier liable. *Weeks v. New Orleans and Carrollton R. R. Co.*, 32 La. An., 615. 1880.

26. — Where, after coming to a full stop, and while passengers were alighting, the train was suddenly moved without warning, it is immaterial whether the motion is backward or forward. That a passenger, injured under such circumstances, was intoxicated, would not exonerate the company. Such intoxication would have consideration upon the question of contributory negligence. *Milliman v. N. Y. Central and Hudson River R. R. Co.*, 6 Thompson & Cook (N. Y. Supreme Ct.), 585; 4 Hun (N. Y.), 409, 1875; 66 N. Y., 642, 1876.

27. **Indictment.** A passenger left the train after the conductor had called out the name of the station to which he was entitled to be carried, and the car in which he was had passed the station and had almost stopped; and, while crossing to the station, was killed by a locomotive on a parallel track, the approach of which he might have seen had he looked before leaving the train. *Held*, on an indictment against the company under the statute of 1874, ch. 372, § 163, that, even if an indictment would lie for the death of a negligent passenger, the person killed

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had ceased to be a passenger while leaving the train while in motion. *Commonwealth v. Boston and Maine R. R. Co.*, 129 Mass., 500, 1880; 1 Amer. & Eng. R. R. Cases, 457.

28. Length of stoppage. A railway company has not discharged its duty or relieved itself from liability to its passengers until it has stopped at the end of their journey a reasonable time for them to get off the train in safety. *Jeffersonville, etc., R. R. Co. v. Parmelee*, 51 Ind., 42, 1875; *Keller v. Sioux City and St. Paul R. R. Co.*, 27 Minn., 178, 1880.

29. — It is the duty of a railway company, at a time when passengers are getting out of the cars, after an announcement by the conductor that ten minutes would be given for refreshments, to permit the cars to stand still. *Sauter v. New York Central and Hudson River R. R. Co.*, 6 Hun (N. Y.), 446, 1876.

30. — If the train is stopped a sufficient length of time to enable a passenger to conveniently alight, and, without any fault of the company's servants, he fails to do so, and the conductor, not knowing, and having no reason to suspect, that he was in the act of alighting, caused the train to start while he was so alighting, then the company would not be liable. *Straus v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 75 Mo., 185, 1881; 6 Amer. & Eng. R. R. Cases, 384.

31. Moving train. If a passenger be negligently carried beyond his stopping place, he can recover for the inconvenience, loss of time and expense of traveling back; but if he jumps or leaves the train under circumstances which prudence would forbid, he does it at his own risk, and assumes the consequences of his own act. *Kelby v. Hannibal and St. Joseph R. R. Co.*, 70 Mo., 604, 1819; *Straus v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 75 Mo., 185, 1881; 6 Amer. & Eng. R. R. Cases, 384; *Nelson v. Atlantic and Pacific R. R. Co.*, 68 Mo., 593, 1878; *Houston and Texas Central R'y Co. v. Leslie*, 57 Tex., 83, 1882; 9 Amer. & Eng. R. R. Cases, 407; *Southwestern R. R. Co. v. Singleton*, 67 Ga., 306, 1881; *Burrows v. Erie R'y Co.*, 63 N. Y., 556, 1876; *Jewell v. Chicago, St. Paul and Minneapolis R'y Co.*, 54 Wis., 610, 1882; 6 Amer. & Eng. R. R. Cases, 379; *Lake Shore and Michigan Southern R'y*

Co. v. Bangs, 47 Mich., 470, 1882; *Illinois Central R. R. Co. v. Chambers*, 71 Ill., 519; 1874; *Illinois Central R. R. Co. v. Lutz*, 84 Ill., 598, 1877; *Dougherty v. Chicago, Burlington and Quincy R. R. Co.*, 86 Ill., 467, 1877.

32. — It is negligence for a passenger to leap from a moving train for the mere purpose of getting off at a station where the train should stop but does not do so, even though he takes that course to save others from distress on account of his absence. *Lake Shore and Michigan Southern R'y Co. v. Bangs*, 47 Mich., 470, 1882.

33. — Whether a railway company which fails to bring its train to a full stop at a station shall be held liable in damages for injuries sustained by a passenger in attempting to get off, depends upon whether, under all the circumstances, it was prudent for him to make the attempt. *Price v. St. Louis, Kansas City and Northern R'y Co.*, 72 Mo., 414, 1880; 3 Amer. & Eng. R. R. Cases, 365.

34. — The facts considered in relation to the injury of a passenger in alighting from a freight train, and the company's employes held negligent in backing the train without giving the passenger time to alight from the caboose; but the contributory negligence of the passenger in jumping off the train was held to defeat the action. *Richmond and Danville R. R. Co. v. Morris*, 31 Grattan (Va.), 200, 1878.

35. — The Lake Shore and Michigan Southern R'y Co. ran a special train from Clinton to Adrian and return, and the plaintiff below, who resided at Tecumseh, an intermediate station, bought a ticket from the latter place to Adrian and return. On the return trip the train reached Tecumseh between eleven and twelve o'clock at night, and stopped at the crossing of the principal street, about a quarter of a mile before reaching the station, where most of the Tecumseh passengers left the cars. The train then started on and passed the station without stopping and without notice to passengers. The plaintiff, supposing it would stop at the station, went out on the platform of the car, and seeing that the train was not going to stop, jumped off on the opposite side from the depot, and in so doing was thrown under the train and seriously in-

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jured. *Held*, that the plaintiff's conduct was beyond all question negligent, and that the jury should have been so instructed. *Lake Shore and Michigan Southern R'y Co. v. Bangs*, 3 Amer. & Eng. R. R. Cases (Mich.), 425. 1882.

36. — If a conductor, or agent, in charge of a train, improperly ordered one who entered it to leave it while in motion, and in so doing an injury occurred, though the party may have been negligent in obeying the order, it would not free the company from liability, but would constitute a case of contributory negligence. *Southwestern R. R. Co. v. Singleton*, 67 Ga., 306. 1881.

37. — If one leaps from a train of cars moving at the rate of fifteen miles per hour, on the advice and concurrence of the conductor, his right to recover would involve the question whether he prudently used the only means provided by the company for him to get off that the course of the company permitted him to use, and also his recklessness and want of ordinary care; for if by the use of ordinary care he could have avoided the injury, the company would not be liable. *Southwestern R. R. Co. v. Singleton*, 66 Ga., 252. 1880.

38. — Plaintiff, in getting off defendant's train while in motion, was injured. In an action to recover damages therefor, it appeared that she was directed to get off when she did, but the evidence was conflicting as to whether the direction was given by a brakeman or by a person not connected with the running of the train. The court charged that it was immaterial who gave the direction; it was for the jury to say whether it was prudent for her, acting under the advice so given by anybody, to alight from the train. *Held*, error; that if directed by an employe, the plaintiff had a right to assume that she could get off with safety, although the train was in motion; but not so if the direction was given by another passenger, as she could have no reason to suppose the latter knew more about the safety of the act than herself. *Filer v. New York Central R. R. Co.*, 59 N. Y., 351, 1874; 7 Amer. R'y Rep., 111.

39. — Though one would not be justified in jumping from a train moving rapidly to avoid paying the fare demanded, although

exorbitant, yet if he refused to pay such fare and was ordered to leave the train, and in so doing was injured, such facts would constitute contributory negligence on the part both of himself and the railroad company. *Southwestern R. R. Co. v. Singleton*, 67 Ga., 306. 1881.

40. Near-sighted passenger. The evidence disclosed that Gonzales' vision was imperfect, but that he could see from ninety to one hundred feet; his hearing, however, was perfect. A witness testified that he stood on the platform of a smoking car, next to the one at which Gonzales got out, and, as the latter was stepping down, the witness remarked that that was a dangerous place to get off. Assuming, as the court did, that there was negligence on the part of the defendant, the negligence of the deceased was so palpable that the defendant was entitled to the direction of a verdict. *Gonzales v. New York and Harlem R. R. Co.*, 50 Howard's Practice (N. Y.), 126. 1875.

41. Overcrowded train. A passenger on the train approaching the station to which he was going, which was a flag station, and at which the conductor had promised him to stop the train, left his seat and tried to make his way to the car-door, in order to leave the train at the station. It was a day of great public excitement, and the train, which was a very long one, was crowded with people, who filled all the seats, passage-ways and platforms. and even occupied the roofs of the cars. The train did not come to a full stop on reaching the station, and the passenger, in making his way through the crowd, reached the platform, and, in the surging of the crowd, fell, or was pushed out on the platform and down the steps of the car; and, after holding on with one hand for a short distance, he finally fell to the ground and was injured. *Held*, that the question whether the plaintiff was in the exercise of proper care, and whether the defendant negligently and improperly managed its train so that the plaintiff's injury was caused thereby, should have been submitted to the jury. *Treat v. Boston and Lowell R. R. Co.*, 131 Mass., 371, 1881; 3 Amer. & Eng. R. R. Cases, 423.

42. Overshooting the platform. On the approach of a train to a station, a porter

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called out the name of the station, and the train was brought to a standstill. Hearing carriage doors opening and shutting, and seeing a person alight from the next carriage, the plaintiff (a season-ticket holder, accustomed to stop there) stepped out of a carriage; but the carriage in which he was, overshot the platform, and he fell on to the embankment and was hurt. It was night, and there was no light near the spot, and no caution was given, nor anything done to intimate that the stoppage was a temporary one only, or that the driver intended to back the train. *Held*, upon a reservation in which it was agreed that the court should "be at liberty to draw inferences, both as to negligence by the defendant, and want of reasonable care of the plaintiff, and upon the facts generally," that there was evidence from which a jury might reasonably find negligence on the part of the company's servants, and no evidence of contributory negligence on the part of the plaintiff. *Weller v. London, Brighton and South Coast R'y Co.*, Law Reports, 9 Common Pleas Cases, 126; 8 Eng. (Moak), 441. 1874.

43. — An excursion train, in which the plaintiffs (husband and wife) were passengers to Rhye, arrived at Rhye station, and, the train being a long one, the carriage in which they were overshot the platform. It was then daylight. The passengers were not warned to keep their seats, nor was any offer made to back the train to the platform, nor was it, in fact, ever so backed, nor did it move until it started for Bangor. After waiting a short time, the husband, following the example of other passengers, alighted, without any request to the company's servants to back the train, or any communication with them. The wife, standing on the iron step of the carriage, took both his hands and jumped down, and in so doing strained her knee. There was a foot-board between the iron step and the ground, which she did not use, but there was no evidence of any carelessness or awkwardness in the manner of descent, except such as might be inferred from the above facts. In an action brought for this injury, *held* (per Martin, Bramwell and Pigott, BB.; Kelly, C. B., *dissentiente*), that there was no evidence for the jury of negligence in the de-

fendant; and that the accident was entirely the result of the plaintiffs' own acts. *Siner v. Great Western R'y Co.*, Law Reports, 3 Exchequer Cases, 150, 1863; *Same v. Same*, 4 ib., 117, 1869.

44. — Where that part of a railway train including the carriage in which the plaintiff rode overshot the platform in daylight, and a porter called out several times the name of the station, and let out some of the passengers, who were departing from the station, and a reasonable time for backing the train had elapsed, and there was, apparently, no intention to back it, and there was at hand no servant of the company whom the plaintiff could request to have the train backed; and the plaintiff, though cautiously attempting to alight, fell, and was injured in the attempt, — *held*, that there was evidence of negligence on the part of the company. *Nichols v. Great Southern and Western R'y Co.*, 7 Irish Reports, Common Law, 40. 1873. See, also, *Thompson v. Belfast, Holyrood, etc., R'y Co.*, 5 Irish Reports, Common Law, 517. 1871.

45. — A train drew up at a small station with the engine and part of one of the carriages beyond the platform. A passenger in that carriage, having parcels in her hands, opened the door and waited on the iron step some time for assistance; but, no one coming to assist, she, fearing that the train would move on, tried to alight by getting on the foot-board, and in so doing fell and injured herself, for which injury she brought an action against the company. *Held*, affirming the decision of the court of queen's bench, that, under the circumstances, there was evidence of negligence which should have been left to the jury. *Robson v. North Eastern R'y Co.*, Law Reports, 2 Queen's Bench Division, 85, 1876; 19 Eng. (Moak), 228; *Same v. Same*, Law Reports, 10 Queen's Bench Cases, 271, 1875; 12 Eng. (Moak), 302.

46. — A train drew up at a station with two of the carriages beyond the platform. The employes of the company called out to the passengers to keep their seats, but were not heard by the plaintiff and other passengers in one of these carriages. After waiting some little time, and the train not having put back, the plaintiff got out, and in so doing fell and was injured; for which in-

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jury she brought an action against the company. *Held*, reversing the decision of the exchequer division, that there was evidence of negligence on the part of defendant to go to the jury. *Rose v. North Eastern R'y Co.*, Law Reports, 2 Exchequer Division, 248, 1876; 19 Eng. (Moak), 539.

47. Place of exit. Where a proper landing place is provided, and the passenger knows or has the means of ascertaining its locality, he should make his exit at the place so provided; and if, in attempting to alight elsewhere, he unnecessarily and negligently exposes himself to danger, and is thereby injured, his injury is the result of his own act, and he cannot recover therefor against the railway company. *Chicago, Rock Island and Pacific R. R. Co. v. Dingman*, 1 Bradwell (Ill.), 162. 1878.

48. Platform too short. On the arrival of a train at the railway terminus, there not being room for all the carriages to be drawn up to the platform, some of the passengers were required to alight upon the line beyond it, the depth from the carriage to the ground being about three feet. In so alighting, a lady, instead of availing herself of the two steps, with the assistance of a gentleman, jumped from the first step to the ground and sustained a spinal injury from the concussion. The jury having found that the company was guilty of negligence in not providing reasonable means for alighting, and that the lady had not by any misconduct on her part contributed to the injury, and having awarded her 500*l.*, the court held that there was evidence to warrant their finding, and declined to interfere with the amount of damages. *Foy v. London, Brighton and South Coast R'y Co.*, 18 Common Bench (N. S.), 225; 114 E. C. L., 225. 1865.

49. Pleading. A complaint for personal injury to a passenger, which does not allege generally that he was without fault, and alleges the facts to be that at the station the train slackened speed so that the plaintiff could have alighted without danger, if there had been a platform; that it was dark, windy and raining, and the plaintiff had never been at the station; that the conductor informed him of arrival at the place and directed him to alight, and, relying entirely on his order, he stepped off as directed, and by reason of

there being no platform, as he supposed there was, he fell under the cars and was injured, is bad on demurrer, because it does not show that plaintiff was free from contributory negligence. *Cincinnati, Wabash and Michigan R. R. Co. v. Peters*, 80 Ind., 168, 1881; 6 Amer. & Eng. R. R. Cases, 126.

50. Presumption from accident. Where a train has stopped, and a passenger, on stepping from the lowest step of the platform of the cars to the ground, fractures her knee-cap, without any apparent external cause, no presumption of negligence is raised. *Delaware, Lackawanna and Western R. R. Co. v. Napheys*, 90 Pa. St., 135, 1879; 1 Amer. & Eng. R. R. Cases, 52.

51. Previous neglect of passenger. A passenger's negligence in going to the platform of a car while it is still moving does not affect his right to recover for an injury suffered in properly alighting after the train has stopped. *Wood v. Lake Shore and Michigan Southern R'y Co.*, 49 Mich., 370, 1882; 8 Amer. & Eng. R. R. Cases, 478.

52. Sudden starting of train. A passenger, after the name of the station was called, went to the platform while the train was slackening up, and asked the conductor if it would stop there for water. The conductor said it would. The passenger then got upon the lower step of the platform, and when the train stopped at the usual landing place tried to step off. But immediately, and without any notice or signal, the train started with a jerk, and drew up at the water-tank, a few feet farther on, throwing the passenger to the ground and severely injuring him. *Held*, that he had a right of action against the company. *Wood v. Lake Shore and Michigan Southern R'y Co.*, 49 Mich., 370, 1882; 8 Amer. & Eng. R. R. Cases, 478. See, also, *Sauter v. New York Central and Hudson River R. R. Co.*, 66 N. Y., 50. 1876.

53. — A passenger on a train that approached a station and was still moving slowly, stood on the lower step of a car, in the act of stepping to the platform of the station, when, in consequence of the car being moved forward with a jerk, he was thrown upon the platform and injured. *Held*, that he was guilty of contributory negligence in attempting to alight from the

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train while it was in motion. *Secor v. Toledo, Peoria and Warsaw R. R. Co.*, 10 Federal Reporter, 15. 1882. See, also, *Illinois Central R. R. Co. v. Green*, 81 Ill., 19. 1875.

54. — Where a train was stopped at a station, but somewhat away from its usual place of stopping, and where there was not good ground for getting off, and a passenger, thinking the train would be moved up to the usual place, failed to get off, as he had intended, and after the train had left the station and was fairly on its way to its next stopping place, the passenger himself seized the bell-rope, rang the engine bell, and took his position on the lower step of the platform to get off, and the engineer having answered the bell, as the cars were coming to a stop, but before they were stopped, the passenger, deeming the motion slow enough for safety, undertook to step off, but, just as he was stepping, he was by a sudden jerk of the cars thrown down, and his arm crushed by one of the wheels of the car passing over it,—*held*, that the conduct of the passenger in the ringing the bell, taking his position on the step, and undertaking to step off whilst the cars were still in motion, was a want of ordinary care, and showed gross negligence on the part of such passenger. *Blodgett v. Bartlett*, 50 Ga., 333. 1873.

55. — At Kirkville, on the defendant's road, the station and depot are on the north side of the track, and passengers generally get off on that side of the cars. Along the south side of the track, and very close to it, is a ditch. The plaintiff, who was well acquainted with the situation of the depot, attempted to get off the train on the south side, at a point where the track was intersected by a highway running at right angles with it, at a time when the train had stopped or was running very slowly. The conductor, who was on the north side of the train, not seeing the plaintiff, who was on the lowest step of the car, signaled the engineer to go on, and by his so doing the plaintiff was thrown off and injured. It was shown that when the cars stopped on the highway it was not unusual for parties to alight from the cars on the southerly side of the train, which was the side nearest to the village.

Held, that it was error for the court to charge, as matter of law, that the attempt to alight on the southerly side of the train did not constitute contributory negligence; that whether it did or not should have been submitted to the jury. *Plopper v. New York Central and Hudson River R. R. Co.*, 13 Hun (N. Y.), 625. 1878.

56. — The plaintiff testified that she took passage on defendant's line from Rochester to Fort Plain. As the train approached the latter station she passed out with others upon the platform; the train was moving slowly; a passenger who preceded her stepped off the car, and the brakeman said to her, "you had better step off, as we are not going to halt any longer;" she thereupon stepped down to the lower step, and, as she attempted to step down upon the ground, the cars gave a sudden jerk, which threw her down; her clothing caught, and she was dragged upon the ground and injured; that the person she called the brakeman had stood upon the platform, had opened the door and called the stations, and called the Fort Plain station, and when he gave the direction to her, stood on the platform with his hand on the brakes. She could not recognize the man, and the brakeman on the train denied the plaintiff's statements. *Held*, that the evidence was sufficient to authorize the submission of the question of negligence and contributory negligence to the jury, and to sustain a verdict for plaintiff. *Filer v. New York Central R. R. Co.*, 68 N. Y., 124. 1877. See, also, *Taber v. Delaware, Lackawanna and Western R. R. Co.*, 71 N. Y., 489, 1877; affirming *Same v. Same*, 4 Hun (N. Y.), 765, 1875.

57. — The plaintiff was a passenger on the defendant's railway from A. to B.; while the train was passing through B. station the company's employes called out the name of the station, and shortly afterwards the train stopped. The carriage in which the plaintiff traveled stopped a little way beyond the platform, and several carriages and the engine, which were in front of that carriage, stopped at some distance from the platform. The plaintiff, who was well acquainted with the station, in alighting from the carriage was thrown down and injured in consequence of the train being backed into the station for the purpose of bringing the car-

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riages alongside the platform. A very short interval elapsed between the time that the train stopped and the time it was backed into the station. *Held*, that there was no evidence of negligence on the part of the company to render it liable to an action. *Lewis v. London, Chatham and Dover R'y Co.*, Law Reports, 9 Queen's Bench Cases, 63, 1873; 7 Eng. (Moak), 119.

58. Tunnel. B. was in the last carriage of a railway train. Before reaching the station at which he was to alight the train had to pass through a tunnel. In that tunnel there was, first, a heap of hard rubbish lying by the side of the rails, irregular in form and height, then a short piece of sloping ground, then a piece of flat platform, like the main platform, but narrower, and within the tunnel. Beyond these was the main platform itself. The train only partially went up to the main platform, leaving the last two carriages within the tunnel, which had no light within it, and on the occasion in question was filled with steam. The last carriage but one came opposite the narrow platform; the last carriage was opposite the hard rubbish. A passenger in the last carriage but one (who was called as a witness at the trial) heard the name of the station called out in the usual way, and got out upon the narrow platform. He then heard a groaning, and, proceeding farther back into the tunnel, found B. lying on the rubbish with his legs between the wheels of the last carriage, but neither of them had touched him. B.'s leg was broken, and he received other injuries, from the effects of all which he died. The witness heard the warning, "Keep your seats," and shortly afterwards the train moved on. On these facts the learned judge at the trial held that there was no evidence of negligence to go to the jury, and he directed a non-suit. Owing to a strong expression by the jurymen he took their finding (on the assumption that there ought to be a verdict for the plaintiff) as to the amount of damages. The non-suit was then entered, with leave to move to enter the verdict for the damages assessed. *Held*, that the ruling at *nisi prius* could not be sustained; that the case ought not to have been withdrawn from the consideration of the jury, for that the evidence furnished

matter on which it was necessary to take the opinion of a jury. *Bridges v. North London R'y Co.*, Law Reports, 7 English & Irish Appeal Cases, 218, 1874; 9 Eng. (Moak), 165; reversing *Same v. Same*, Law Reports, 6 Queen's Bench Cases, 377, 1871.

59. Water station. Any encouragement given to a passenger to attempt to get off a train at a place of danger, and not a stopping place except for water, resulting in injury to him, cannot be imputed to the railway company as in any way its act, and it is not responsible for the same. *Illinois Central R. R. Co. v. Green*, 81 Ill., 19. 1875.

II. INJURIES CAUSED BY DEFECTIVE ROADWAY, MACHINERY, ETC.

60. Bell-rope. A charge that the defendant would be liable if the bell-rope did not reach through the passenger car at the end of a train is erroneous; the neglect must appear to have caused or contributed to the injury. *Mobile and Montgomery R. R. Co. v. Ashcroft*, 48 Ala., 15. 1872.

61. Bridge; admission by construction of new bridge. Case by administrator for injuries resulting in the death of his intestate, by the subversion of a bridge on defendant's railway, by which the train wherein intestate was traveling was wrecked; *held*, that the subsequent construction of a new bridge over the same channel, in a different manner, amounted to an admission that the former one was improperly constructed. But this is not evidence that the defects were attributable to negligence. *Kansas Pacific R'y Co. v. Miller*, 2 Colo., 442, 1874; 20 Amer. R'y Rep., 245.

62. Boilers. Railroad companies, as carriers of passengers, must apply to the boiler of a locomotive used by them in hauling passenger trains every test recognized as necessary by experts; but they are not liable for defects which cannot be discovered by such tests. *Robinson v. New York Central and Hudson River R. R. Co.*, 9 Federal Reporter, 877. 1882.

63. — A railway company should examine its locomotive boilers by every test recognized as necessary by experts, but it is not liable for a defect not discoverable by such

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tests. *Robinson v. New York Central and Hudson River R. R. Co.*, 20 Blatchford (U. S. C. C.), 333. 1883.

64. — The jury may infer negligence from the mere fact of a boiler explosion, and evidence of the persons whose negligence presumably caused the injury may be disregarded by the jury. *Ib.*

65. **Broken rail.** It was error to instruct "That there is no presumption that the rail was broken before this train reached it, and if the plaintiff claims that it was, the burden of proof is upon him." *Cleveland, etc., R'y Co. v. Newell*, 75 Ind., 542, 1881; 8 Amer. & Eng. R. R. Cases, 377.

66. — In such case a *prima facie* presumption of negligence arises against the railroad company, to be overcome by proof. *Ib.*

67. — On trial of an action against a railway company for injuries to a passenger in a car of defendant, which was thrown from the track by a broken rail, or the breaking of a rail, an instruction undertaking to define a safe rate of speed by its comparison with the velocity "practiced before, with the tacit consent of the community, and without accident," assumed a false criterion, and was erroneous. *Ib.*

68. — It is not sufficient for the defendant to show that the car in which the injured passenger was riding was thrown from the track by reason of the breaking of a rail sufficient in size and free from all defects; but it must also show that such broken rail had been properly laid down and spiked on sound and sufficient cross-ties. *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Williams*, 74 Ind., 462, 1881; 3 Amer. & Eng. R. R. Cases, 457.

69. **Burden of proof.** Proof of the occurrence of an accident which, under ordinary circumstances, would not have happened, if due care had been exercised, raises a presumption of negligence; and to rebut this presumption the defendant must show that, in the selection and operation of the machinery which caused, or contributed to, the accident, he used due care, skill and prudence, but he is not required to furnish a satisfactory explanation of the cause of the accident to relieve himself of liability. *Tuttle v. Chicago, Rock Island and Pacific R. R. Co.*, 48 Ia., 233. 1878.

70. **Cattle-chutes.** Upon the evidence in a particular case, it was held to be a question for the jury whether there is a universal or general custom of railway companies to build cattle-chutes as near to the track as was that which is alleged to have caused the injury complained of. *Dorsey v. Phillips and Colby Construction Co.*, 42 Wis., 583, 1877; 15 Amer. R'y Rep., 148.

71. **Connecting line.** Injury was caused by defective axle breaking down and causing collision with passenger train. The defective car did not belong to defendant corporation, but was carried for a connecting line. The car had not been properly inspected by the company that had loaded it, and the jury found that defendant was negligent in not "requiring some distinct assurance that it had been thoroughly examined and repaired." Defendant was held liable for the injury. *Richardson v. Great Eastern R'y Co.*, Law Reports, 10 Common Pleas Cases, 486, 1875; 13 Eng. (Moak), 343. On appeal the above case reversed and contrary doctrine held. *Same Case*, Law Reports, 1 Common Pleas Division, Appeal Cases, 342. 1876.

72. **Ditch; transfer from one train to another on account of wreck.** H. was a passenger from Vicksburg to Jackson. About midnight the train encountered a wrecked freight train. The night was dark and rainy. The passengers were transferred to a train beyond the wreck. To reach this train a ditch about three feet deep had to be crossed. Across it was placed a plank, but no light was stationed by it by the employes, nor any warning of it given to the passengers. H., in attempting to cross it, fell and broke his leg, causing him to suffer much pain, lose time, etc. He thereupon sued the road for damages. *Held*, that the failure to place a light at the crossing of the ditch, or to give any warning thereof, or to take some means to guard passengers against injury from the extra hazard to which they were exposed in crossing, was such negligence as would render the company liable for any injury sustained by passengers in crossing. *Vicksburg and Meridian R. R. Co. v. Howe*, 52 Miss., 202. 1876.

73. **Evidence.** Although the existence of defective ties or rails at one place on a rail-

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road is not conclusive evidence that they are defective at another, yet it is evidence competent to be submitted to a jury, and from which, in connection with other proof, they may infer the presence of the same defects at the place where an injury occurred, or the cause of an accident commenced to operate. *Murphy v. N. Y. Central R. R. Co.*, 66 Barbour (N. Y.), 125. 1867.

74. — When cars run off the track, and the condition of the ties at the point of divergence cannot be ascertained, it is competent to show their condition near to it, thus laying the foundation for the inference that if the ties were damaged and decayed in the immediate vicinity of the accident, they may have been so at the place where the cars passed from the track. *Ib.*

75. **Floods.** The overturning of a train was caused by the sudden weakening of the track by an extraordinary flood. There was no defect in any car in the train, or in the track, or in the ditches or drains at the side of the road-bed. In an action for the death of a passenger caused thereby, *held*, that the liability of the company depended upon the question whether or not the engine-driver, on approaching the place where the track had been so weakened by the flood, had reason to believe, from the height of the water in the ditches, etc., that it had previously risen so as to soften the road-bed and render the track unsafe. If he had, it was his duty to have tested the track before taking his train over it, and this omission would amount to negligence for which the company would be liable. *Ellet v. St. Louis, Kansas City and Northern R'y Co.*, 76 Mo., 518, 1882; 12 Amer. & Eng. R. R. Cases, 183.

76. — When an injury occurs to a railway passenger, by reason of the giving way of a bridge under the passing train, proof of the casualty is *prima facie* evidence of negligence in the location and construction of the bridge, or in both its location and construction. So, too, when the subversion of the bridge appears to have been occasioned by an unusual flood or freshet. *Kansas Pacific R'y Co. v. Miller*, 2 Colo., 442, 1874; 20 Amer. R'y Rep., 245.

77. — A railway company is required so to construct its road-bed and track as to avoid those dangers which it could be

reasonably foreseen by competent and skillful engineers might result from the ordinary rain-fall and freshets peculiar to the particular section of country in which it is constructed. *International and Great Northern R. R. Co. v. Halloren*, 53 Tex., 46, 1830; 3 Amer. & Eng. R. R. Cases, 343.

78. — A railway company is not liable in damages for culpable negligence, where the injury results from the failure of the company to provide in the construction of its road-bed against extraordinary floods unknown to common experience, and which could not have been reasonably anticipated in the construction of the road. *Ib.*

79. — Where an accident occurs by reason of the washing away of an embankment because of insufficient drainage, the company will not be relieved of liability by the fact that the road was constructed under the supervision of a competent engineer, and that the drainage, at the point of the accident, was provided for in a manner directed and approved by him. *Philadelphia and Reading R. R. Co. v. Anderson*, 94 Pa. St., 351, 1830; 6 Amer. & Eng. R. R. Cases, 407.

80. — In an action against a railway company for an injury sustained while traveling on its line, the declaration complaining that it kept and maintained its line in an insecure state, the evidence being that the embankment ran through a country subject to floods, and had five years ago been constructed of sandy soil, with insufficient culverts to carry off water; that an extraordinary fall of rain had caused a flood, which had washed away the soil, or part of the embankment, leaving the "sleepers" unsupported, so that the earth gave way, and the train, an express train, passing over it at night, at the ordinary express rate, went off the line; there being no evidence that the water was seen on the line, or that there had been anything to indicate danger, and no engineer or skilled witness having been called to prove that the nature of the soil of the embankment was such that water would wash it away in ordinary floods, — *held*, that although the evidence as to the construction and condition of the line at the time of the accident, and of the rate of speed at which the trains had been going, had been properly ad-

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mitted, as there were circumstances which might have shown negligence, if it had been proved that the line was known or ought to have been known to be in an insecure state, yet that, as there was nothing to show that it was so known, there was no evidence of negligence, or so little, that the verdict was against the weight of evidence. *Withers v. North Kent R'y Co.*, 3 Hurlstone & Norman (Exchequer), American Reprint, 969; 27 Law Journal (Exch.), 417. 1858.

81. — If the real cause of the injury is a sudden and extraordinary rainstorm which washed away the ties of the railroad, negligence of the carrier, which only remotely and indirectly contributed to the injury sued for, will not make the carrier liable. *Gillespie v. St. Louis, Kansas City and Northern R'y Co.*, 6 Mo. App., 554. 1879.

82. **Latent defects.** A carrier of passengers for hire is bound to use the utmost care and skill in everything that concerns the safety of the passengers; but he is not bound at his peril to provide a carriage road worthy at the commencement of the journey; and if the carriage turns out to be defective, he is not liable to a passenger for the consequences, if the defect was of such a nature that it could neither be guarded against in the process of construction, nor discovered by subsequent examination (by Mellor and Lush, JJ.). But by Blackburn, J., there is an obligation on a carrier of passengers to provide at his peril a vehicle in fact reasonably sufficient for the journey, and he is responsible for the consequences of any insufficiency, though arising from a latent defect. *Readhead v. Midland R'y Co.*, Law Reports, 2 Queen's Bench Cases, 412. 1867.

83. **Misplaced switch.** In a suit by a passenger against a railway company to recover damages for an injury occasioned by a misplaced switch, proof of the fact of the accident constitutes a *prima facie* case for the plaintiff, and throws the burden of proof on the company to show that by no human skill or forethought could the accident have been prevented. *New York, Lake Erie and Western R. R. Co. v. Daugherty*, 6 Amer. & Eng. R. R. Cases (Pa.), 139. 1882.

84. — B. took a ticket from Workington to Carlisle from the W. Railway Company. In order to arrive at the platform at the sta-

tion at Maryport the trains pass over the line of the Maryport and Carlisle Railway. On that line is a self-acting switch, used for shunting carriages into a siding. The switch and siding were the property of the Maryport and Carlisle Railway Company, but used exclusively by the W. Railway Company. The switch is about four yards from a gate which is on the line of the W. Railway Company, a servant of which company was in the habit of occasionally looking over the gate to see that the switch was in proper order. It was proved that all switches are liable to get out of order. A train of the W. Railway Company coming slowly up to the station, in consequence of the points being turned the wrong way, ran into the siding, and came in collision with some coal trucks, whereby B. was killed. The judge left it to the jury to say whether there was negligence on the part of the W. Railway Company. The jury found that there was. *Held*, that the question was properly left to the jury; that there was evidence of such negligence, and that, upon such finding, the W. Railway Company was liable, under the 9 and 10 Vict., c. 93, to an action by the personal representative of B. *Birkett v. Whitehaven R'y Co.*, 4 Hurlstone & Norman (Exchequer), 730. 1859.

85. — **act of trespasser.** In an action brought under the statute for the negligent killing of plaintiff's intestate while a passenger on defendant's road, the evidence showed conclusively that there was no negligence or want of proper care, on the part of the defendant, in the management of its road or in running its cars at the time of the accident, but the evidence was clear and convincing to establish the fact that the misplacement of the switch which caused the accident by which the death ensued, was done by some evil-disposed person, not connected with the road, shortly preceding the arrival of the train at night-time. *Held*, that the plaintiff was rightly non-suited. *Keeley v. Erie R'y Co.*, 47 Howard's Practice (N. Y.), 256. 1873.

86. — **leased line.** If a switch is not properly locked or secured, whether by the neglect of the employees of the company owning the same, or its lessees, or if the switch is not properly constructed and maintained, and injury is thereby occasioned to

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a passenger on a train operated by the lessees, the company owning the road and franchise will be liable. *Peoria and Rock Island R. R. Co. v. Lane*, 83 Ill., 448. 1876.

87. Other defects. It was not error to instruct the jury that proof of defects at other points in the road would not make a case of negligence at the place of the accident, nor render the defendant liable for the injury to the plaintiff, unless it was further shown that such defective conditions caused or materially contributed to the accident. *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Williams*, 74 Ind., 432, 1831; 3 Amer. & Eng. R. R. Cases, 457.

88. Road-bed. When an injury is alleged to have arisen from the improper construction or maintenance of a railway, the fact of one of its embankments giving way will amount to *prima facie* evidence of such insufficiency, and this evidence may become conclusive, in the absence of any proof on the part of the company to rebut it. *Great Western R'y Co. of Canada v. Braid*, 1 Moore, Privy Council (N. S.), 101. 1863.

89. Rolling stock. A railway company, which purchased its rolling stock from competent manufacturers in the due course of business, is responsible for the negligence of those manufacturers in the construction of that stock to the same extent as it would be in case it was itself the manufacturer. *Burns v. Cork and Youghal R'y Co.*, 13 Irish Common Law, 548, 1863; 15 Irish Jurist, 71.

90. — A railway company has a right to assume that machinery bought from a reputable dealer is in good condition, if it seems to be so on such inspection as is reasonable and practicable. *Grand Rapids and Indiana R. R. Co. v. Huntley*, 38 Mich., 537. 1878.

91. — Such companies buying rolling stock from reputable manufacturers are not chargeable with neglect in accepting the same on such inspection as is usual and practicable, without discovering latent defects; they cannot be held to warrant their cars. *Ib.*

92. Sleeping cars; fall of berth. On proof of injury sustained by a passenger on a railroad train by the fall of a berth in a sleeping car, and that the passenger was

without fault, a presumption arises, in the absence of other proof, that the railroad company is liable. *Railroad Co. v. Mowery*, 36 Ohio St., 418, followed. *Railroad Co. v. Walrath*, 38 Ohio St., 461. 1883.

93. Special verdict. In a suit against a railway company by a passenger, for injuries received through the alleged neglect of the defendant in employing an incompetent engineer and defective machinery, in suffering the line to be out of repair, and in running the train recklessly, thereby wrecking the train carrying the plaintiff, the jury, with their general verdict for the plaintiff, found specially that, at a point on the defendant's line where the ties were bad and the rails short, because of a flaw, discoverable by a practicable test, in an axle of one of the trucks of the tender, the axle broke, throwing the train on which the plaintiff was riding from the track, thereby injuring him. *Held*, that such finding supports, but is no stronger than, the general verdict. *Grand Rapids and Indiana R. R. Co. v. Boyd*, 65 Ind., 523. 1879.

94. — The jury also found specially that, three months previous to the accident, the axle had been "tested by the best approved methods in use," and had been duly inspected just before the train left on the trip during which the accident occurred; that the flaw could not have been detected; that the axle had been made by a good and reputable manufacturer; that the train, at the time of the accident, was running at a safe rate of speed; that the road was in ordinary condition, and that no act of negligence "in particular" had been committed by the company, or by any of its agents or employes, "in particular." *Held*, that the defendant was entitled to judgment, notwithstanding the verdict. *Ib.*

95. Ties; speed. Where the track of a railway company is out of repair, pieces of old rails being used to supply the place of a broken rail, and laid upon rotten or decayed ties, and a train of cars is run over such track at a rate of speed of from twenty-five to thirty miles an hour, and an accident occurs resulting in personal injury, the company will be liable. *Peoria, Pekin and Jacksonville R. R. Co. v. Reynolds*, 88 Ill., 418, 1878; 21 Amer. R'y Rep., 324.

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96. Wheels. Where an injury to a passenger on a railroad train is the result of the breaking of a wheel to the coach, and it appears that such wheel was made by one of the most skilful manufacturers, and had previously been thoroughly tested by skilful and experienced men and no defects perceived, and such a wheel is in extensive use, the company will not be liable for negligence, nor will the company be liable in such case for defects in a rail which do not contribute to the injury. *Toledo, Wabash and Western R. R. Co. v. Beggs*, 85 Ill., 80, 1877.

97. — The contract made by a general carrier of passengers for hire with a passenger is to take due care (including in that term the use of skill and foresight) to carry the passenger safely; and is not a warranty that the carriage in which he travels shall be in all respects perfect for its purpose; that is to say, free from all defects likely to cause peril, although those defects were such that no skill or foresight could have detected their existence. *Readhead v. Midland R'y Co.*, Law Reports, 4 Queen's Bench Cases, 379. 1869.

98. — From an imperfect weld in the formation of a driving wheel used to one of the carriages on the defendant's line, the wheel gave way and caused serious injury to the plaintiff, who was a passenger. When the wheel was new, and before using it, it had been properly and regularly tested by hammering all round and all over, and although this was a test not absolutely certain to discover a defect, yet it was the best known and usual course pursued; no defect was then discoverable. The wheel was afterwards much used, and by it reduced in thickness and considerably worn; after this, and after the tire had been re-turned, it was not again tested or hammered all round; if it had been after it had been so worn, according to the evidence, the defect which in fact existed in the wheel would in all probability have been discovered. The jury . . . by their verdict found that the company should have again tested the wheel after it had been so worn and re-turned, and was, under the circumstances, guilty of negligence and liable for not doing so. *Held*, that the question of the company's liability

was properly left to the jury upon the evidence given. There was evidence to go to the jury in favor of the plaintiff's case, and a rule for a new trial was refused. *Manser v. Eastern Counties R'y Co.*, 6 Hurlstone & Norman (Exchequer), American Reprint, 399; 3 Law Times (N. S.), 535. 1860.

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99. Baggage truck; union depot. The stations of the defendant and of two other railway companies at B. adjoin, and are open to one another, and the passengers of each company are in the habit of passing directly from one to the other, the whole area being used as common ground by the passengers of all three companies. While the plaintiff was standing on the defendant's platform, on his way from the terminus of one of the other companies to the booking office of the other company, waiting for his luggage, a porter of the defendant negligently drove a truck laden with luggage, and a portinanteau fell off and injured the plaintiff. *Held*, that as the negligence complained of was an act of misfeasance by a servant of the defendant in the course of his employment, the maxim "Respondeat superior" applied; and that under the circumstances the defendant was liable. *Terbutt v. Bristol and Exeter R'y Co.*, Law Reports, 6 Queen's Bench Cases, 73. 1870.

100. Cattle-guard. A railway company was held liable for the death of a passenger who fell into a cattle-guard concealed by snow, and was there killed by a passing train. *Hoffman v. N. Y. Central and Hudson River R. R. Co.*, 75 N. Y., 605. 1878. See *Same v. Same*, 13 Hun (N. Y.), 589. 1878.

101. Changing cars. Although the agents and employees of a railway company may be guilty of gross neglect in the manner of operating its road, yet if a passenger, in passing from one train to another, recklessly, and without care, fails to pay heed to timely warnings, and attempts to cross the track in front of an approaching train that he in fact sees approaching, or which he knows to be approaching, in dangerous proximity, and is killed or injured, such

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accident is attributable, not to the negligence of the company, but to the reckless negligence of the injured party himself. *Baltimore and Ohio R. R. Co. v. The State*, 60 Md., 449. 1883.

102. Contributory negligence. Action against a railway company for so negligently managing and lighting its station that the plaintiff, being a passenger, was thrown down while on his way to the carriages. Plea, not guilty. At the trial, the defendant's counsel having rested his defense on the ground that the accident was entirely owing to the want of ordinary care on the part of the plaintiff, and that there was no negligence on the part of the defendant, the judge left it to the jury to say whether the accident occurred from the alleged negligence of the defendant, or whether it was entirely the plaintiff's own negligence which caused it. Verdict for the plaintiff. On a motion for a new trial for misdirection, on the ground that the judge ought to have told the jury that, if the plaintiff contributed, by his own negligence, to the injury, the defendant was entitled to the verdict, although it might have been guilty of negligence, *held*, that the defendant was not entitled to a new trial, the issue on which alone it rested its defense having been left to the jury. *Martin v. Great Northern R'y Co.*, 30 Eng. Law & Equity, 473. 1855.

103. Crossing track. A passenger traveling by railway, whose train, from which he had alighted at a junction, was shunted to an unusual siding, out of sight from the platform on a dark night, was killed while crossing the main line. *Held*, that, although there was no accommodation by a bridge for the passengers and no servant of the company at hand to direct them, there was no evidence of positive negligence on the part of the company. *Falkner v. Great Southern and Western R'y Co.*, 5 Irish Reports (Common Law), 213. 1871.

104. — A passenger at a station has a right to assume that the company will not expose him to unnecessary danger, but will discharge its duty, which requires it to provide passengers a safe passage to and from the train. *Brassell v. New York Central and Hudson River R. R. Co.*, 84 N. Y., 241, 1881; 8 Amer. & Eng. R. R. Cases, 380; *Baltimore*

and Ohio R. R. Co. v. The State, 60 Md., 449, 1883.

105. — A passenger, therefore, is not, in all cases, liable to the charge of contributory negligence because he attempts to cross an intervening track without looking for approaching trains. *Ib.*

106. — To permit a train to pass on a track between a depot and another track on which a passenger train was standing while discharging and receiving passengers, just as passengers were passing from the depot to take that train, and across which track they were obliged to walk to reach their train, without any provision having been made on the part of the company to avert danger, held to have been actionable negligence. *Klein v. Jewett, Receiver*, 26 N. J. Eq., 474 1875.

107. — The rule that any person who goes upon a railroad track incautiously or without using all reasonable precaution to escape injury, assumes the hazard, and, if injury ensues, is without remedy, is to be applied in determining the liability of a railroad corporation where the injury is sustained by a person while crossing the track on a public highway, but it has no application to a case where, by the arrangement of the corporation, it is made necessary for passengers to cross the track in passing to and from the depot to the cars. *Ib.*

108. — If a person buys a ticket which entitles him to a passage over a railway from A. to C., and stops at B., intending to resume his journey to C. the same day, leaves the station at B., and afterwards, while on his way to the station of another railway company near by, for the purpose of meeting his son, returns to the station which he had left, and is injured while crossing the tracks through the negligence of the company which had sold him the ticket, when he might have crossed the track at a highway crossing, he is a trespasser, and cannot, in the absence of evidence that the negligence was wilful, maintain an action for the injury, although the defendant's platforms extended between two highways crossing the track, and people have been accustomed to pass from the station on one railway to that on the other at that point, without objection by the company, and although his ticket does not forbid stopping over at B. *Johnson*

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v. Boston and Maine R. R. Co., 125 Mass., 75, 1878.

109. — A railway company cannot be said to be wholly free from negligence when it calls upon passengers to disembark, for the purpose of going to its passenger depot, without any warning or information that a train is about to cross the path, and immediately, and before a passenger has time to get beyond the path of the expected train, allows the locomotive silently, and without ringing the bell or giving any alarm, to rush upon and crush him. *Armstrong v. N. Y. Central and Hudson River R. R. Co.*, 66 Barbour (N. Y.), 437, 1873; affirmed, 64 N. Y., 635, 1876.

110. — A station on defendant's line is situated south of the tracks, two in number, running east and west, and just east of a highway crossing them. While plaintiff was waiting there to take a passenger train going west, a freight train coming from that direction, and ringing its bell, ran by the station on the south track, at the rate of eight or ten miles an hour. Just before it arrived at the station, plaintiff's intestate started to cross the track to reach the passenger train which had arrived on the north track, had slowed down, and then started up to reach a milk platform. As she crossed the south track she was struck by the engine of the freight train and killed. *Held*, that the foregoing facts established negligence on the part of the company. *Terry v. Jewett, Receiver*, 17 Hun (N. Y.), 395. 1879.

111. — **passenger bridge.** A railway company, for the more convenient access for passengers between the two platforms of a station, erected across the line a wooden bridge, which the jury found to be dangerous. *Held*, that the company was liable for the death of a passenger through the faulty construction of this bridge, although there was a safer one about one hundred yards further round, which the deceased might have used. *Longmore v. Great Western R'y Co.*, 19 Common Bench (N. S.), 183; 115 E. C. L., 183. 1865.

112. — Although a railway company is not bound to erect a foot-bridge over its line to give passengers access from one platform to the other, and the want of such a bridge will not *per se* make them liable for injuries

received by the public on that account, still the absence of such a precaution throws a greater *onus* on the company to provide for the safety of the public. *Thomson v. North British R'y Co.*, 4 Scotch Session Cases (4th series), 115. 1876.

113. — In an action by a passenger against a railway company, for compensation on account of injuries sustained by the breaking down of a bridge on the line, alleged to have been improperly made, but which had been constructed under the superintendence of a competent engineer, the judge directed the jury that the question for them to consider was, whether the bridge had been constructed and maintained with sufficient care and skill, and of reasonably proper strength with regard to the purposes for which it was made. *Held*, that the direction was right. *Grote v. Chester and Holyhead R'y Co.*, 5 Eng. R. R. & Canal Cases, 649, 1848; *Same v. Same*, 2 Welsby, Hurlstone & Gordon (Exchequer), 251, 1848.

114. **Depot building.** In an action for negligence against a railway company the plaintiff proved that he went to defendant's station for the purpose of traveling by its railway, and made some inquiries respecting the departure of trains, and was directed by a porter of the defendant to look at a timetable suspended on a wall under a portico of the station. While there, a plank and a roll of zinc fell through a hole in the roof upon the plaintiff and injured him; and at the same time a man was seen on the roof of the portico. The judge non-suited the plaintiff. *Held*, that there was no evidence that would have justified the jury in finding the defendant was guilty of negligence, and that the non-suit was right. *Welfare v. London and Brighton R'y Co.*, Law Reports, 4 Queen's Bench Cases, 693. 1869.

115. — The plaintiff, without invitation, and as a mere intruder, entered upon the uninclosed premises of the defendant, upon which was a building of defendant in a visible state of decay. While there, a sudden storm blew a fragment of the dilapidated building against him, injuring him severely. The building had once been used as a freight house, but had been long since abandoned as a place of public business, and was not so situated, with reference to any

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public way, as to endanger travelers thereon. *Held*, in an action for damages for the injuries received, that the plaintiff could not recover. *Lary v. Cleveland, etc., R. R. Co.*, 78 Ind., 323. 1881.

116. Direction to passengers. If the company's employes permit or direct passengers to enter the car at some other place than the platform or place provided for such purpose, they are held to the utmost care in avoiding injuries to the passengers. *Allender v. Chicago, Rock, Island and Pacific R. R. Co.*, 43 Ia., 276, 1876; 14 Amer. R'y Rep., 443.

117. — It must be determined, in view of all the circumstances of the case, whether an employe of a railway company, after directing a passenger how to enter a car situated at a distance from the platform, had a right to suppose that his instructions were understood. *Ib.*

118. — The actual purchase of a ticket on the entering of a car is not always necessary to constitute the relation of passenger, and place upon the railroad company that degree of care which a common carrier owes a passenger. That the plaintiff entered the office or waiting-room provided by the company for passengers, and informed the depot or ticket agent of her desire to become a passenger; that she, in good faith, placed herself under his direction, and that he directed her as to the manner in which she was to get on a caboose car, on which she was to take passage, would, in itself, be sufficient to justify the jury in finding that the relation of passenger existed. *Allender v. Chicago, Rock Island and Pacific R. R. Co.*, 37 Ia., 264, 1873; 8 Amer. R'y Rep., 115.

119. — A railway company is liable for injuries resulting to a passenger who, on leaving the car after night, attempts, by direction of the brakeman in charge of the car, to cross a gully by way of a certain bridge maintained by another upon the company's grounds, and is injured by a defect in the bridge which could not then be seen. *Chance v. St. Louis, Iron Mountain and Southern R'y Co.*, 10 Mo. App., 351. 1881.

120. — A passenger who was told by a brakeman to change cars at a way station entered another car, but was told by one of the company's servants there that he could

not remain inside the car as the train was not ready. The passenger, after remaining a short time on the platform of the car, alighted; and while standing on a track near that on which the car was, was injured by another train. *Held*, that his expulsion from the car was not the proximate cause of the injury. *Henry v. St. Louis, Kansas City and Northern R'y Co.*, 76 Mo., 288, 1882; 12 Amer. & Eng. R. R. Cases, 136.

121. Disorderly crowd. In an action under Lord Campbell's Act, to recover damages for death through the alleged negligence of a railway company, it appeared that on the occasion of the casualty the deceased had taken a ticket for a special train at a cheap rate for harvestmen. He was unable to find accommodations in the special train, but remained on the platform until the arrival of the next ordinary train, together with a crowd composed of harvestmen who had also taken tickets for the special train, and of other persons, a large number of whom had entered the station without permission. The company had an extra number of porters at the station; but in consequence of the great disorderliness of the persons so assembled on the platform, and by a sudden and violent rush of the crowd, the deceased was pushed on the line, and was killed by the engine of the ordinary train as it approached. At the trial the jury, *inter alia*, found that the deceased was not entitled to proceed by the ordinary train; that the accident was occasioned by the rush of the crowd; that the company had not taken due and reasonable precautions to prevent injuries from the crowding on the platform, and that, by using due and reasonable precautions, it might have prevented the rush of the crowd. *Held*, that even assuming the deceased to have been lawfully on the platform, the defendant, the railway company, was not liable for the accident which occasioned his death. *Canon v. Midland Great Western R'y Co.*, Law Reports, 6 Ireland, 199. 1879.

122. Duty of railway company. A railway company is bound to exercise due care in providing for its passengers while they are waiting for its trains, and it is liable for the consequences of a neglect to properly direct them respecting the mode of entering its cars. *Allender v. Chicago, Rock Island*

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and *Pacific R. R. Co.*, 43 Ia., 276, 1876; 14 Amer. R'y Rep., 443; *Bennett v. Railroad Co.*, 102 U. S., 577, 1880; 1 Amer. & Eng. R. R. Cases, 71.

123. — Whether or not it is the duty of a railway company's employes to assist a passenger in getting upon a car must be determined by the circumstances of each particular case, and therefore the question may be left to the jury. *Ib.*

124. — A passenger on a railway is justified in assuming that the company has, in the exercise of due care, so regulated its trains that the road will be free from interruption or obstruction when passenger trains stop at a depot or station to receive and deliver passengers. *Baltimore and Ohio R. R. Co. v. State*, 12 Amer. & Eng. R. R. Cases (Md.), 149. 1883.

125. — Where a railway company has a platform and other facilities for entering and leaving the cars with safety on the depot side of their track, the failure to have the opposite side likewise prepared as a place for entering and leaving the cars cannot be regarded as negligence; it may select and adhere to such arrangement of its depots and platforms as it may see fit, if those made are safe and commodious. *Michigan Central R. R. Co. v. Coleman*, 28 Mich., 440, 1874; 12 Amer. R'y Rep., 59.

126. Light. Railway companies carrying passengers over long journeys are bound to provide easy modes and to allow a reasonable time to their passengers to obtain food and necessary refreshments. They are bound to furnish safe and proper modes of ingress and egress to and from trains to the eating stations, whether said eating houses be under the control of the railroad or a third person. This obligation includes the duty of providing sufficient lights for the safety of their passengers going to or coming from meals had at night, and giving them correct information as to the exact location of their respective trains, when trains have been moved during the absence of the passengers at their meals. Passengers receiving injuries for want of sufficient light and correct information of the whereabouts of their train on returning from the eating station, are entitled to recover damages against the company. *Peniston v. Chicago*,

St. Louis and New Orleans R. R. Co., 34 La. An., 777. 1882.

127. — The defendant's failure to light its depot building at the Syene station (situated off from the public highway), or to have an agent there to aid passengers leaving the train at night, were acts from which negligence might be inferred. That it was properly submitted to the jury to determine, from all the facts and circumstances, whether the defendant was guilty of neglect in those respects, and whether, if so, its negligence was the direct and proximate cause of the accident to plaintiff, so as to render it liable. *Patten v. Chicago and Northwestern R'y Co.*, 36 Wis., 413. 1874.

128. Neglect of mail agent. A railroad company is not liable to a passenger who, while entering the station for the purpose of taking an approaching train, is struck and injured by mail bags carelessly and negligently thrown from the mail-car by a postal clerk employed by the United States government. *Carpenter v. Boston and Albany R. R. Co.*, 24 Hun (N. Y.), 104. 1881.

129. Open cattle-guard. About half past nine o'clock on a dark, rainy and snowy night, plaintiff went to defendant's depot at a village, for the purpose of taking the caboose at the rear of defendant's freight train for his place of residence. The train stopped with the caboose several rods north of the depot platform, and two car-lengths north of a cattle-guard, which was constructed across both tracks of the road and between them, and was partly uncovered. Plaintiff asked the night-watchman whether he would have to walk that far back to get on the caboose, and was answered affirmatively, and while on his way to the caboose met the conductor with a lantern accompanying lady passengers from the caboose; nothing was said to him by the conductor, and before plaintiff reached the caboose he fell into the open cattle-guard and was injured. He had been in the habit of taking this train with the caboose standing north of the platform, but had never taken it with the caboose standing north of the cattle-guard, and he had never noticed the situation and condition of the cattle-guard, nor did he know before the accident that the caboose stood north of it. *Held*, that these

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facts warranted the jury in finding that defendant was guilty of negligence, and plaintiff free from contributory negligence. *Hartwig v. Chicago and Northwestern R'y Co.*, 49 Wis., 358, 1880; 1 Amer. & Eng. R. R. Cases, 65.

130. Platform. A passenger has the right to presume that he can stand without danger upon a depot platform. *Dobiecki v. Sharp*, 8 Amer. & Eng. R. R. Cases, 485; 88 N. Y., 203. 1882.

131. — A railway company is bound to provide safe and sufficient platforms for the landing of passengers, of sufficient length to afford safe egress to passengers from an ordinary train. *St. Louis, Iron Mountain and Southern R. R. Co. v. Cantrell*, 37 Ark., 519, 1881; 8 Amer. & Eng. R. R. Cases, 198.

132. — It is gross negligence for a railway company to construct its platform for passengers so narrow that a passenger while standing thereon may be injured by a passing train. *Chicago and Alton R. R. Co. v. Wilson*, 63 Ill., 167. 1872. A stranger has the right to presume that a platform for passengers has been so constructed as to be safe. *Ib.*

133. — Plaintiff was rightfully at defendant's depot in the evening, for the purpose of taking the train. There was a platform extending from the east side of the depot to the track, over which passengers passed to and from the cars. Stairs led through the center of the depot to the street on the opposite side, which was several feet lower than the track, and there were also stairs at either end of the depot, leading from the platform to the street. The stairs at the north end of the depot were open at the top, as if they might be used. These stairs, and a platform at the bottom of them about four feet from the ground, were constructed by an express company for its sole use, but they were on defendant's premises, of which defendant had control. Plaintiff, in attempting to pass down these stairs in the dark, from the upper platform to the street, without fault on her part, fell from the lower platform to the ground, striking beyond the limit of defendant's premises, and was injured. *Held*, that defendant was liable. *Beard v. Connecticut and Passumpsic Rivers R. R. Co.*, 48 Vt., 101, 1875; 16 Amer. R'y Rep., 375.

134. Pleading. In an action against a railway company for negligence in the management of its railway at one of its stations, whereby the plaintiff, a passenger, was injured, the defense relied on by the defendant's counsel was, that the accident arose *entirely* from the plaintiff's own want of caution, and that the company was wholly blameless. The evidence showed that the plaintiff arrived at the station about two minutes or less before the time of departure of the train, and that, in running along the line, at a place where he ought not to have gone, in order to reach the train, which was some distance ahead on the opposite side of the railway, he fell over a switch-handle, and was considerably hurt. The judge left it to the jury to say whether the injury to the plaintiff was occasioned by the negligence and want of proper care of the defendant, or resulted *entirely* from the plaintiff's own carelessness, as the company contended. The jury having found for the plaintiff, *held*, that the judge was, under the circumstances, warranted in leaving the case to the jury upon the only points raised by the parties; and that the omission to call their attention to the intermediate case of negligence of both parties being contributory to the accident, was no misdirection. *Martin v. Great Northern R'y Co.*, 16 Common Bench, 179; 81 E. C. L., 177. 1855.

135. Snow and ice. It is the duty of railway companies to remove snow and ice from a platform over which it is necessary for passengers to pass in order to reach its cars; or to take precautions by covering it with ashes or other substance to protect passengers passing over it from danger to which otherwise they would be exposed. *Weston v. New York Elevated R. R. Co.*, 73 N. Y., 595, 1878; *Same v. Same*, 42 N. Y. Superior Ct., 156, 1877.

136. — A passenger has the right to assume that the corporation has performed its duty, and that the platform is safe. His going upon it in order to reach the cars is not, therefore, of itself, contributory negligence. *Ib.*

137. Stairs. On the platform there were two doors in close proximity to each other, the one, for necessary purposes, had painted over it the words, "For gentlemen," the

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other had over it the words, "Lamp-room." The plaintiff, having occasion to go to the urinal, inquired of a stranger where he should find it, and having received a direction, by mistake opened the door of the "lamp-room" and fell down some steps and was injured. In an action against the railway company, *held*, that in the absence of evidence that the place was more than ordinarily dangerous, the judge was justified in non-suiting the plaintiff, on the ground that there was *no evidence* of negligence on the part of the company. *Toomey v. London, Brighton and South Coast R'y Co.*, 3 Common Bench (N. S.), 146; 91 E. C. L., 146. 1857.

138. — The defendant had at one of its stations a staircase, used to enable passengers to ascend from the platform to the street; the stairs were six feet wide, and were nosed with a strip of brass two and one-half inches in width, which had worn smooth and slippery, and were not provided with any hand-rail. The plaintiff, who for eighteen months had been in the almost daily habit of traveling on the line and using the stairs, in ascending them in the daylight, slipped upon the brass nosing and was injured. *Held*, that there was no evidence of negligence on the part of the defendant to go to the jury. *Crafter v. Metropolitan R'y Co.*, 1 Harrison & Rutherford, 164, 1866; *Same v. Same*, Law Reports, 1 Common Pleas Cases, 300, 1866.

139. **Telegraph office.** A railroad company having a telegraph office in one of its stations for the use of the public is responsible to one of its passengers, who is injured solely because of the company's negligence in failing to keep in proper condition the structure or platform erected by them, over which the passenger, in alighting from the cars, must pass to reach the telegraph office. *Clusman v. Long Island R. R. Co.*, 9 Hun (N. Y.), 618, 1877; affirmed, *Same v. Same*, 73 N. Y., 606, 1878.

140. **Unfenced depot grounds.** A railway company is bound so to fence a station that the public may not be misled, by seeing a place unfenced, into injuring themselves by passing that way, being the shortest to the station. *Burgess v. Great Western R'y Co.*, 95 E. C. L., 923; 32 Law Times, 76. 1853.

141. **Vicious dog in depot.** The plaintiff was bitten by a stray dog at a railway station, while waiting for a train. It was proved that at 9 P. M. the dog flew at and tore the dress of another female on the platform; that at 10:30 he attacked a cat in the signal-box near the station, when the porter there kicked him out, and saw no more of him; and that he made his appearance again at 10:40 on the platform, where he bit the plaintiff. *Held*, no evidence to warrant the jury in finding that the company had been guilty of any negligence in keeping the station reasonably safe for passengers. *Smith v. Great Eastern R'y Co.*, Law Reports, 2 Common Pleas Cases, 4. 1866.

IV. NEGLIGENCE.

1. *Of carrier.*

142. **Duty of carrier.** Where the measure of duty is ordinary and reasonable care, and the degree of care varies according to circumstances, the question of negligence is necessarily for the jury. *Pennsylvania R. R. Co. v. White*, 88 Pa. St., 327. 1879.

143. — A railway company is an insurer of its passengers' safety only against the risks caused or increased solely by its own neglect. *Grand Rapids and Indiana R. R. Co. v. Boyd*, 65 Ind., 526. 1879.

144. **Evidence.** Where the record fails to show that an accident on a railway train, resulting in the death of the plaintiff's intestate, was the result of any negligence or fault on the part of the company, in any respect, a judgment in favor of the plaintiff will be reversed. *Chicago and Alton R. R. Co. v. Mock*, 88 Ill., 87, 1878; 21 Amer. R'y Rep., 297.

145. **False announcement of arrival of train.** The plaintiff's wife was a passenger on defendant's train from Baltimore to Washington. When near its depot in the latter city, "Washington" was called by some one. She inquired of another passenger if they were in Washington, and was answered in the affirmative. She then prepared to leave the train. The night was dark. The announcement of "Washington" was not countermanded. No warning was given to passengers not to leave the train,

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and several passengers, in fact, left it. Plaintiff's wife lived near the depot, and had frequently been on the defendant's road. She was seen to go out of the car door, when the train started and moved into the depot. She was afterward found lying on the track about two squares outside of the depot, so much injured that her death ensued in about ten days. This action is by the husband for the loss of service. The judge instructed the jury that the passenger had a right to presume that the train had stopped, and that the cry of "Washington" was made by the agent of the company. That it was the duty of the company to counteract a false proclamation of arrival, and to keep an agent in their reach to advise passengers of the truth or falsehood of a proclamation so made, or else the company would be derelict in its duty and chargeable with the consequences. This ruling was held to be erroneous and a new trial granted. *Pabst v. Baltimore and Ohio R. R. Co.*, 2 MacArthur (District of Columbia), 42. 1875.

146. Putting off passenger at wrong station. A passenger, unacquainted with the route of a railway, and with the location of towns and cities along such route, may lawfully rely upon the statements of the conductor and brakemen in charge of the train, in regard to his stopping place; and if, so relying, the passenger leaves the train at the wrong place, and is damaged thereby, the company will be liable to the passenger for resulting damages, if there be no contributory negligence of the passenger. *Pennsylvania Co. v. Hoagland*, 78 Ind., 203, 1881; 3 Amer. & Eng. R. R. Cases, 436.

147. Rate of speed. The only question is as to the instructions given. The latter clause of the eighth was as follows: "In determining whether the rate [of speed] was unsafe on the occasion in question, you should consider whether the velocity was greater than that which had been practiced before with the tacit consent of the community and without accident." This is not the law. The fact that trains have been run over a railway at a high and dangerous speed without injury is not conclusive that it will continue to be so and thereby relieve the company from liability on account thereof. The tacit acquiescence in, and tol-

eration of, a wrong for the time being by the community, does not justify a repetition and a perpetuation of the wrong. *Cleveland, Columbus, Cincinnati and Indianapolis R. R. Co. v. Newell*, 3 Amer. & Eng. R. R. Cases (Ind.), 483. 1881.

148. — A railway company may run its trains at any rate of speed it may choose, so long as the high rate of speed does not increase the ordinary risks of travel by rail. *Indianapolis, Bloomington and Western Ry Co. v. Hall*, 106 Ill., 371, 1883; 12 Amer. & Eng. R. R. Cases (Ill.), 146, 1883.

149. — More than ordinary speed is not necessarily evidence of negligence in operating a train. *Grand Rapids and Indiana R. R. Co. v. Huntley*, 38 Mich., 537. 1878.

2. Of passenger.

150. Attempt to leave the cars in case of accident. Where a passenger, to avoid danger, attempts to leave the car, believing, upon reasonable grounds, that by so doing he will escape injury, and while in the act of leaving is injured through the carrier's negligence, he is not chargeable with contributory negligence, although, had he made no attempt to leave the car, the injury would not have happened. *Iron R. R. Co. v. Mowery*, 36 Ohio St., 418, 1881; 3 Amer. & Eng. R. R. Cases, 361.

151. — That his attempt to escape resulted in injury to a passenger, and that, if he had not made the attempt, he would not have been injured, may be considered by the jury in determining whether the attempt was one which a person acting with ordinary prudence would make; but these facts do not necessarily prove the act an imprudent one. *Wilson v. Northern Pacific R. R. Co.*, 26 Minn., 278. 1879.

152. — The plaintiff having received his injuries by leaping from the car, while others, who remained inside, were not hurt, it is proper for him to prove that others besides himself did the same, and also their declarations at the time of their reasons for so doing, to show the reasonableness of his conduct and to avoid the charge of contributory negligence. *Mobile and Montgomery R. R. Co. v. Ashcroft*, 43 Ala., 15. 1872.

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153. Burning train. Where a passenger, after escaping from a burning car, returned to get his valise and was injured, *held*, that his own negligence contributed to the injury, and a non-suit was ordered. *Hay v. Great Western R'y Co.*, 37 Upper Canada (Queen's Bench), 456. 1875.

154. Contributory negligence. Contributory negligence of the plaintiff is matter of defense. Plaintiff need not prove there was none, in making out his case. *Wilson v. Northern Pacific R. R. Co.*, 26 Minn., 278, 1879; *McQuilken v. Central Pacific R. R. Co.*, 50 Cal., 7, 1875; 12 Amer. R'y Rep., 166.

155. — Contributory negligence, to prevent a recovery, must be of such a degree as to amount to a want of ordinary or reasonable care on the part of the injured party. *Houston and Texas Central R'y Co. v. Gorbett*, 49 Tex., 573, 1878; *Mackoy v. Missouri Pacific R'y Co.*, 18 Federal Reporter, 236, 1883.

156. — Where the the defense is contributory negligence, the proper question for the jury is whether the damage was caused entirely by the negligence of the defendant, or whether the person injured so far contributed to the injury by his own negligence that, but for it, the injury would not have occurred. *Kentucky Central R. R. Co. v. Thomas*, 79 Ky., 160, 1880; 1 Amer. & Eng. R. R. Cases, 79.

157. Crawling between cars. The doctrine that one who has contributed proximately to the injury cannot recover damages therefor is now too firmly rooted in our jurisprudence to be open to further controversy. The failure to ring the bell or blow the whistle on the starting of the train, as required by the statute, fixes the charge of negligence on a railroad company, and any one injured thereby may recover damages for the injury, unless his own negligence or fault has disabled him from making complaint. Plaintiff's intestate got off a passenger train of defendant, which had just arrived in a small incorporated town, and attempted to crawl between two cars of a freight train, standing on a side-track with locomotive attached and steam up, ready to start, which stood between him and the depot. Those in charge of the freight train did not see him, and backed it without giv-

ing proper signals, just as he got between the cars. *Held*, the conduct of the deceased cannot be classed less than negligence, bordering on recklessness, and contributed proximately to his death; and his personal representative cannot recover, though defendant was negligent in not giving proper signals before its train started — the injury not having been inflicted wantonly or intentionally. *Memphis and Charleston R. R. Co. v. Copeland*, 61 Ala., 376. 1878.

158. Getting on moving train. Attempting to get upon a train while it was in motion was held to be contributory negligence. *Haldan v. Great Western R'y Co.*, 30 Upper Canada (Common Pleas), 89. 1879.

[See Subdivision I of this Title.]

159. Infant; neglect of person in charge. P. had charge of a child too young to take care of itself, and took two tickets at a railway station for the purpose of the two being conveyed on the railway. While P. and the child were on the railway, after P. had taken the tickets, the child was injured by an accident which was caused by the joint negligence of P. and the company's servants. *Held*, by the court of exchequer chamber, affirming the judgment of the court of queen's bench, that the child could not maintain an action against the company. *Waite v. North Eastern R'y Co.*, Ellis, Blackburn & Ellis, 719; 96 E. C. L., 719. 1858.

160. Intoxication of passenger. Drunkenness is not a defense by way of contributory negligence, unless it was the proximate cause of the death of the deceased. If the person injured got drunk under such circumstances that any reasonably prudent man could foresee that he was putting himself in such a condition that that which resulted might probably happen, then his drunkenness would be a defense. *Davis v. Oregon and California R. R. Co.*, 8 Oreg., 172. 1879.

161. Neglect in treatment after injury. In an action against a railroad company for personal injuries received, the plaintiff cannot recover for damages which might have been avoided by the use of reasonable and ordinary diligence in effecting a cure. The use of slight care and diligence would not be sufficient. *Allender v. Chicago, Rock Island and Pacific R. R. Co.*, 37 Ia., 264, 1873; 8 Amer. R'y Rep., 115.

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162. — In an action to recover damages for injuries alleged to have been sustained by defendant's negligence, where defendant had given evidence tending to show that exercise taken by plaintiff might have tended to retard recovery, and that quiet would have been better, *held*, that evidence that plaintiff was advised by his physician that it was right and beneficial to exercise was proper. *Lyons v. Erie R'y Co.*, 57 N. Y., 489, 1874; 7 Amer. R'y Rep., 63.

163. — The trial court, in an action for personal injuries, instructed the jury that although plaintiff may not have employed a skilful surgeon to attend him, still "if he did exercise such care and attention in regard to his case as a prudent man would, under his particular circumstances and situation, have done," they should find for him. In other instructions the jury were told in detail what facts within the range of the evidence, if found, would constitute contributory negligence and prevent plaintiff's recovery. *Held*, that the instruction quoted, though general, was not misleading, and, taking all the instructions together, the question of negligence was fairly presented to the jury. *Klutts v. St. Louis, Iron Mountain and Southern R'y Co.*, 75 Mo., 642, 1882; 11 Amer. & Eng. R. R. Cases, 639.

164. Passenger assuming to perform unauthorized service for the carrier. If a passenger on a freight train is injured while simply riding on a freight car by reason of an accident to the train, the company will be liable if the rule prohibiting passengers from riding elsewhere than in the caboose is not conspicuously posted as required by law; but it is otherwise if the injury is the result of an attempt on his part to perform an unauthorized service for the company. *Sherman v. Hannibal and St. Joseph R. R. Co.*, 72 Mo., 62, 1880; 4 Amer. & Eng. R. R. Cases, 589.

165. Passing from car to car. For a traveler to pass from one car to another while the train is in motion may generally be considered an act of negligence; but when a party, acting under a suggestion from the conductor, attempts to pass from car to car, and is injured in consequence of the fact that the train was still moving, such party will not be debarred his right of recovery

merely because he undertook to comply with the conductor's suggestion; and it is the province of the jury to determine both the nature and effect of the conductor's remarks; whether they were intended and understood as an order to change from car to car or were by way of advice, and also whether such remarks affected the action of the parties, and caused them to act differently from what they otherwise would. *Cleveland, etc., R. R. Co. v. Manson*, 80 Ohio St., 451. 1876.

166. Riding in baggage car. A passenger who voluntarily leaves his proper place in a passenger car, in violation of the rules of the company, to ride in the baggage car, or other known place of danger, and is injured in consequence of such violation, cannot recover damages therefor. *Pennsylvania R. R. Co. v. Langdon*, 92 Pa. St., 21, 1879; *Kentucky Central R. R. Co. v. Thomas*, 79 Ky., 160, 1880; 1 Amer. & Eng. R. R. Cases, 79; *Houston and Texas Central R. R. Co. v. Clemmons*, 55 Tex., 88, 1881; 8 Amer. & Eng. R. R. Cases, 396; *Peoria and Rock Island R. R. Co. v. Lane*, 83 Ill., 448, 1876.

167. — A conductor of a train cannot, in violation of a known rule of the company, license a man to occupy a place of danger so as to make the company responsible. *Pennsylvania R. R. Co. v. Langdon*, 92 Pa. St., 21. 1879.

168. — Although the rules of the company forbid passengers to ride in its baggage cars, which rules were known to the passenger, he is not thereby precluded from recovery for damages sustained by collision caused by the gross neglect of the company's employes. In the collision in question no one was seriously injured in the passenger cars. *Watson v. Northern R'y Co.*, 24 Upper Canada (Queen's Bench), 98. 1864. See, also, *Jacobus v. St. Paul and Chicago R'y Co.*, 20 Minn., 125. 1873.

169. Riding on engine. E. and a friend arrived at the station immediately after the departure of the train. An employe of the company who had charge of the trains, train-men and rolling stock invited them to get on an engine which was at the station, and informed them that the engine would overtake the train at the bridge, a short distance from the station, where they could

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catch the train. The engine overtook the train, but, as a collision with the rear car was imminent, E. jumped from the engine to escape the danger. *Held*, that the act of the employe was that of the company, and that E. and his friend were not guilty of negligence, and were properly upon the engine. *Nashville and Chattanooga R. R. Co. v. Erwin*, 3 Amer. & Eng. R. R. Cases (Tenn.), 465. 1882.

170. — Where a drover claims that he was riding on an engine by the consent of the engineer, to look after his cattle, as was customary, and the defendant claims that it was contrary to orders for anybody to ride on an engine, the question to be left to the jury to determine is, whether the defendant had, notwithstanding its rules for the government of its employes, by its conduct held out its employes to the plaintiff as authorized, under the circumstances, to consent to his being carried on the train with his cattle. *Waterbury v. New York Central and Hudson River R. R. Co.*, 17 Federal Reporter, 671. 1883.

171. — Where a shipper of live stock, in going into stock yards in company with five or six other persons, rides on the front of the engine, all of whom, except himself, seeing a backing train on the same track, jump off and thus escape injury, but he does not, and is killed on a collision of the trains, the question of negligence arising on his failure to jump off and save himself is a question of fact for the jury, under proper instructions, in an action to recover for his death. *Wabash, St. Louis and Pacific R'y Co. v. Shacklet*, 105 Ill., 364. 1883.

172. **Riding on the platform.** A passenger riding on the platform cannot recover for an injury received, unless it was through a wanton and wilful act. *Taylor v. Danville, Olney and Ohio River R. R. Co.*, 10 Bradwell (Ill.), 311, 1881; *Camden and Atlantic R. R. Co. v. Hoosey*, 99 Pa. St., 492, 1882; 6 Amer. & Eng. R. R. Cases, 454.

173. — A lack of seats would not justify a passenger in riding on the platform. *Chicago and Northwestern R. R. Co. v. Carroll*, 5 Bradwell (Ill.), 201. 1879.

174. — **breaking of train in two.** The defendant's line leaves the depot at Towanda, Pa., upon a sharp curve, which ex-

tends to a river crossed by a bridge one thousand five hundred feet long. To start the train, it is necessary to have an additional engine to push it. Soon after the pushing engine had left the train, on which the plaintiff was a passenger, it parted between the seventh and eighth cars, the draw-head of one of them having pulled out. The parting of the train broke the bell cord and rang the engine bell, but the engine-driver, thinking it unwise to stop upon the bridge, continued on until he had nearly crossed it. He then applied the air brakes and stopped the train, without knowing what had occurred. The rear part of the train came on and collided with the front part, causing a concussion which broke the platform upon which the plaintiff was standing and injured him. As the train left the depot, the plaintiff left his seat in the car and went upon the platform. Notices were posted in the car forbidding passengers to stand upon the platform, but the plaintiff testified that he did not notice them, and that he did not hear the brakeman tell him that it was against the rules to stand upon the platform. *Held*, that the question of negligence and contributory negligence were for the jury. *Goodrich v. Pennsylvania and N. Y. Canal and R. R. Co.*, 29 Hun (N. Y.), 50. 1883.

175. **Rules; violation by passengers.** If a passenger wilfully violate a known rule intended for his safety, and is injured in consequence of such violation, he is not entitled to recover damages for the injury. *Pennsylvania R. R. Co. v. Langdon*, 1 Amer. & Eng. R. R. Cases, 87; 92 Pa. St., 21. 1879.

176. **Standing up in car.** Whether a passenger in a railway car, standing up in it, when getting into the station-house, at the close of the journey, but before an actual stoppage of the car, is guilty of negligence in the circumstances of the case, is a question of fact for the jury to decide under proper instructions. *Railroad Co. v. Pollard*, 22 Wallace, 341. 1874.

V. ASSAULT AND BATTERY.

[See next subdivision.]

177. **Arrest for non-payment of freight on goods.** The plaintiff, having taken a horse to an agricultural show by the de-

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fendants' railway, was entitled under arrangements advertised by the defendants to take the horse back free upon the production of a certificate. The plaintiff accordingly produced a certificate, and the horse was put into a box without payment or booking, and the plaintiff having taken a ticket for himself, proceeded by the same train. At the end of the journey the station master demanded payment for the horse, and the plaintiff, refusing to pay, was detained in custody by two policemen under the orders of the station master, until it was ascertained by telegraph that all was right. An action having been brought against the defendant for false imprisonment, *held*, that a railway company has power to apprehend a person traveling on the railway without having paid his own fare, but has power only to detain the goods for non-payment of the carriage; consequently, as the defendants themselves would have had no power to detain the plaintiff on the assumption that he had wrongfully taken the horse by the train without paying, there could be no authority implied from them to the station master to detain the plaintiff on this assumption, and they were, therefore, not liable for this act of the station master. *Poulton v. London and South Western R'y Co.*, Law Reports, 2 Queen's Bench Cases, 534. 1867.

178. Assault by intoxicated passenger. The introduction of a manifestly intoxicated, quarrelsome and indecently attired man into a street car by the employes of the company is an act of negligence for the consequences of which the company is liable; and when the conductor admits such a person into the car, in response to a statement of the driver that such person is "too full" to ride on the front platform, the negligence is aggravated and unjustifiable. A verdict against the company for damages for personal injuries sustained by a passenger, from an unprovoked assault by such person under such circumstances, should not be set aside on the ground that there is no evidence of negligence. The plaintiff in this case was severely injured about the head and face by blows received as above stated. A verdict of \$1,000 held not excessive. *Hendricks v. Sixth Avenue R. R. Co.*, 44 N. Y. Superior Ct., 8. 1878.

179. Assaults of other passengers. It is the duty of the conductor of a passenger train to preserve order on his train, to protect passengers from insult and injury from their fellow-passengers, and if it be necessary to enable him to discharge this duty, he should stop the train and summon to his aid his fellow-employes on it and passengers who are willing to assist, and eject from the train any person or passenger guilty of disorderly, insulting or threatening conduct; and a failure to discharge this duty, so far as he has the means and power, renders the railway company liable in damages to the insulted or injured passenger. *New Orleans, St. Louis and Chicago R. R. Co. v. Burke*, 53 Miss., 200, 1876; 9 Amer. R'y Rep., 308.

180. — To render the company liable, however, it must be shown that the conductor had knowledge, or opportunity of knowing, that the injury was threatened, and also that by his prompt interposition he could have prevented or mitigated it; and it must be shown, also, that, with the power at his disposal, namely, his own exertions and the assistance of the other employes on the train and willing passengers, he could have prevented or mitigated it; for all that is required of him is a fair and honest effort, with the best means in his power to prevent the wrong. *Id.*

181. — Under the facts in this cause, where a passenger was brutally assaulted by co-passengers, and the conductor did not take the proper steps to prevent the injury, the co-passengers being employes, though not then on duty, and these employes were continued in the company's service and one of them promoted, there was a proper case for exemplary damages, and a verdict of \$6,000 was upheld. *Id.*

182. Expulsion of passenger; loss of property. The plaintiff was traveling with other passengers in a carriage of a railway company, and on the tickets being collected there was found to be a ticket short. The plaintiff was charged by the collector with being the defaulter, and on his refusing to pay the fare or leave the carriage, he was removed from the carriage by the officers of the company without any unnecessary violence. It turned out that the plaintiff had a ticket; and he brought an action for the

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assault against the company, laying as special damage the loss of a pair of race-glasses, which he had left behind him in the carriage when he was removed. There was also a count in trover, but there was no evidence that the glasses had come to the possession of any of the company's servants. *Held*, that the plaintiff could not recover for the loss of the glasses. *Glover v. London and South Western R'y Co.*, Law Reports, 3 Queen's Bench Cases, 25. 1867.

183. Female passengers. A railway company is bound to protect female passengers on its trains from all indecent approach or assault; and where a conductor on a train makes such an assault on a female passenger, the company is liable for compensatory damages. *Craker v. Chicago and Northwestern R'y Co.*, 36 Wis., 657, 1875; 9 Amer. R'y Rep., 118.

184. — A verdict of \$1,000 damages for the insult offered by defendant's conductor to the plaintiff, held not so excessive as to authorize the court to set it aside. *Ib.*

185. Liability of company. A railway company is liable for the malicious and criminal acts of its employes toward passengers while they are executing what they suppose to be the orders of the company, even though the orders do not in fact contemplate such acts. *McKinley v. Chicago and Northwestern R'y Co.*, 44 Ia., 314, 1876; *Chicago and Eastern R. R. Co. v. Flexman*, 103 Ill., 546, 1882; 8 Amer. & Eng. R. R. Cases, 354; *Gdsaway v. Atlanta and West Point R. R. Co.*, 58 Ga., 216, 1878; 16 Amer. R'y Rep., 99.

186. — Where an agent was placed at a car door to prevent the ingress of passengers without tickets, and a passenger in attempting to pass was assaulted by the agent, and there was no evidence that such act was authorized or sanctioned by the company, *held*, that the employer was not liable. *Priest v. Hudson River R. R. Co.*, 65 N. Y., 589. 1875.

187. — Where a passenger on arriving at the place to which he had paid his fare missed his watch, and, supposing it to have been stolen, refused to leave the train until he should recover his watch, and the conductor consented that he might remain on the train until it reached another station, and after

the train had started and a partial search had been made, a passenger asked who he thought had his watch, when he replied, "That fellow," pointing at a brakeman, who immediately struck him in the face with a lantern, *held*, that the facts showed a right of action against the company, and that the company occupied the same position towards the passenger as if he had paid his fare to such other station. *Chicago and Eastern R. R. Co. v. Flexman*, 103 Ill., 546, 1882; 8 Amer. & Eng. R. R. Cases, 354.

188. Pleading. The declaration alleged that plaintiff was a passenger on defendant's road, having paid his fare from Alapaha to Waycross; that he was in the usual passenger coach; that while thus situated and entitled to the care and protection of defendant, at an intermediate station he was called out of the train by the conductor in charge thereof, who was defendant's agent, and was beaten, bruised, etc. *Held*, that the failure to allege in express terms that the agent acted "in the prosecution and within the scope of his business," was not a vital defect, and the court erred in dismissing the case on general demurrer. *Aliter* had the injury been inflicted after the delivery of the plaintiff at his destination. *Peeples v. Brunswick and Albany R. R. Co.*, 60 Ga., 281. 1878.

189. Ratification of act of employe. There was evidence tending to show that after defendant had notice that its brakeman had committed the injuries complained of, it retained him in its service and promoted him. *Held*, that if this was done with knowledge of the manner and circumstances of the assault alleged in the complaint, it might be such a ratification of the brakeman's act as to authorize the jury, in its discretion, to award exemplary damages, and they should have been so instructed. *Bass v. Chicago and Northwestern R'y Co.*, 39 Wis., 636, 1876; 18 Amer. R'y Rep., 414; *Bass v. Chicago and Northwestern R'y Co.*, 42 Wis., 654, 1877; 15 Amer. R'y Rep., 45; *Gasway v. Atlanta and West Point R. R. Co.*, 58 Ga., 216, 1877; 16 Amer. R'y Rep., 99.

190. — A verified complaint, duly served, in a suit against the company for the misconduct of its employe, is notice of such misconduct; and where, *after* such service, the

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servant is retained and promoted, these facts may be put in evidence to show ratification of his act. *Bass v. Chicago and Northwestern R'y Co.*, 42 Wis., 654, 1877; 15 Amer. R'y Rep., 45.

191. — Immediate notice (by whomsoever given) to the conductor of the train, of the brakeman's misconduct, is notice to the company; and if the conductor or other officer of the company, after such notice, disbelieves the charge made against the brakeman, still the retention of the latter in its service by the company will be at its peril. *Ib.*

192. Smoking by passenger. A railway station keeper assaulted a passenger for not leaving the waiting-room when ordered, the passenger having enraged him by spitting on the floor. *Held*, that in defending an action for the assault and battery a question as to the plaintiff's smoking was irrelevant, where his smoking had not been objected to. *People v. McKay*, 8 Amer. & Eng. R. R. Cases (Mich.), 205. 1881.

193. Throwing water on passenger. The contract of a railway company with its passenger is to carry safely; and if, through the negligence or wilful act of the conductor or of a brakeman, or of both, a jet of water is dashed upon the passenger while being carried, it is a breach of the contract. *Terre Haute and Indianapolis R. R. Co. v. Jackson*, 81 Ind., 19, 1881; 6 Amer. & Eng. R. R. Cases, 178.

VI. EXPULSION OF PASSENGERS FROM THE CARS.

[See preceding subdivision.]

194. Amount of force to be used. An instruction, as to the degree of force which an employe of defendant might lawfully use in ejecting an obnoxious person from the station house, considered, and held unobjectionable. *Johnson v. Chicago, Rock Island and Pacific R. R. Co.*, 58 Ia., 348, 1882; 8 Amer. & Eng. R. R. Cases, 206.

195. — Where a conductor, with a loaded revolver in his hand, approaches a passenger before making any effort to induce him to get off, and when the passenger had not made, or threatened to make, forcible re-

sistance to his authority, the conductor is guilty of a gross outrage. With or without the use of a deadly weapon, a conductor has no right to compel a passenger, by commands or threats, to jump from a moving train. *Gallena v. Hot Springs R. R. Co.*, 13 Federal Reporter, 116, 1882; 4 McCrary, 371.

196. — On the trial appellant offered testimony that on previous occasions the train had been boarded in that locality by roughs and confidence men who had attacked the brakemen, in explanation of the reason why the brakeman was armed with the billet with which appellee was struck. *Held*, that the evidence should have been admitted. Appellee was claiming exemplary damages of the company for the wilful misconduct of one of its servants, and in mitigation of such damages it was allowable to show the reason why the brakeman became armed with this weapon. *Chicago, Burlington and Quincy R. R. Co. v. Boger*, 1 Bradwell (Ill.), 472. 1877.

197. Damages. Where a railroad conductor, acting in what he believes to be the performance of his duty to the company, removes a passenger who refuses to produce a ticket or to pay fare, although the removal be unlawful, the company is liable only to compensatory damages. *Townsend v. New York Central and Hudson River R. R. Co.*, 56 N. Y., 295, 1874; 6 Amer. R'y Rep., 160.

198. — Plaintiff testified that after the purchase of her ticket from Kansas City to Utica, she exhibited it to the baggage master, who checked her baggage to Utica, and it was put upon the train by the agents of the company, who assisted her in getting into a car of the same train; that upon the arrival of the train at a station some miles short of Utica, upon her refusal to get off at that station as requested by the conductor, he used profane and threatening language to her, and thereupon sent a brakeman, who took her little girl, thereby compelling her to follow with her baby, and leave the train at nine o'clock at night; that she was compelled to remain in the dark and exposed to the cold, for half an hour, until the freight train came along, and was made sick by the exposure. *Held*, that upon this evidence the trial court was justified in refusing an instruction, asked by the defendant, that plaintiff

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iff could not recover punitive but only actual damages. *Hicks v. Hannibal and St. Joseph R. R. Co.*, 68 Mo., 329. 1878.

199. — Where a party is forcibly and unlawfully ejected from a car, in the presence of other passengers, and the conductor publicly announces that the passenger has refused to pay his fare, a jury may properly find from such facts that the party thus ejected suffered feelings of shame and humiliation without any other proof on that subject. *Chicago and Northwestern R'y Co. v. Chisholm*, 79 Ill., 584. 1875.

200. — In estimating the damages the jury may take into consideration the plaintiff's condition in life, his reputation in the community, and any circumstances attending the act complained of; but they cannot consider the wealth of the defendant or the poverty of the plaintiff. *Hays v. Houston and G. N. R. R. Co.*, 46 Tex., 272, 1876; 13 Amer. R'y Rep., 281; *Chicago, Burlington and Quincy R. R. Co. v. Bryan*, 90 Ill., 126, 1878.

201. — If the agent uses more force than is necessary to eject a passenger, or uses vile epithets toward him, such conduct should always be considered by the jury in aggravation of damages. *Quigley v. Central Pacific R. R. Co.*, 11 Nev., 350. 1876.

202. — The plaintiff, under a contract made with the defendant, claimed to be entitled, by virtue of a commutation ticket, to ride to East New York. Having exercised this right for some time, the defendant refused to carry him to that point unless he would pay extra fare from Jamaica to East New York; and upon his refusal so to do, in obedience to an order of defendant, the conductor ejected him from the train, using no unnecessary violence. The court charged that the evidence was not sufficient to give punitive damages against the conductor, but that plaintiff was entitled to have the railroad company punished to such an extent as the jury should, in their discretion, say the facts authorized and demanded. *Held*, that the charge was erroneous. *Parker v. Long Island R. R. Co.*, 13 Hun (N. Y.), 319. 1878.

203. — A contract of carriage is made with reference to the reasonable regulations of the carrier for the intercommunication between the agents of the carrier in the

transaction of its business; and mistakes should be treated, as in other business transactions, as matters for adjustment between the passenger and the proper agents of the carrier. *Held*, therefore, that where there is a dispute arising on the train about the ticket, it is the duty of the passenger, if able to do so, to pay the extra fare and rely on his remedy to recover it back, rather than to force the conductor to expel him, with a view to suing for damages for a wrongful ejection. And, if he insists on expulsion, he can recover no other damages than he could have recovered if he had paid the extra fare or quietly left the train and sued for a breach of the contract. *Hall v. Memphis and Charleston R. R. Co.*, 15 Federal Reporter, 57, 1882; 9 Amer. & Eng. R. R. Cases, 348; *Hall v. Memphis and Charleston R. R. Co.*, 9 Federal Reporter, 585, 1881.

204. — Where the plaintiff was ejected, without violence, by the conductor, under the mistaken impression that he had not paid his fare, and the inconvenience was but trifling, and the jury awarded 50% damages, a new trial was awarded on the ground of excessive damages. *Huntsman v. Great Western R'y Co.*, 20 Upper Canada (Queen's Bench), 24. 1860. See, also, *Davis v. Same*, ib., 27.

205. — The conductor took up the ticket of a passenger, which entitled him to ride to a certain place, and, having given him no check, afterward, when within a few miles of such passenger's destination, accused him of attempting to ride beyond the distance for which he had paid, charging him with falsehood, and treating him insolently in the presence of the other passengers, and, with the help of a brakeman, seized and put him off the train in a rude and angry manner, at a place where there was no station or house, it being cold and dark, and being about nine o'clock at night, and the passenger had to walk to his destination. In an action by the passenger against the company for damages for such treatment, there was a verdict for the plaintiff for \$700. *Held*, that the damages were not excessive. *Indianapolis, Bloomington and Western R. R. Co. v. Milligan*, 50 Ind., 392. 1875.

206. — Where a passenger was expelled from the train in a rough manner, accom-

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panied with profane and unbecoming language, the supreme court will not disturb, as excessive, a verdict for damages in the sum of \$562.50: *St. Louis and South Eastern R'y Co. v. Myrtle*, 51 Ind., 566. 1875.

207. — An award of \$2,500 for compensatory damages, *held*, especially in view of the former verdicts in the case, not to be so disproportioned to the injury sustained as to bear marks of passion, prejudice, partiality or corruption in the jury, and therefore not to be excessive. *Bass v. Chicago and Northwestern R'y Co.*, 42 Wis., 654, 1877; 15 Amer. R'y Rep., 45.

208. — In a suit by a passenger for being wrongfully ejected from the cars, it appeared that the rates of fare fixed by the company, and which, by its established rules, it was made the duty of the conductor to demand, were higher than were lawful. The plaintiff tendered the legal rates, and, upon refusal to pay more, was ejected from the cars, but without any rudeness or unnecessary violence. It also appeared that the plaintiff, at the time he took passage, knew the established rates, and expected to be expelled from the cars, intending to bring an action therefor, in order to test the right of the company to charge the established rates. *Held*, that the plaintiff was only entitled to compensatory damages, and that it was competent for the company, for the purpose of mitigating damages, or preventing the recovery of exemplary damages, to give in evidence subsequent declarations of the plaintiff, tending to prove that his object was to make money by bringing suits against the company for demanding illegal fares. *Cincinnati, Hamilton and Dayton R. R. Co. v. Cole*, 29 Ohio St., 126. 1876.

209. Death of passenger. If the conductor of a train ejected a passenger so that he was run over and disabled by such train, and another train of the same line passing shortly afterwards extinguished what life was left, a right of action arose whether the actual death was caused by the first or second train. *South Carolina R. R. Co. v. Nix*, 68 Ga., 572. 1882.

210. Drawing-room car. The defendant entered into a contract with one Wagner, by which Wagner agreed to place upon defendant's road certain drawing-room cars at his

own cost, Wagner's conductors and porters thereon to be carried free of charge by the railroad company. The defendant's conductors had a right to enter the cars in the management of the train, and for the collection of fares, and to the assistance of Wagner's conductors and porters in enforcing good order; but not otherwise to interfere with the business of such cars. Wagner agreed to pay defendant twenty per cent. of the gross receipts. In an action brought by the plaintiff against the railroad company, to recover for injuries sustained by reason of his alleged wrongful removal from the drawing-room car by the porter thereof, *held*, that the defendant was liable for any injuries so sustained by him. *Thorpe v. New York Central and Hudson River R. Co.*, 18 Hun (N. Y.), 70. 1878.

211. — Passengers upon a railroad taking a drawing-room car have a right to assume that they are there under a contract with the railway company, and that the servants in charge of the car are its servants, for whose acts in the discharge of their duty it is liable. *Thorpe v. New York Central and Hudson River R. R. Co.*, 76 N. Y., 402. 1879.

212. — It appeared that one or more of the seats in the ordinary cars were occupied by passengers' luggage. A number of passengers were standing in the passage-ways, and it did not appear that the seats so occupied by luggage would have been sufficient for the standing passengers. *Held*, that it was not the duty of plaintiff, under the circumstances, to have asked the conductor for a seat before passing into the drawing-room car. *Ib.*

213. Drunken passenger. It is not only the right of a conductor to expel from a train a drunken, unruly, boisterous passenger, but when such a person endangers by his acts the lives of people, it is the duty of the conductor to remove him in order to protect others from violence and danger. *Railway Co. v. Valleley*, 32 Ohio St., 345. 1877.

214. — If, having exercised reasonable prudence, considering the time, place and circumstances, as also the condition of the drunken man himself, the conductor expels such passenger, who is afterward run over and killed by another train not in fault, the

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expulsion itself is not such proximate cause of the death as will make the company liable. *Ib.*

215. — A railway company may refuse to receive and carry as a passenger any person who is so intoxicated as to be disgusting, offensive, disagreeable or annoying, as long as he continues in that condition, though he may have purchased a ticket entitling him to passage. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Vandyne*, 57 Ind., 576, 1877; 18 Amer. R'y Rep., 454.

216. — But slight intoxication, such as would not seriously affect the conduct of the passenger, will not justify the company in refusing to receive and carry him. *Ib.*

217. — Under § 2, 1 R. S. 1876, p. 710, an intoxicated passenger who advises other passengers not to pay their fare is guilty of disorderly conduct, and the conductor of the train may, after tendering him such "proportion of the fare he has paid as the distance he then is from the place to which he has paid his fare bears to the whole distance for which he has paid his fare," remove him from the train, and, unless unnecessary force is used, the company incurs no liability on account of such removal. *Baltimore, Pittsburgh and Chicago R. R. Co. v. McDonald*, 68 Ind., 316. 1879.

218. — If the conduct of a passenger upon a street car is such that his expulsion appears to the conductor to be a just and proper expedient for the purpose of preventing a violation of decency and good order, the conductor will be justified in expelling him, the company being responsible for an abuse in this discretion, or of any oppression in its exercise; and it will be error if the court so instruct the jury as to take away from them the consideration of the question whether the conduct of the passenger furnished a reasonable and probable cause for apprehending a breach of good order. *Le-mont v. Washington and Georgetown R. R. Co.*, 1 Mackey (Dist. of Columbia), 180, 1881; 1 Amer. & Eng. R. R. Cases, 263.

219. — A conductor upon the defendant's train removed therefrom the plaintiff's intestate, who had failed to produce a ticket when required, and who had no money wherewith to pay his fare. There was evidence tending to show that the intestate had

bought and lost his ticket, and before he was expelled one of his companions tendered the fare to the conductor, who refused to receive it, demanding a ticket. The intestate, who was very much intoxicated, was put off the train in a cut about twenty feet deep. He proceeded in the direction of his home some one thousand seven hundred feet, when he laid or fell down and was run over and killed, about fifteen minutes later, by the train of another company which had the right to run its cars over the defendant's road. *Held*, that, as the intestate was wrongfully removed from the train, the question as to whether his death was or was not directly traceable to such removal should have been left to the jury, and that the court erred in non-suiting the plaintiff. *Guy v. New York, Ontario and Western R. R. Co.*, 30 Hun (N. Y.), 399. 1883.

220. Evidence. A passenger purchased a ticket from N. to W. and rode on it to M., an intermediate point; the ticket under the rules of the company was canceled for the whole route; he voluntarily left the train at M. Subsequently he offered the ticket for his passage from M. to W.; the conductor took up the ticket, refused to allow him to ride and required him to leave the train. In a suit by the passenger against the company the court rejected evidence by the plaintiff that he offered to pay his fare if the conductor would return the ticket, which was refused, to be followed by evidence that in claiming to ride he had acted in good faith upon information, by a ticket agent from whom he had previously purchased the ticket, that he had a right to ride on it. *Held* to be error. *Vankirk v. Pennsylvania R. R. Co.*, 76 Pa. St., 66. 1874.

221. — The declarations of a ticket agent made some days after selling a ticket, although not evidence to establish a contract with the plaintiff, are evidence to show that plaintiff in good faith claimed a right to ride on the ticket. *Ib.*

222. — In a suit for damages for the alleged wrongful ejectment of a passenger from a train, it is competent for a witness who was present to state what he heard said on the occasion of such expulsion, leaving it to others to identify the persons who made the statements. *Indianapolis, Peru and*

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Chicago R'y Co. v. Anthony, 43 Ind., 183, 1873.

223. — In an action to recover damages, alleged to have been sustained by the plaintiff by being improperly removed from defendant's cars after having paid his fare, evidence going to show that on other occasions plaintiff had done acts showing an attempt to avoid payment of his fare is properly rejected. *English v. Delaware and Hudson Canal Co.*, 4 Hun (N. Y.), 683, 1875; affirmed, 66 N. Y., 454, 1876.

224. — In a suit by a passenger against a railway company for wrongfully putting him off the train for failing to pay the fare demanded, it is competent to prove by himself and other witnesses that they had traveled over the road between the *termini* of the plaintiff's trip, with and without tickets, and never paid more than the plaintiff tendered to the conductors. *Louisville, Nashville and Great Southern R. R. Co. v. Guinan*, 11 Lea (Tenn.), 98, 1883.

225. — In a suit for damages, caused by the action of a conductor in ejecting plaintiff from the cars, he need not allege nor prove that specific authority was conferred on the conductor by the company to perform such acts, where it appeared that he was intrusted with all authority which concerned the reception or rejection of passengers. *Travers v. Kansas Pacific R'y Co.*, 63 Mo., 421, 1876; 20 Amer. R'y Rep., 119.

226. Free pass. When the plaintiff was traveling on a free ticket, which had on its back an indorsement containing certain conditions for his signature, and when he tendered such ticket to the conductor, the latter declined to accept it unless the plaintiff would sign such indorsement, and, on his refusal either to sign or to pay fare, ejected him from the train, the discretion of the court below setting aside a verdict for \$5,000 damages will not be controlled. *Elliott v. Western and Atlantic R. R. Co.*, 58 Ga., 454; 16 Amer. R'y Rep., 106, 1877; *Same v. Same*, 62 Ga., 163, 1878.

227. — In an action of damages by A. and his wife, for ejecting the latter from a train, it appeared that A. made a special contract with defendant for the carriage of stock, which contract provided that none but the owner or persons in charge of the stock

should be entitled to a return pass. A. applied to the agent of the road for a pass for his wife, stating that she was the owner of a part of the stock, whereas she neither owned nor had charge of any of the stock. On this statement the agent issued the pass, saying at the time that he had no authority to issue one to a lady, and doubted if the conductor would recognize it. The pass was given "on account of stock account surrendered," and bore indorsed on the back an acceptance by the wife, subject to its conditions, and with the express stipulation that the company should not be liable for any injury to her person or property. The wife, being in company with her husband, offered her pass, which the conductor refused to recognize, and, on her declining to pay the required fare, removed her, without any violence or incivility, from the train, whereupon the fare was paid and plaintiffs reentered the train and proceeded upon their journey. *Held*, that the procurement of the pass was a fraud upon the company which vitiated the contract; that it was obviously the intention of A. to pay the fare, if necessary to enable his wife to ride, and in view of this fact and the conduct of the conductor, plaintiff had no ground for punitive damages, such as might be given in case of a real expulsion. *Brown v. Missouri, Kansas and Texas R'y Co.*, 64 Mo., 536, 1877.

228. Freight train. Where a passenger having notice of the rules fails to purchase a ticket for a freight train, and is ejected from such train by the conductor, by the use of no more force than is necessary, he cannot maintain an action therefor. *Falkner v. Ohio and Mississippi R'y Co.*, 55 Ind., 369, 1876; 16 Amer. R'y Rep., 262.

229. — A railroad company may require that passengers procure tickets before riding on freight trains, and conductors may expel from the cars, at regular stations, such as neglect to comply with the regulation. *Toledo, Peoria and Warsaw R. R. Co. v. Patterson*, 63 Ill., 304, 1872; 7 Amer. R'y Rep., 168.

230. — A passenger who had ridden on a way freight train before and after making the rule requiring tickets, without objection for want of ticket, could not be ejected from the car at a distance from the station, with-

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out proof of express notice or actual knowledge of the rule. *Lake Shore and Michigan Southern R'y Co. v. Greenwood*, 79 Pa. St., 373. 1875.

231. — A railway company has the right to make regulations requiring passengers to purchase tickets before entering coaches attached to their freight trains, and authorizing conductors to expel persons not having tickets, even though they may offer money in payment of their fare. But where the company had been usually receiving money on its freight trains for fare, passengers wanting thus to pay their fare were entitled to notice of the regulation making the change, before they could be expelled for non-compliance. *Lane v. East Tenn., Va. and Ga. R. R. Co.*, 5 Lea (Tenn.), 124, 1880; 2 Amer. & Eng. R. R. Cases, 278.

232. — A railroad company has the clear right to make rules that no one shall be carried as a passenger on its freight trains. But when it is in the habit of carrying passengers on such a train, and had its regular hour for departure posted in its office at the station, it will not be justified in refusing to carry a passenger from such station, or in putting him off such train. *Illinois Central R. R. Co. v. Johnson*, 67 Ill., 312. 1873.

233. — Where the plaintiff applied to the office of the defendant railway company for a ticket, but could get no answer, and then took passage on a train carrying passengers, and explained to the conductor the fact of his inability to procure a ticket, and was put off the train in the night time, not at any regular station or usual stopping place, and compelled to walk back, *held*, in an action to recover for the wrong, that a verdict for \$500 was excessive. *Illinois Central R. R. Co. v. Cunningham*, 67 Ill., 316. 1873.

234. — Gamblers and monte-men, whose purpose in traveling upon a train is to ply their vocation, may be excluded. *Thurston v. Union Pacific R. R. Co.*, 4 Dillon (U. S. C. C.), 321. 1877.

235. Ladies' car. In this case the jury might have found from the evidence that the plaintiff, as a passenger on defendant's train, being unable to find a seat elsewhere, except in a filthy smoking car, peaceably and lawfully, and without being forbidden, entered the ladies' car, in which there were

many vacant seats, and, when about to occupy one of these, without having been first requested to leave the car, was rudely and violently seized by the defendant's brakeman and forcibly thrust from the car to the platform; that the train was then crossing a river, though, from the construction of the platform, the peril to plaintiff from that circumstance was slight; that the assault was committed in the presence of a number of ladies and gentlemen; that plaintiff's cane, and a ring on one of his fingers, were broken, and the broken ring cut the finger to the bone, making a ragged wound; that the back of one of his hands was lacerated or bruised so that blood flowed from the wound; and that one arm was somewhat bruised, and showed extravasation for three weeks thereafter. Under instructions, which did not allow exemplary damages, plaintiff had a verdict and judgment for \$4,500. *Held*, excessive. *Bass v. Chicago and Northwestern R'y Co.*, 39 Wis., 636, 1876; 18 Amer. R'y Rep., 414; *Bass v. Chicago and Northwestern R'y Co.*, 36 Wis., 450, 1874; 9 Amer. R'y Rep., 101.

236. — *Held*, on a new trial, that the injury was one which, in an action against the brakeman, would sustain a verdict for punitive damages, and, if the company ratified his act, it was likewise liable for such damages. *Bass v. Chicago and Northwestern R'y Co.*, 42 Wis., 654, 1877; 15 Amer. R'y Rep., 45.

237. — A regulation of the defendant company, by which one car on each passenger train is set apart, primarily, for the use of women and men traveling with them, is reasonable and proper. *Bass v. Chicago and Northwestern R'y Co.*, 36 Wis., 450, 1874; 9 Amer. R'y Rep., 101.

238. — A brakeman was stationed by the defendant at the entrance to one of its passenger cars with orders to notify gentlemen not in charge of ladies that such car was reserved, and direct them to cars forward. Plaintiff entered the car after receiving such notice, and was ejected therefrom. *Held*, that, although the brakeman, in removing plaintiff, exceeded the orders given him, the presumption was that, in doing it, he was acting within the scope of his authority, and a refusal to non-suit plaintiff on the

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ground that he was not was proper. *Peck v. N. Y. Central and Hudson River R. R. Co.*, 6 Thompson & Cook (N. Y. Supreme Ct.), 436, 1875; 8 Hun (N. Y.), 286, 1876; 4 Hun (N. Y.), 236, 1875; 70 N. Y., 587, 1877.

239. Manner of removal. Where the legal right of a conductor of a railroad train to eject or remove a passenger from the cars exists, he must effect the removal at a proper place and in a proper manner, and with no more confusion, force or violence than is reasonably necessary for the purpose. *Galena v. Hot Springs R. R. Co.*, 13 Federal Reporter, 116, 1882; 4 McCrary, 371.

240. — Before a conductor can require a passenger to get off the cars he should stop the train at a station or depot, or where he could be put off without injury or danger of injury. He has no right to forcibly eject a passenger at such place and in such a manner as his whim, caprice or malice may dictate or suggest. *Ib.*

241. — If one goes upon a train intending, in good faith, to become a passenger, the conductor, while he has the undoubted right to put him off if the rule of the company prohibits the carrying of passengers on that train, has no right for that reason to eject him violently, or in such a manner as to imperil his life, as by pushing or ordering him off while the train is in motion; and if he does, the company is responsible in damages for any resulting injury. *Brown v. Hannibal and St. Joseph R. R. Co.*, 66 Mo., 588, 1877.

242. — Where a passenger lawfully on a railway train conducts himself in an orderly and decent manner, and pays or offers to pay the fare fixed by the company, his expulsion from the cars by the conductor in a forcible manner is unjustifiable, and being so, the company will be held liable for an assault and battery in a civil action. *Chicago, Burlington and Quincy R. R. Co. v. Bryan*, 90 Ill., 126, 1878.

243. Misconduct of passenger. When a passenger, because not furnished a seat in a car already filled with passengers, abused the conductor in a violent manner, with profane language, and struck the conductor without any excuse whatever, and, on account of his misconduct, and refusal to pay his fare or deliver his ticket, the passenger

was ejected from the train, *held*, that such ejection was justifiable. *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Van Houten*, 48 Ind., 90, 1874.

244. Misinformation from ticket agent. Where a passenger took passage to B., upon the information from the company's ticket agent that the train would take him to that station, and upon giving up his ticket he was told by the conductor that the train would not stop at B., and the passenger was ejected from the car before arriving at B., such expulsion occurring after he had been notified and requested by the conductor to leave the train at the nearest stopping place before reaching B., *held*, that the passenger could claim no damages for the expulsion, in the absence of unnecessary violence, but could only claim damages for the negligence of the agent who misinformed him as to the sale of the ticket. *Lake Shore and Michigan Southern R'y Co. v. Pierce*, 47 Mich., 277; 3 Amer. & Eng. R. R. Cases, 340, 1882. The same principle recognized. *Yorton v. Milwaukee, Lake Shore and Western R'y Co.*, 54 Wis., 234, 1882; 6 Amer. & Eng. R. R. Cases, 322.

245. Mistake of employe. The plaintiff, a passenger on the defendant's line of railway, sustained injuries in consequence of being violently pulled out of a railway carriage by one of defendant's porters, who acted under an erroneous impression that the plaintiff was in the wrong carriage. The defendant's by-laws did not expressly authorize the company's servants to remove any person being in a wrong carriage, but they provided that no person should be allowed to enter any carriage or to travel therein without having first paid his fare and taken a ticket. They likewise provided that the porters should act under the orders of the station-master, etc., and do all in their power to promote the comfort of the passengers and the interests of the company. *Held*, that the act of the porter in pulling the plaintiff out of the carriage was an act done within the course of his employment as the defendant's servant, and one for which it was therefore responsible. *Bayley v. Manchester, Sheffield and Lincolnshire R'y Co.*, Law Reports, 7 Common Pleas Cases, 415; 3 Eng. (Moak), 308; 4 Eng. (Moak), 384,

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1872; *Same v. Same*, Law Reports, 8 Common Pleas Cases, 148, 1873.

246. Mother and child. In a suit by a child twenty-seven months old against a railroad company for expelling him from its train, the fact that the conductor may have used improper language to the mother of such child at the time of the expulsion will not authorize the finding of exemplary damages. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Dewin*, 86 Ill., 296. 1877.

247. Non-payment of fare. A passenger who refuses to pay his fare becomes a mere trespasser. *Stone v. Chicago and Northwestern R. Co.*, 47 Ia., 82. 1877.

248. — The plaintiff purchased from the defendant a ticket from Lockport to Troy. There are two routes on defendant's road between Rochester and Syracuse, one direct, and the other by Auburn, which is twenty-three miles longer. The defendant was accustomed to carry all through passengers over the direct route. Plaintiff having, at Rochester, taken a train upon the Auburn branch, was requested by the conductor to pay additional fare for the extra distance, and, upon his refusal so to do, was put off the train. *Held*, that he had no right to insist upon passing over the longer route without paying additional fare, and that he should have been non-suited. *Bennett v. New York Central and Hudson River R. R. Co.*, 5 Hun (N. Y.), 599, 1875; *Bennett v. New York Central and Hudson River R. R. Co.*, 69 N. Y., 594, 1877.

249. — A railway company is under no obligation to transport a person who has innocently purchased his ticket with counterfeit money, and may eject such person from the train if he refuses to rectify the wrong. *Memphis and Charleston R. R. Co. v. Chastine*, 54 Miss., 503. 1877.

250. — It was held to be error to charge the jury that if the conductor received and retained the fare tendered by the passenger, he was not justified in expelling such passenger for a refusal to pay the additional sum demanded. But in this case the passenger was not expelled until he had ridden far enough, so that at the regular rates the money paid could have been earned by the company. *Hoffbauer v. Davenport and Northwestern R'y Co.*, 52 Ia., 342. 1879.

251. — Where, in violation of an unquestioned by-law, a party took his seat in a railway carriage without having first paid his fare and obtained a proper ticket, and refused to leave when requested to do so by the company's servants, *held*, reversing the decision of the court of queen's bench, that the company was justified in removing him from the carriage, though he had, when challenged by the company's servants, offered to pay the fare. *McCarthy v. Dublin, Wicklow and Wexford R'y Co.*, 5 Irish Reports, Common Law, 244. 1870.

252. — The expulsion of a passenger for non-payment of fare held to be too hasty. *Curl v. Chicago, Rock Island and Pacific R. R. Co.*, 11 Amer. & Eng. R. R. Cases (Ia.), 85. 1883.

253. — Although a company may fix the rate for passage when paid on the cars at a higher rate than when paid at the ticket office, yet when the car rate is in excess of the rate authorized by law, the passenger need only tender the ticket rate in order to entitle him to remain on the cars. *Smith v. Pittsburgh, Fort Wayne and Chicago R. R. Co.*, 23 Ohio St., 10. 1872.

254. — Whether the rate of passenger fare fixed by a railroad company under § 12 of the act of February 11, 1848 (S. & C. 271), for distances less than thirty miles, be reasonable or not, is a question of fact for the jury, to be determined under such instructions by the court as the circumstances of the particular case may require. *Id.*

255. — If a railway company advertises to carry passengers purchasing tickets at a less rate than the regular fare, it is not bound to keep its ticket office at a particular station open after the time when a train of cars is advertised to leave that station, and if a person arrives after that time, and enters the train without a ticket, he may, in accordance with the regulations of the corporation, be expelled for refusing to pay full fare, although he was unable to procure a ticket in consequence of the ticket office being closed. *Swan v. Manchester and Lawrence R. R. Co.*, 132 Mass., 116, 1882; 6 Amer. & Eng. R. R. Cases, 327.

256. — Where a passenger, having time to do so, fails to obtain a ticket, or to ascertain the rules of the company in regard to

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the payment of fare on the train, and the conductor demands of him more than what he supposes is the regular fare, he should pay the same and investigate the matter afterward; and, upon his refusal so to do, the conductor may eject him from the train. *Toledo, Wabash and Western R'y Co. v. Wright*, 68 Ind., 586. 1879. See, also, *Chicago, Burlington and Quincy R. R. Co. v. Griffin*, 68 Ill., 499. 1873.

257. — The issue made by the parties was, whether the conductor put the plaintiff off the car while it was in motion. The court instructed the jury as follows: "The jury are instructed that if they believe, from the evidence, that the plaintiff had not paid or offered to pay his fare from Elkhart to South Bend, then the defendant would not be warranted in throwing the plaintiff from the train, in a way to endanger his life or limb, or throw him off while the train was in motion." *Held*, that the instruction assumed as fact the very matter in contest, and was calculated to prejudice the defendant. *Michigan Southern and Northern Indiana R. R. Co. v. Shelton*, 66 Ill., 424. 1872.

258. — The plaintiff got upon the train without a ticket, and, when his fare was demanded, declined to pay at the time on the ground that he had not yet made up his mind how far he would go. The conductor demanded of him that he should pay to some place on the line. On his refusal, the train was stopped, and, as he was being put off, he tendered a \$20 gold piece and offered to have \$1.35 taken out, that being the fare to Cornwall. The conductor ejected him from the train. *Held*, that the action of the conductor was justifiable. *Fulton v. Grand Trunk R'y Co.*, 17 Upper Canada (Queen's Bench), 428. 1859.

259. — A passenger, who had not procured a ticket previous to entering the train, handed the conductor a \$10 bill to pay his fare of \$6.20; in making the change the conductor handed him \$5 too much. Upon the demand of the conductor that the mistake be corrected, M. refused and declined to examine his change to ascertain if the conductor's claim of mistake was correct. When he had rode as far as the payment made entitled him to ride he was directed to leave the train, and did so. *Held*, that, having

the means at hand to determine whether or not the mistake had been made, and failing to use them, he was not entitled to damages for expulsion from the train. *McCarthy v. Chicago, Rock Island and Pacific R. R. Co.*, 41 Ia., 432. 1875.

260. Offer to pay fare. A person on a train refusing to produce a ticket or pay his fare, subsequently changing his mind, and tendering full fare, would be entitled to continue his journey on the train. But if the refusal be accompanied by violent and abusive conduct, whereby the conductor is compelled to stop the train for the purpose of putting him off, he may forfeit such right, and the conductor, using proper discretion, may remove such person, notwithstanding tender of full fare is then made. *Gould v. Chicago, Milwaukee and St. Paul R'y Co.*, 18 Federal Reporter, 155, 1883; *Haffbauer v. Davenport and Northwestern R'y Co.*, 52 Ia., 342, 1879; *Louisville, Nashville, etc., R. R. Co. v. Harris*, 9 Lea (Tenn.), 180, 1882; *Thomas v. Geldart*, 4 Pugsley & Burbridge (New Brunswick), 95, 1880; *O'Brien v. New York Central and Hudson River R. R. Co.*, 80 N. Y., 236, 1880; 1 Amer. & Eng. R. R. Cases, 259; *Nelson v. Long Island R. R. Co.*, 7 Hun (N. Y.), 140, 1876.

261. — A passenger who gets upon the cars of a railroad company in good faith, in ignorance of the fact that a tax certificate would not pay his fare, having no intention to impose upon the carrier, cannot be treated as a mere trespasser, but on failure or refusal to pay his fare, after request and after reasonable opportunity allowed to comply, he may be ejected or put off the cars by the conductor; but if before eviction another person offer to pay the fare, the carrier is bound to receive the fare and convey the passenger. *Louisville and Nashville R. R. Co. v. Garrett*, 8 Lea (Tenn.), 438, 1881; *South Carolina R. R. Co. v. Nix*, 68 Ga., 572, 1882.

262. — When a passenger has been ejected from the train and purchases a ticket from the point at which he has been ejected, and attempts to re-enter the train, he must pay fare from the point at which he just entered the train, before he can insist on being carried forward on the same train. *Stone v. Chicago and Northwestern R. R. Co.*, 47 Ia., 82. 1877.

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263. — A railway company as a carrier is entitled to receive its fare as a condition precedent to carrying passengers; but when this is paid or offered to be paid, the duty is imperative on the carrier, where no legal objection to the passenger exists. An offer to pay the fare of a passenger by a third party while the conductor is on his way out with the passenger, and before actual ejection, must be accepted by the conductor, and ejection after such offer is unlawful where there is no captious or factious or vexatious refusal to pay, but only an inability growing out of a mistake. *Garrett v. Louisville and Nashville R. R. Co.*, 3 Amer. & Eng. R. R. Cases (Tenn.), 416. 1851. See, also, *O'Brien v. New York Central and Hudson River R. R. Co.*, 80 N. Y., 236, 1880; 1 Amer. & Eng. R. R. Cases, 259.

264. — Where a passenger tenders a railway conductor a certain amount of fare to be carried to a certain station, which is less than the rate fixed by the company, saying he will pay no more, and the conductor retains enough to take the passenger to an intermediate station and returns the balance, the passenger will have the right, on reaching such intermediate station, to pay the fare demanded from that point to the place of his destination, and upon his offering to pay the same he cannot rightfully be put off the train. *Chicago, Burlington and Quincy R. R. Co. v. Bryan*, 90 Ill., 126. 1878.

265. — If a passenger be ejected from a train for failure to pay his fare, and after the train is in motion he tenders it, the conductor is not bound to stop the train to receive his fare and take him on board; if the tender were made while the train was standing still, the conductor was bound to receive the fare and admit the passenger. *South Carolina R. R. Co. v. Nix*, 68 Ga., 572. 1882.

266. — A passenger who enters a car at one station, and is properly expelled from it, for non-payment of fare, at a second station, is not entitled to be carried to a third station by the same train of cars, by tendering the fare between the second and third stations. *Swan v. Manchester and Lawrence R. R. Co.*, 132 Mass., 116, 1882; 6 Amer. & Eng. R. R. Cases, 327.

267. Place of expulsion. Action will lie and damages be awarded for putting off a

passenger at other than a regular station. *Toledo, Peoria and Warsaw R. R. Co. v. Patterson*, 63 Ill., 304, 1872; 7 Amer. R'y Rep., 168.

268. — The statute authorizing the expulsion of passengers who refuse to pay their fare provides that this may be done at any "usual stopping place." Paschal's Dig., art. 4892. Held, that this did not refer to a wood or water station, but to a place where passengers were received. *Texas and Pacific R. R. Co. v. Casey*, 52 Tex., 112. 1879.

269. — Section 28 of the general law of Indiana for the incorporation of railway companies (1 R. S. 1876, p. 709), which provides that, "If any passenger shall refuse to pay his fare or toll, the conductor of the train and the servants of the corporation may put him out of the cars at any usual stopping place," is permissive and not prohibitory. The passenger may be expelled at a place other than a station. *Toledo, Wabash and Western R'y Co. v. Wright*, 68 Ind., 586. 1879. See, also, *Baltimore, Pittsburgh and Chicago R. R. Co. v. McDonald*, 68 ib., 316. 1879.

270. — A regular station is not an improper place to eject a passenger, although there may not be a hotel for public accommodation at that place. *Hall v. Memphis and Charleston R. R. Co.*, 15 Federal Reporter, 57, 1882; 9 Amer. & Eng. R. R. Cases, 348.

271. — The rule that railroad companies have no right to expel a passenger except at a regular station, though correct as a general rule of law, is not applicable in all cases. Appellee had been once thrust off the train at a regular station, and as the cars were moving out from that station he again leaped on to the train. Under such circumstances, he was not in all respects entitled to the same consideration as if he had not been once expelled for neglecting to comply with the rules of the company. He occupied quite a different position from that of a person who might enter the cars under a mistaken notion that he had a right to do so. *Chicago, Burlington and Quincy R. R. Co. v. Boger*, 1 Bradwell (Ill.), 472. 1877.

272. — Evidence that a conductor allowed plaintiff to ride past several stations and ejected him at a place remote from shelter in

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a storm, etc., is proper for the jury in considering whether the conductor selected such place intentionally. *Vankirk v. Pennsylvania R. R. Co.*, 76 Pa. St., 66. 1874.

273. — A railway company cannot be subjected to liability for the ejection of a recusant passenger at a point remote from a station, if, in other respects, and under all the circumstances, reasonable care and prudence are exercised in the act. *Brown v. Chicago, Rock Island and Pacific R. R. Co.*, 51 Ia., 235. 1879.

274. Pleading and practice. Where a complaint against a railway company, for an injury to the plaintiff, shows that he was rightfully upon the defendant's train as a passenger, and alleges that the servants and agents of the defendant wrongfully struck and threw him from the cars, it will sufficiently show that the wrong complained of was committed by the employes of the defendant in their business of running the train. *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Theobald*, 51 Ind., 246. 1875.

275. — To maintain an action of trespass *vi et armis* against an employer, it must appear that the particular injury or act of trespass of the employe was done by his command or with his assent. *Allegheny Valley R. R. Co. v. McLain*, 91 Pa. St., 442, 1879; 1 Amer. & Eng. R. R. Cases, 464.

276. — An action for damages, joined with an action for a penalty for an overcharge, held not to be improper, because the cause of action set up in the claim for a penalty was invalid. *Sullivan v. N. Y., New Haven and Hartford R. R. Co.*, 19 Blatchford (U. S. C. C.), 388; 61 Howard's Practice (N. Y.), 490. 1881.

277. — A complaint sought a recovery for sickness and bodily and mental suffering of the plaintiff wife, and for mental suffering and expense and trouble on the part of the plaintiff husband growing out of the illness of the wife, alleged to have been caused by the neglect of defendant's employes in directing plaintiffs to leave a train before they had reached their destination; and the action was held to be in tort for the negligence, and not upon the contract of carriage, notwithstanding allegations which show a contract relation between the parties, and that defendant "wholly disregarded its duty in the

premises and its contract and obligations to and with the plaintiffs." *Brown v. Chicago, Milwaukee and St. Paul R'y Co.*, 54 Wis., 342, 1882; 3 Amer. & Eng. R. R. Cases, 444.

278. — The fact, therefore, that defendant's employes did not know the delicate state of health of the wife at the time of the alleged wrong, would not relieve defendant from liability for the actual, direct consequences of such wrong. *Ib.*

279. — When a railway company engages to carry a passenger, and, after taking him on the train, wrongfully puts him off, the action of trespass on the case will lie. *Emigh v. Pittsburgh, Ft. Wayne and Chicago R. R. Co.*, 4 Bissell (U. S. C. C.), 114. 1867.

280. — Pleadings considered and held insufficient, there being a fatal variance. *Chicago, Burlington and Quincy R. R. Co. v. Wilcox*, 12 Bradwell (Ill.), 42. 1882.

281. — Practice in such cases considered. *Murphy v. Boston, Clinton and Fitchburg R. R. Co.*, 110 Mass., 465. 1872.

282. Refusal to ride in smoking car. Where a train consisted of two cars, one of which was a smoking car, and the other car being already filled with passengers, a passenger has no right to demand a seat in the latter car, and to refuse to pay his fare or deliver his ticket unless furnished a seat therein; and if he refuses, under such circumstances, to deliver his ticket or pay his fare, the persons in charge of the train may rightfully eject him therefrom. *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Van Houten*, 48 Ind., 90. 1874.

283. Resistance by passenger. While resistance to the authority of a conductor does not preclude a passenger from recovering reasonable damages for a wrongful ejection from the train, it is his duty, certainly where he is in the wrong, to submit without resistance, except in defense against impending bodily injury; and, right or wrong, necessary resistance will excuse the use of force and mitigate the damages for any injury received. *Hall v. Memphis and Charleston R. R. Co.*, 15 Federal Reporter, 57, 1882; 9 Amer. & Eng. R. R. Cases, 348.

284. — A charge that plaintiff had a right to resist the conductor's attempt to put him off the car, if he was rightfully there, is

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proper. And if he is injured by the use of the force necessary to remove him, he can recover damages therefor. *English v. Delaware and Hudson Canal Co.*, 4 Hun (N. Y.), 683, 1875; affirmed, 66 N. Y., 454, 1876.

285. — A passenger has the right to resist an attempt to eject him from a train for non-payment of fare, made when the train is in motion, so that his being put off would subject him to great peril. *Ib.*

286. Return of money paid after expulsion. The plaintiff entered the defendant's cars without procuring a ticket, and handed to the conductor the ticket fare. The conductor thereupon demanded of the plaintiff the additional amount required by the rules of the company to be paid by persons paying on the train, and, on the plaintiff's refusal to pay, ejected him from the cars, and then returned him his money. *Held*, that the conductor had no right to eject the plaintiff without first returning the money which he had paid. *Bland v. Southern Pacific R. R. Co.*, 55 Cal., 570, 1880; 3 Amer. & Eng. R. R. Cases, 285.

287. Right of removal. A passenger wrongfully upon a train may be removed, and the corporation will only be liable for unnecessary violence. *Lake Shore and Michigan Southern R'y Co. v. Pierce*, 47 Mich., 277, 1882; 3 Amer. & Eng. R. R. Cases, 340; *Shelton v. Lake Shore and Michigan Southern R'y Co.*, 29 Ohio St., 214, 1876.

288. Tickets. Where a passenger has purchased a ticket and applies for passage, the employees of a railway company have no discretion, but are bound to carry him according to the terms of the ticket. If the holder of the ticket deports himself properly, the company has no right to refuse the ticket, or, so long as he deports himself properly, to eject him from the train before reaching the station named in the ticket. *Churchill v. Chicago and Alton R. R. Co.*, 67 Ill., 390, 1878.

289. — It is the duty of the agents of a railroad company to ascertain whether a passenger has purchased a ticket before ejecting him from the cars; their negligence in this respect cannot be pleaded or urged as a defense, nor considered in mitigation of damages. *Quigley v. Central Pacific R. R. Co.*, 11 Nev., 350, 1876.

290. — If it afterwards turns out that the passenger had a ticket, then no matter how much the agent was mistaken, nor how honestly he may have believed that the passenger had not paid for his ticket, or how little force was used in ejecting the passenger, the act was nevertheless unlawful and wrong, and for any injury which the passenger received on account of such expulsion he is entitled to full compensation in damages. *Ib.*

291. — In an action for damages against a railroad company for ejecting plaintiff from defendant's cars, evidence that a friend of plaintiff offered to pay the amount claimed by the conductor, while the latter was attempting to put plaintiff off the train for refusal to pay his fare, was not proper evidence to show that plaintiff was from that time entitled to remain on the train, notwithstanding such refusal to pay in the first instance. In such suit evidence that plaintiff had made an ineffectual attempt to procure a ticket before entering the train, although incompetent to show his right to remain on the cars without payment of fare, would be proper, nevertheless, in order to show his good faith in getting aboard without his ticket, and as a part of the *res gestæ*. *Perkins v. Missouri, Kansas and Texas R. Co.*, 55 Mo., 201, 1874.

292. — A passenger purchased a ticket from one not the agent of the road, which was issued by one who was the general ticket agent of another railway company. The agent issuing the ticket was authorized, by custom among railroads, only to issue tickets of a certain prescribed form. The ticket purchased was not of the prescribed form, and on being presented was not accepted by the conductor, who ejected the passenger from the car after the train had proceeded a few miles from the station, on his refusing to pay his fare as a passenger. On appeal by the railway company from a judgment for \$750 damages against it, it was held that, the ticket having been issued by one who at most occupied to the defendant company the relation of special agent, the passenger purchased the ticket at his own peril. The ticket when presented being detached from the stub, and having printed on it the words "not good if detached," the

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conductor acted properly in rejecting it. *Houston and Texas Central R. R. Co. v. Ford*, 53 Tex., 364, 1880; 2 Amer. & Eng. R. R. Cases, 514.

293. — drover's pass. A passenger who presents to the conductor a "stock pass" from the railroad company, which entitles him to return on its road without payment of fare, can recover damages sustained by him, when so returning, caused by his expulsion from the cars by the conductor for non-payment of the fare, although no physical force was used, and the conductor acted under an honest misunderstanding of the rules of the company in regard to such passes, and although the passenger stated his intention to stop at a station short of that to which his pass entitled him to return. *Graham v. Pacific R. R. Co.*, 66 Mo., 536. 1877.

294. — excursion ticket. Where the plaintiff purchased an excursion ticket with the printed condition, "Good this day only on all trains, except the Boston express trains," and was expelled from the Boston express train for non-payment of fare, *held*, that he had no cause of action. *Nolan v. N. Y., New Haven and Hartford R. R. Co.*, 41 N. Y. Superior Ct., 541. 1876.

295. — The plaintiff purchased from defendant at Patchogue an excursion ticket to Brooklyn which read, "Good until three days after date. Excursion ticket," and on the same rode to Brooklyn. On the following day he took a train from Brooklyn, which arrived at Babylon late at night and did not connect with any train for Patchogue. He drove to the next station east, remained there over night and in the morning took a train for Patchogue, from which he was without violence ejected by the conductor, in compliance with a regulation of the company providing that stop-over checks should not be given on excursion tickets. *Held*, that the company was authorized to remove him, and that he was not entitled to recover. That plaintiff, under his contract with the company, could only demand a continuous passage. *Terry v. Flushing, North Shore and Central R. R. Co.*, 13 Hun (N. Y.), 359. 1878.

296. — land exploring tickets. G., a resident of Lincoln, Neb., purchased in Chi-

cago a land exploring ticket, with coupons attached, to Lincoln and return, of an agent of the B. and M. R. R. Co. in Neb., for \$23.75, the regular fare to Lincoln being \$18.75. The ticket contained provisions that it was to be used only by the purchaser, who was to sign his name to the same whenever requested to do so by the conductors of the train. *Held*, 1. That a resident of this state, if he made no misrepresentations in purchasing the same, could purchase and use such ticket, but no one but the purchaser could use it; 2. That possession of the ticket was *prima facie* evidence of ownership, and that the failure of the plaintiff to sign his name to the contract on the ticket, there being no evidence that he had been requested to do so, did not invalidate the ticket, as the signature was merely a mode of identifying the purchaser; 3. That the rules and regulations of the company could not be pleaded as an excuse for not performing an express contract; that, even if the ticket was obtained by false representations, the contract was voidable, not void, and the company could not retain the excess over regular fare, and refuse to perform the contract; nor would the failure of the agent to require the purchaser to sign the contract invalidate the ticket, notwithstanding these rules, if the company retained the consideration. *Gregory v. Burlington and Missouri River R. R. Co.*, 10 Neb., 250, 1880; 1 Amer. & Eng. R. R. Cases, 270.

297. — limited ticket. A passenger holding a ticket, the limitation of which has expired, cannot insist that the conductor shall take it, in violation of a regulation of the company requiring the conductor to demand train fare of persons without tickets, although he may have an understanding or contract with the station agent of whom the ticket was purchased, that it would be received after the time limited on the face of it; and on the refusal to pay the fare ejection from the train was not wrongful. And the measure of damages, in a suit for a breach of the alleged contract, is, in the absence of proof of any special damage by delay, only the price of the extra fare demanded and paid for transportation to the place of destination. *Hall v. Memphis and Charleston R. R. Co.*, 15 Federal Reporter,

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57, 1882; 9 Amer. & Eng. R. R. Cases, 343.

298. — A ticket for a continuous passage over several connecting lines construed, and held good for a separate continuous passage over any one of the lines. The expulsion of a passenger holding such a ticket, held to be wrongful. *Auerbach v. N. Y. Central and Hudson River R. R. Co.*, 89 N. Y., 281, 1882; 6 Amer. & Eng. R. R. Cases, 334.

299. — **lost ticket.** A rule, requiring a conductor to eject passengers who refuse to produce tickets or pay fare on demand, is a reasonable one, and the purchaser of a non-transferable commutation ticket, who has lost it, and refuses, on account of such loss, to pay his fare upon a train, falls within the rule, and cannot maintain an action of tort against the company to recover damages for being ejected by the conductor for a non-compliance with it. *Crawford v. Cincinnati, Hamilton and Dayton R. R. Co.*, 26 Ohio St., 580, 1875; 13 Amer. R'y Rep., 387.

300. — A passenger lost his ticket, and, on being called on for it, could not produce it, and, after the conductor had rung the bell to stop the train to put him off, he offered to pay his fare, which was refused, and the passenger was ejected from the train. A verdict of \$300 damages was permitted to stand. *Curtis v. Grand Trunk R'y Co.*, 12 Upper Canada (Common Pleas), 89. 1862.

301. — **mistake of ticket agent.** Plaintiff paid for three tickets, for himself and two others with him, but, by mistake of the ticket agent, he received only two. The train being ready to start, he got on it, and handed the two tickets to the person with him. When the conductor applied to plaintiff for his ticket he was told by plaintiff that he (plaintiff) had paid for a ticket, but did not receive it. *Held*, that the conductor had the right to require plaintiff to pay his fare, and, in case of refusal, to expel him from the train. *Weaver v. Rome, Watertown and Ogdensburg R. R. Co.*, 3 Thompson & Cook (N. Y. Supreme Ct.), 270. 1874.

302. — Whether an action for damages for breach of contract might not lie for expelling a passenger who had paid for a ticket to a certain point, but had been given one for a shorter distance, query? But it

must not be based on the conductor's refusal to accept a correct ticket, if he really respects the ticket presented, for the distance it actually covers. *Frederick v. Marquette, Houghton and Ontonagon R. R. Co.*, 37 Mich., 342. 1877.

303. — **Ohio statute.** Where a passenger presents to the conductor a ticket issued by the railway company, authorizing him to ride from one to another designated station, "only on such trains as stop regularly at both stations," and is ejected from the cars by such conductor between such stations, it will be no defense to the passenger's action against the company for damages, that by the regulations of the company the train on which he was traveling did not stop at the latter station, if the ticket was issued since the passage of the act of 1867, and such station was in a municipal corporation which, at the time the ticket was issued, had a population of three thousand inhabitants, and the passenger believed when he took passage on the train that it stopped at both stations. *Pennsylvania Co. v. Wentz*, 37 Ohio St., 333, 1881; 3 Amer. & Eng. R. R. Cases, 478.

304. — **overcharge.** In an action against a railroad company for an illegal expulsion from its train, an allegation in the petition that the price of the ticket was seventy cents, and that the plaintiff, in the train, when a ticket or fare was demanded by the conductor, tendered this amount, which was refused, and that the conductor, for the purpose of robbing and oppressing him, demanded one dollar and five cents, and upon his failure to pay it compelled him to leave the train, makes out *prima facie* a good cause of action; and it will not, on demurrer, be presumed that the company had made a distinction between ticket-fare and train-fare, and that the one dollar and five cents was train-fare, as fixed by the company. *Avery v. Atchison, Topeka and Santa Fe R. R. Co.*, 11 Kans., 448. 1873.

305. — **stop-over tickets.** If the passenger asks the proper conductor for a stop-over ticket, and, through the conductor's fault, receives instead only a trip check, the second conductor may still demand of him the additional fare, and, upon his refusal to pay it, may eject him from the train at some usual stopping place, using no unnecessary

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force; and such ejection will be no ground of recovery against the company, though such company will be liable to the passenger for the fault of the first conductor. *Yorton v. Milwaukee, Lake Shore and Western R'y Co.*, 54 Wis., 234, 1882; 6 Amer. & Eng. R. R. Cases, 322. The same principle recognized. *Lake Shore and Michigan Southern R'y Co. v. Pierce*, 47 Mich., 277, 1892.

306. — Where a passenger is informed by the conductor that he may get off at a station and continue his journey by the next train upon the same ticket, and the passenger, relying upon the statement, leaves the train at that station, the company is bound to carry him on the next train to the end of his route upon that ticket, and is estopped from denying the authority of the conductor to make such agreement. *Tarbell v. Northern Central R'y Co.*, 24 Hun (N. Y.), 51, 1881.

307. — The regulations of the defendant required that a passenger's ticket should be indorsed by the conductor if he desired to stop over at a way station, and resume his journey on another train. Plaintiff, a passenger on a through train to New York, desiring to stop over at Little Falls, applied to the conductor of the train on which he was traveling to have his ticket so indorsed, and was told by him it was not necessary. Plaintiff stopped over at Little Falls, and resumed his journey on another train of the defendant, and, without applying to the conductor of that train to have his ticket indorsed, again stopped over at Amsterdam. On attempting to resume his journey from Amsterdam on another train, the conductor refused to recognize his ticket, because it was not indorsed in accordance with the company's regulations, and ejected him for non-payment of his fare. *Held*, that the privilege granted him by the conductor of the train on which he first embarked, of stopping over at a way station, without having his ticket indorsed as required by the company's regulations, was exhausted by his stopping over at Little Falls, and that, when he again embarked, he became subject to all the company's regulations, and that he could not again stop over at a way station without having his ticket indorsed. *Denny v. New*

York Central and Hudson River R. R. Co., 5 Daly (N. Y.), 50, 1874.

308. — The plaintiff was riding in the cars by virtue of a ticket that did not give him a right to a discontinuous passage. Having stopped at an intermediate point, and having entered another train, he claimed the right to continue his journey on such ticket, under permission given by a conductor of the first train. Refusing to pay his fare, he was put off, it appearing that only train agents had the power to modify the force of such tickets. *Held*, such expulsion was justifiable, although, at the trial, the plaintiff testified that it was, in point of fact, a train agent, and not a conductor, that had given him the privilege claimed. *Petrie v. Pennsylvania R. R. Co.*, 42 N. J. Law, 449, 1880; 1 Amer. & Eng. R. R. Cases, 258.

309. — A rule requiring a passenger to obtain a stop-over check if he desires to break his journey is a reasonable one. A passenger has no right to travel on a train upon the individual check of a conductor given him upon another train. *Breen v. Texas and Pacific R. R. Co.*, 50 Tex., 43, 1878.

310. — **return ticket.** "Return tickets" by the rules of the company were not good for use upon Sunday trains. These rules were published with the time-tables, and posted in the depots of the company. *Held*, that the regulation was sufficiently published, and the company was justified in expelling a passenger who insisted upon traveling upon such a ticket upon Sunday. *Highland R'y Co. v. Menzies*, 5 Scotch Session Cases (4th series), 887, 1878.

311. — Where A., a railway company, sold a ticket to B., good for a trip from C. to D. over A.'s road and E.'s road, with which A.'s connected, and also good for a return trip on condition that B. should, within a specified time, identify himself to E.'s authorized agent at D., and have his ticket dated and signed in ink and stamped by such agent, and B., in a suit against A. for damages, set forth said facts in his petition, and alleged that within the specified time he presented himself and the ticket "at the business office and depot" of E. at D., before the time of departure of E.'s train for C.,

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which he desired to take, and offered to identify himself and have the ticket stamped, etc., "and in all manner fully complied with the terms of said contract on his part," but that the defendant and E. failed to have an agent present then and there at said office for that purpose at any time between the time the plaintiff so presented himself and his ticket and the arrival of the train for C.; that B. proceeded on said train, however, and explained the circumstances to the conductor, who agreed to let him ride as far as X., an intermediate point, but subsequently, instead of so doing, ejected him from the train,—*held*, on demurrer, that no sufficient excuse for B.'s non-compliance with the conditions of his ticket was given; that the conductor had no power to pass upon B.'s excuses; and that, therefore, the petition did not state a cause of action. *Mosher v. St. Louis, Iron Mountain and Southern R'y Co.*, 17 Federal Reporter, 880. 1883.

312. — In an action against a railway company to recover damages for the ejection of the plaintiff from a train by the conductor, the evidence showed that the plaintiff had purchased a round-trip ticket of the defendant's agent at one of its stations, entitling him to a passage to and from another station on the line of the defendant's railway; that shortly after entering the car a man came along, asked for the ticket, which was given him, tore it in two, handing back one and keeping the other part thereof; at about eleven o'clock the same night the plaintiff entered a car on the defendant's line to return to the station at which he had purchased the ticket, handed the conductor the part of the ticket returned to him by the man on the first train, which the conductor refused to accept, and upon the plaintiff's refusal to pay the fare demanded, notwithstanding his explanation and remonstrance, forcibly ejected him from the car. The man who took the ticket on the first train was a brakeman in charge thereof, instead of the conductor, who, to avoid an arrest, was concealed on the engine. The brakeman testified that he supposed that one-half of the ticket was good for a ride either way. The behavior of the plaintiff was orderly and gentlemanly. *Held*, that the plaintiff was entitled to damages; and

that \$600 was not excessive. *Lake Erie and Western R'y Co. v. Fix*, 88 Ind., 381, 1832; 11 Amer. & Eng. R. R. Cases, 109.

313. — **wrongful taking up of ticket.** T. purchased a ticket from S. to R., a station beyond P. The train on which he took passage only went to P., but his ticket was taken up before reaching P. At P. he took passage upon another train for R., and was expelled for non-payment of fare. *Held*, that defendant was liable for the damages. *Townsend v. N. Y. Central and Hudson River R. R. Co.*, 6 Thompson & Cook (N. Y. Supreme Ct.), 495, 1875; *Townsend v. New York Central and Hudson River R. R. Co.*, 4 Hun (N. Y.), 217, 1875.

314. — A regulation of a railroad company requiring passengers either to present evidence to the conductor of a right to a seat when reasonably required so to do, or to pay fare, is reasonable, and for non-compliance therewith a passenger may be lawfully put off the train. And the wrongful taking of the passenger's ticket by the conductor of a previous train in which the former has performed part of his journey does not exonerate him from compliance with this regulation. *Townsend v. New York Central and Hudson River R. R. Co.*, 56 N. Y., 295, 1874; 6 Amer. R'y Rep., 160.

315. — For the wrongful act of the former conductor the company is liable. It does not justify the passenger in violating the company's lawful regulations upon another train. *Ib.*

316. — The fact that a ticket was wrongfully taken up by a conductor will not relieve the passenger from the duty of providing himself with a ticket or paying fare on another train of the defendant in which he may be a passenger. In such case the right of action of the passenger would be for the wrongful taking up of the ticket and not for having been removed from a train by another conductor for refusing to pay fare. *Shelton v. Lake Shore and Michigan Southern R'y Co.*, 29 Ohio St., 214. 1876.

317. — Where a passenger upon a mixed train gave up his ticket to the conductor, who gave him a check for the same, and afterwards as the express train passed the mixed train at a station the passengers were directed by the conductor to get upon the

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express train, and stated that their checks would be received for passage, but the conductor of the express train refused to receive the check and ejected the passenger from the train for refusal to pay fare, *held*, that the passenger was entitled to damages for the expulsion. *Toledo, Wabash and Western R'y Co. v. McDonough*, 53 Ind., 289. 1876.

318. Unchastity of passenger. A state statute which abrogates all common law remedies for the wrongful exclusion from the cars of a railroad company is unconstitutional, so far as it relates to railroads running between two or more states, it being a regulation of interstate commerce that the state has no power to make. *Brown v. Memphis and Charleston R. R. Co.*, 5 Federal Reporter, 499, 1880; 1 Amer. & Eng. R. R. Cases, 247.

319. — A carrier of passengers may rightfully exclude a passenger whose conduct at the time is annoying, or whose reputation for misbehavior is so notoriously bad that it furnishes a reasonable ground to believe that the person will be offensive to other passengers; but the social penalties of exclusion of unchaste women from hotels, theaters and other public places cannot be imported into the law of common carriers, nor can the carrier classify his passengers according to their respective reputations for chastity, whether they be men or women. *Ib.*

320. — Where a woman was excluded from the "ladies' car" because she was of notoriously bad character, the defendant pleaded a reasonable regulation authorizing the exclusion, and that the plaintiff came within it. *Held*, that it is a mixed question of law and fact whether the regulation is reasonable or not, to be submitted to the jury, on proper instructions by the court, and that it will not be determined on demurrer. *Same v. Same*, 4 Federal Reporter, 37. 1880.

321. — Motion for new trial overruled, and a verdict of \$3,000 for the expulsion of the plaintiff sustained. *Same v. Same*, 7 Federal Reporter, 51. 1881.

322. Wilful acts. A railway company is liable for the wilful acts or torts of the conductor of a train and its other employees, acting under him, in ejecting a passenger, when such ejection is wrongful. *Terre*

Haute and Indianapolis R. R. Co. v. Fitzgerald, 47 Ind., 79, 1874; 8 Amer. R'y Rep., 282.

VIII. DAMAGES.

1. Death.

See INJURIES CAUSING DEATH.

323. Judgment. Claim, stating that plaintiff was administratrix of her husband L., who, being a season-ticket holder, was received by the defendant at its station to be conveyed as a passenger, and by its negligence was injured, and in consequence unable to attend to his business from that day to the day of his death, and incurred expense, etc. Defense, first, denying specifically all allegations in the statement relating to the injury to the deceased and the damage arising from it. And secondly, that, after the death of L., the plaintiff, as his administratrix, for the benefit of herself, as his wife, and of his children, sued the defendant in respect of the injury caused to them by his death, and recovered damages. Reply, that the defendant was estopped from denying the facts relating to the accident, as in the previous action they had pleaded not guilty, and that L. was not received by them as a passenger, and those issues were found by the jury in the plaintiff's favor. *Held*, on demurrer, first, that the second action was not barred by the judgment and satisfaction under the first; secondly, that there was no estoppel of which either party could take advantage, as the plaintiff sued in a different right in either action. *Leggott v. Great Northern R'y Co.*, Law Reports, 1. Queen's Bench Division, 599, 1876; 17 Eng. (Moak), 238.

324. — In this case the action embraced the damages up to the date of the death of the injured party, and the former action was brought for the damages occasioned by the death. *Ib.*

325. Measure of damages. Where a passenger on a railway was injured by an accident, and after an interval died in consequence, *held*, that his executrix might recover, in an action for breach of contract against the railway company, the damage to his personal estate arising in his life-time from medical expenses and loss occasioned

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by his inability to attend to business. *Bradshaw v. Lancashire and Yorkshire R'y Co.*, Law Reports, 10 Common Pleas Cases, 189. 1875.

2. Other damages.

326. Accident insurance. In an action for injuries caused by defendant's negligence, a sum received by the plaintiff on an accidental insurance policy cannot be taken into account in reduction of damages. *Bradburn v. Great Western R'y Co.*, Law Reports, 10 Exchequer Cases, 1, 1874; 11 Eng. (Moak), 330; *Baltimore and Ohio R. R. Co. v. Wightman*, 29 Grattan (Va.), 431, 1877.

327. Amount; whether excessive or not. A verdict for \$35,500 damages for an injury to a passenger held excessive. *Louisville and Nashville R. R. Co. v. Fox*, 11 Bush (Ky.), 495, 1875; 14 Amer. R'y Rep., 374.

328. — Where a passenger paid for a ticket to a certain station, but through inadvertence received a ticket to an intermediate point, and refused to pay the additional fare, which was only twenty cents, and refused to get off, and was put off by force, and immediately got aboard another coach, agreeing to pay, but while making change made use of grossly profane and obscene language, in the presence of ladies, for which he was again forcibly expelled, no more force being used either time than was necessary to overcome his resistance, it was held that a verdict, in a suit by him against the company, giving him \$1,500, was grossly excessive and out of all proportion to the injury inflicted upon the plaintiff, other than what was attributable to his own misconduct. *Chicago, Burlington and Quincy R. R. Co. v. Griffin*, 68 Ill., 499. 1873.

329. — Where the damage alleged was the breaking of the leg of the plaintiff, resulting in permanent injury, and the plaintiff being twenty-one years of age, realizing from \$200 to \$300 for four months, and being deprived thereafter of employment, a verdict for \$14,833 was excessive. *Southwestern R. R. Co. v. Singleton*, 66 Ga., 252. 1880.

330. — Whilst this court will always be careful to protect railroad companies against

excessive damages, still, when from gross negligence the lives and safety of passengers are exposed to danger, and injury results therefrom, it will not interfere with the finding of a jury except when it is apparent that the verdict was the result of passion or prejudice. Verdict for \$10,000 for a personal injury upheld. *Montgomery and West Point R. R. Co. v. Boring*, 51 Ga., 582. 1874.

331. — In an action for a personal injury arising from indisputable negligence, the injury being permanent and recovery apparently hopeless, the court will not reduce the damages if the judge is not dissatisfied with the verdict. *Britton v. South Wales R'y Co.*, 3 Hurlstone & Norman (Exchequer), 963, American Reprint; 27 Law Journal (Exch.), 355. 1858.

332. — A verdict for \$5,000 damages for an injury which manifestly resulted in great physical and mental suffering, and which most probably involves the permanent reduction of the strength of the broken leg, is not so excessive as to make it appear that the jury were influenced in their action by passion or prejudice. *Maysville and Lexington R. R. Co. v. Herrick*, 13 Bush (Ky.), 122. 1877.

333. — Where a plaintiff had obtained against a railway company a verdict, with damages, sustained by reason of an accident to a train in which he was a passenger, and a new trial was ordered by the court of queen's bench, on the ground alone of excessive damages, the finding as to negligence by the defendant company being approved by two courts, *held*, that, inasmuch as there had been no misdirection, the judge having put to the jury whether all was done which was reasonably and practically possible under the circumstances of the case, and inasmuch as the damages were not of such an excessive character as to show that the jury had been influenced by improper motives or led into error, there ought not to be a new trial. *Lambkin v. South Eastern R'y Co.*, Law Reports, 5 Appeal Cases, 352. 1880.

334. — A new trial will be granted, in an action for personal injuries sustained through the defendant's negligence, where the damages found by the jury are so small as to show that they must have omitted to take into consideration some of the elements

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of damage. In this case £7,000 had been awarded by the jury. *Phillips v. London and South Western R'y Co.*, Law Reports, 5 Queen's Bench Division, 78, 1879; 29 Eng. (Moak), 177.

335. Carriage beyond station. In the absence of recklessness, wilfulness and insult, a railway company is not liable to a passenger for exemplary damages; and if the conductor, confused by unusual occurrences, passes a station, and, courteously explaining the facts to a passenger for this place, gives him a free return ticket, the company is only liable for compensatory damages. *Chicago, St. Louis and New Orleans R. R. Co. v. Scurr*, 59 Miss., 456, 1882; 6 Amer. & Eng. R. R. Cases, 341.

336. — A passenger on a railroad train who is carried beyond her station by the negligence of the company, but without any circumstances of aggravation, and without receiving any personal injury, may recover compensation for the inconvenience, loss of time, labor and expense of traveling back, but not for anxiety and suspense of mind suffered in consequence of the delay, nor the effects upon her health, nor the danger to which she was exposed in consequence of the train being stopped at her station an insufficient length of time to enable her to get off. *Trigg v. St. Louis, Kansas City and Northern R'y Co.*, 74 Mo., 147, 1881; 6 Amer. & Eng. R. R. Cases, 345.

337. Disease resulting from injury. If a disease causing suffering or permanent injury results proximately from personal injuries inflicted by the negligence of a railway company, the suffering caused by that disease constitutes an element in estimating damages; nor is this rule affected by the fact that such a disease would not ordinarily result from the original personal injury inflicted. *Houston and Texas Central R'y Co. v. Leslie*, 57 Tex., 83, 1882; 9 Amer. & Eng. R. R. Cases, 407.

338. — The plaintiff, with his wife and two children of five and seven years old respectively, took tickets on the defendant's railway from W. to H. by the midnight train. They got into the train, but it did not go to H., but went along the other branch to E., where the party were compelled to get out. It being so late at night the plaintiff was un-

able to get a conveyance or accommodation at an inn; and the party walked to the plaintiff's house, a distance of between four and five miles, where they arrived at about three in the morning. It was a drizzling night, and the wife caught cold and was laid up for some time, being unable to assist her husband in his business as before, and expenses were incurred for medical attendance. In an action to recover damages for the breach of contract, the jury gave 28*l.* damages, viz., 8*l.* for the inconvenience suffered by having to walk home, and 20*l.* for the wife's illness and its consequences. *Held*, as to the 8*l.*, that the plaintiff was entitled to damages for the inconvenience suffered in consequence of being obliged to walk home, but as to the 20*l.*, that the illness and its consequences were too remote from the breach of contract for it to be given as damages naturally resulting from it. *Hobbs v. London and South Western R'y Co.*, Law Reports, 10 Queen's Bench Cases, 111. 1875.

339. — Where the plaintiff, a woman, was a passenger on a sleeping-car of the defendant, which, through the negligence of the defendant, caught fire, and the plaintiff, on account of the smoke and flames, was compelled, in a half-clad condition, to leave the car, and caught cold, which resulted in the suppression of her menses and subsequent illness, it appearing from the evidence that such illness was of the character that results from arrested menstruation, *held*, that the plaintiff, being "unwell" at the time, there was in her then physical condition an intermediate and independent cause of the subsequent illness, which was the remote and not the proximate result of the defendant's negligence. Persons who are ill have a right to enter and travel in the cars of a railroad company, and as a common carrier of passengers the company has no right to prevent them, but the increased risk arising from conditions of health affecting their fitness to travel, certainly where such conditions are unknown to the carrier, must be assumed by the passenger. *Pullman Palace Car Co. v. Barker*, 4 Colo., 344. 1878.

340. — The liability of a railway company for a violent ejection of a passenger from its train is not diminished by the fact that he was at the time suffering from a disease

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which aggravated the injuries sustained, or rendered them more difficult of cure. *Brown v. Hannibal and St. Joseph R. R. Co.*, 66 Mo., 588. 1877.

341. Evidence; professional man. The past earnings of a professional man may be shown on the question of damages in a case of personal injury. *Nash v. Sharpe*, 19 Hun (N. Y.), 365. 1879.

342. Exemplary damages. Mental anguish arising from the nature and character of the assault is a proper element of compensatory damages, and the outrage and indignity which have accompanied an injury are to be estimated as well as its physical effects, even in cases where exemplary damages do not lie. *McKinley v. Chicago and Northwestern R'y Co.*, 44 Ia., 314. 1876.

343. — It is the well-settled law of this state that corporations, like natural persons, are liable in exemplary damages when the facts of the case are of a character to warrant them. *Malecek v. Tower Grove and Lafayette R'y Co.*, 57 Mo., 17, 1874; 9 Amer. R'y Rep., 1.

344. — Where the testimony shows that the train upon which the deceased was riding as a passenger was thrown from the track, and that thereby the deceased received the injuries from which he died, and fails to show any unusual speed or want of care in the management of the train, or by any direct evidence the cause of the train's being thrown from the track, and discloses as the only evidence of negligence on the part of the company the fact that some of the ties at and near the place of the accident were rotten, and it appears that the company had a suitable and competent person in charge of the track at that place as section boss, and that he was from time to time, and as fast as he deemed necessary for the safety of the track, replacing the old and rotten ties with new and sound ones, *held*, that no case was shown for exemplary damages. *Kansas Pacific R'y Co. v. Cutter*, 19 Kans., 83. 1877.

345. — Plaintiff's injury was caused by a train running into a river through the open draw of a bridge, a few minutes after six o'clock in the morning. The bridge-tender, it was shown, could neither read nor write,

but it was not made to appear that the accident was in any degree attributable to that fact. Evidence tending to show inattention on the part of the engineer was also given. The court charged the jury: "If you find from the evidence that the conduct of the engineer, or the conduct of the railroad company in the employment of a bridge-keeper who could neither read nor write, amounted to such a reckless indifference to human life as to constitute wilful and malicious misconduct, then you may be justified in giving exemplary damages." *Held*, error. *Brooks v. New York and Greenwood Lake R. R. Co.*, 30 Hun (N. Y.), 47. 1883.

346. — A passenger in a railway car who has been injured in a collision caused by the negligence of the employes of the company is not, as a general rule, entitled to an action against the company to recover damages beyond the limit of compensation for the injury actually sustained. Exemplary damages should not be awarded for such injury, unless it is the result of wilful misconduct of the employes of the company, or of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. *Milwaukee and St. Paul R'y Co. v. Arms*, 91 U. S., 489, 1875; 6 Amer. R'y Rep., 512. See, also, *Western Union Tel. Co. v. Eyser*, 91 U. S., 495. 1875.

347. — The absence of slight care in the management of a train, or in keeping a railroad in repair, is gross negligence; and to enable a passenger to recover punitive damages for a personal injury, it is not necessary to show the absence of all care, or reckless indifference to the safety of passengers, or intentional misconduct on the part of the agents and officers of the company. *Maysville and Lexington R. R. Co. v. Herrick*, 13 Bush (Ky.), 122. 1877.

348. — Punitive damages are recoverable, if the proof shows that the company failed to use such diligence in keeping its bridge in repair as careless and inattentive persons usually exercise in the preservation of the same, or of business of like character. *Ib.*

349. — To authorize the recovery of punitive damages, under the act of March 10, 1854, it is necessary to show a state of case — wilful neglect — *quasi criminal* in its nature. *Ib.*

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350. Expulsion from train. Where a party who is rightfully on a railroad car, and has paid his fare, is unlawfully expelled therefrom, he is entitled to recover more than nominal damages, even though he sustains no pecuniary loss or actual injury to his person. *Chicago and Northwestern R'y Co. v. Chisholm*, 79 Ill., 584. 1875.

351. — Where, owing to a misunderstanding, a lady was not permitted to travel upon a return excursion ticket, and she left the train and took the next one, upon which her ticket was recognized, *held*, that a verdict of \$1,000 damages was excessive. *Goins v. Western R. R. Co.*, 59 Ga., 426, 1877; 18 Amer. R'y Rep., 107.

352. — In an action for wrongful expulsion of a passenger he is entitled to recover for loss of time, expenses while delayed, the cost of another ticket and a fair compensation for the indignity put upon him. In this case the plaintiff recovered \$1,052.50; a new trial was ordered unless he should remit \$900 of his judgment. *Quigley v. Central Pacific R. R. Co.*, 5 Sawyer (U. S. C. C.), 107. 1878.

353. — In a suit against a railway company for expelling the plaintiff from its car, where there is nothing to authorize the recovery of vindictive damages, and no actual damage is shown, a judgment for \$750 will not be sustained. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Dewin*, 86 Ill., 296. 1877.

354. — Where plaintiff purchased a ticket at Elko for San Francisco, and was ejected from the cars within half a mile from Elko, without sustaining any bodily injuries, the conductor using no more force than was necessary to eject him; was delayed one day and had to buy another ticket at an expense of \$40.50, *held*, that a verdict of \$5,000 was so excessive as to indicate passion and prejudice upon the part of the jury. *Quigley v. Central Pacific R. R. Co.*, 11 Nev., 350. 1876.

355. — Where a passenger is wrongfully expelled from the cars, and it appears that while there was a sharp scuffle, some blows given, and some blood drawn, there were no broken limbs or bones, no permanent injury or disfigurement, no long confinement, no protracted pain and suffering, no heavy ex-

penses for medicine, nursing or physician, little loss of time, not to exceed a day's delay, and no circumstances of outrage and insult independent of the actual expulsion, *held*, that a verdict awarding \$5,000 was excessive. *Missouri, Kansas and Texas R. R. Co. v. Weaver*, 16 Kans., 456. 1876.

356. — P. was wrongfully removed from a parlor car, for a refusal to pay his fare, by one of the defendant's conductors, who was acting in good faith. The only unnecessary violence consisted in seizing him, while standing upon the ground, and pulling him from the car while he was holding on to the rail by one hand, thereby wrenching him and injuring his finger, so that subsequently a felon appeared, from which he suffered two weeks. The judge charged that compensatory damages only could be allowed. The jury brought in a verdict for \$3,000. *Held*, that the verdict was excessive, and should be set aside. *Cox v. New York Central and Hudson River R. R. Co.*, 11 Hun (N. Y.), 621. 1877.

357. — The rendering a verdict on conflicting evidence contrary to a strong intimation from the court, and assessing against a corporation damages at \$350 for injuries to the plaintiff's feelings and a slight pinching of his hands in ejecting him from a car for alleged non-payment of fare, is not sufficient to show that the jury was actuated by passion and prejudice. *Hamilton v. Third Avenue R. R. Co.*, 40 N. Y. Superior Ct., 376, 1876; appeal denied, *Same v. Same*, 41 ib., 538, 1876.

358. — exemplary damages. Punitive damages may be allowed for the wrongful expulsion of a passenger. *Baltimore and Yorktown Turnpike Co. v. Boone*, 45 Md., 344, 1876; *Philadelphia, Wilmington and Baltimore R. R. Co. v. Larkin*, 47 Md., 155, 1877; 18 Amer. R'y Rep., 536; *Chicago, Burlington and Quincy R. R. Co. v. Bryan*, 90 Ill., 126, 1878; *Kansas Pacific R'y Co. v. Kessler*, 18 Kans., 523, 1877; 15 Amer. R'y Rep., 338.

359. — Where a passenger is unlawfully put off the train at a flag station at midnight, in a wintry storm, a great distance from his starting-point and his destination, and, in endeavoring to walk to the next station, falls through a cattle-guard and is

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injured, it is proper to submit to the jury the questions as to whether the conduct of the conductor in putting him off was wanton, reckless and oppressive, and therefore the proper subject of exemplary damages. *Evans v. St. Louis, Iron Mountain and Southern R'y Co.*, 11 Mo. App., 463. 1882.

360. — Where it appears that prior to January 1st the railway company had been in the habit of carrying passengers on its freight trains, and that on that day a regulation went into effect prohibiting the carrying of passengers on such trains east of Brookville, but making no change as to such trains west thereof, and where it does not appear that any public notice was given of such change, and does affirmatively appear that the ticket agent at Bosland, one of its stations west of Brookville, received no notice thereof, and did not in fact know of it until the middle of March following, and then only as he heard it from a passing conductor, and that on the 2d of March he sold plaintiff a ticket to Salina, a station east of Brookville, and assured him that it was good to carry him there on a freight train then approaching the station, and that plaintiff entered such train and rode without objection, or notice of the change of rule, until it had passed Brookville, where he was put off after dark by the conductor, at a small station about half way between Brookville and Salina, and where it appears from the testimony of the agent that he had been in the habit up to said 2d of March of selling passenger tickets to be used on freight trains east of Brookville, and from the testimony of the conductor that he had frequently put passengers off from his train, but had never had any trouble about it before, *held*, that a verdict of \$820, \$800 of which the jury specifically awarded as exemplary damages, would not be set aside by this court. *Kansas Pacific R'y Co. v. Kessler*, 18 Kans., 523, 1877; 15 Amer. R'y Rep., 338.

361. — Where an employe of a railway company in enforcing a valid rule of the company, in a case to which he in good faith believes it to apply, without wantonness, indignity or insult, ejects a passenger from a train, exemplary damages are not recoverable therefor. *Fitzgerald v. Chicago, Rock Island and Pacific R. R. Co.*, 50 Ia., 79. 1878.

362. — **ratification of employe's act.** If the malicious act of the agent is ratified by the railroad company it may be held liable for exemplary damages. *Hays v. Houston and G. N. R. R. Co.*, 46 Tex., 272, 1876; 13 Amer. R'y Rep., 281; *Graham v. Pacific R. R. Co.*, 66 Mo., 536. 1877.

363. — **remote damages.** Where a passenger was ejected wrongfully from a train, and while leaving the car slipped and was injured, it was held that the injury resulting from the slipping was too remote for recovery. *Williamson v. Grand Trunk R'y Co.*, 17 Upper Canada (Common Pleas), 615. 1867.

364. **Hernia.** Facts held sufficient to sustain a verdict for \$1,500 damages against a railway company, for producing a more aggravated condition of hernia than had before existed, caused by its cars running off the track, whereby plaintiff was shocked, and thus damaged. *Houston and Texas Central R. R. Co. v. Shafer*, 54 Tex., 641, 1881; 6 Amer. & Eng. R. R. Cases, 421.

365. **Loss of hearing.** Where the great pressure of the case was on the question whether the child of deaf and dumb parents was deprived of the sense of hearing by an injury received at the hands of the defendant, when it was under two months of age, it was devolved on the plaintiff to show that the child was not deaf before the injury, or was not born deaf. A charge to the jury that "if the evidence be equally balanced for plaintiff and defendant on any contested point, they should find that part of the case in favor of the defendant," was not erroneous in view of the special facts. *Davis v. Central R. R. Co.*, 60 Ga., 329. 1878.

366. **Measure of damages.** In an action against a railway company for personal injury to a passenger, the jury in assessing the damages may take into their consideration, besides the pain and suffering of the plaintiff, and the expense incurred by him for medical and other necessary attendance, the loss he has sustained through his inability to continue a lucrative professional practice. *Phillips v. London and South Western R'y Co.*, Law Reports, 5 Common Pleas Division, 280, 1879; 30 Eng. (Moak), 769; *Phillips v. South Western R'y Co.*, Law

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Reports, 4 Queen's Bench Division, 406, 1879; 28 Eng. (Moak), 844.

367. — Mere speculative profits are not to be considered; damages in cases of personal injury may be ascertained by the reduction of plaintiff's earning powers, mental or physical, and therefore reference should be had to his business at the time of the accident. *Pennsylvania R. R. Co. v. Dale*, 76 Pa. St., 47. 1874.

368. — A passenger who is injured by the negligent running of a train, or on account of an insufficient platform at which he is landed, is entitled, as damages, to compensation for the bodily injury sustained, the pain suffered, the effect of the injury on his health, according to its degree and probable duration, the expenses of his sickness resulting from the injury, and of attempting to effect a cure, and the pecuniary loss sustained by reason of inability to attend to his business or profession. *St. Louis, Iron Mountain and Southern R. R. Co. v. Cantrell*, 37 Ark., 519, 1881; 8 Amer. & Eng. R. R. Cases, 198; *Pittsburgh and Connellsville R. R. Co. v. Andrews*, 39 Md., 329, 1873; 10 Amer. R'y Rep., 485; *Mackoy v. Missouri Pacific R'y Co.*, 18 Federal Reporter, 236, 1883.

369. — The trial court, in an action for personal injuries, instructed the jury that if they should find for plaintiff, they should allow: "First. The expenses incurred by plaintiff in attempting to cure himself of his injuries. Second. His loss of time. Third. His bodily pain and suffering and mental anguish," etc., etc. *Held*, that this instruction, while not as definite and precise as it might have been, was not open to the objection that it assumed that plaintiff had incurred expense, lost time and endured bodily pain, etc., and the judgment should not be reversed for the mere want of precision. *Klutts v. St. Louis, Iron Mountain and Southern R'y Co.*, 75 Mo., 642, 1882; 11 Amer. & Eng. R. R. Cases, 639.

370. — The suit being by an infant child for damages from wounds and bruises that were cured in a few months, and from the loss of the sense of hearing, alleged to have been a consequence of the injury, a charge on the measure of damages in the terms following was substantially correct: "There

is no known rule of law by which witnesses can give you the amount in dollars and cents as the amount of injury, but this is left to the enlightened conscience of an impartial jury. This does not mean that juries can arbitrarily enrich one party at the expense of the other, nor that they should act unreasonably through mere caprice. But it authorizes you to give reasonable damages when the proof shows that the law authorizes it. But the jury should exercise common sense and love of justice, and, from a desire to do right, fix an amount that will fairly compensate for the injury received." *Davis v. Central R. R. Co.*, 60 Ga., 329, 1873.

371. — The fact that the salary of a person sustaining personal injury through the negligence of another is continued by his employer during the time he is disabled cannot mitigate the damages that the injured party may recover in an action therefor. *Ohio and Mississippi R'y Co. v. Dickerson*, 59 Ind., 317. 1877.

372. Pain. Pain and bodily suffering, resulting from a tort to the person, may be considered by the jury in estimating damages. *Western and Atlantic R. R. Co. v. Drysdale*, 51 Ga., 644, 1874; 7 Amer. R'y Rep., 343.

373. Pregnant woman. Premature confinement, caused by the fright resulting from a railway collision, the child being born dead, constitutes ground of action against a railway company. *Fitzpatrick v. Great Western R'y Co.*, 12 Upper Canada (Queen's Bench), 645. 1855.

374. Remote damages. Damages growing out of loss of profits during the time that an injured passenger was confined to his house, such loss arising from his peculiar manner of doing business, *held*, too remote. *Phyfe v. Manhattan R'y Co.*, 30 Hun (N. Y.), 377. 1883.

375. — The injured party had the combination of his safe concealed from his clerks, and during his confinement certain gold that was locked in the safe was not sold because of the inability of the clerks to open the safe; *held*, that the loss of the profits upon such sales was too speculative and uncertain for allowance. *Ib.*

376. — A common carrier of passengers

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contracted to take plaintiff from a railroad depot to her home, but, before arriving there, set her down in the city, within a mile of her residence, on the sidewalk of a frequented street, on which ran a line of street cars which passed within a square of her house, in daylight, on a dry but very cold winter day, the plaintiff being of a delicate constitution, but not sick at the time, and being warmly clad, and in company with an intimate friend. The plaintiff walked home, and in doing so contracted such a cold as permanently injured her health. *Held*, that the injury was too remote, and the contributory negligence of plaintiff too direct to warrant a recovery for the sufferings, loss of employment, and permanent injury to the health of plaintiff; and her recovery could only be for the reasonable cost of a conveyance home, and her expenses in endeavoring to avoid exposure to the cold. *Francis v. St. Louis Transfer Co.*, 5 Mo. App., 7. 1877.

377. Province of jury. It is not sufficient ground for disturbing a verdict for heavy damages given by a jury for injury sustained in a collision upon a railway, that the plaintiff, who had been advised by medical men to abstain entirely from business for a considerable time, did not act upon such advice (though, if he had, the evidence was that he would permanently recover), but resumed his business shortly after the accident, even though the effect might be to render permanent an ailment which otherwise would have been only temporary. The question of damages is entirely within the province of the jury, and the court will not, in such a case, interfere with their finding upon it. *Saunders v. London and North Western R'y Co.*, 98 E. C. L., 887; 2 Law Times (N. S.), 153. 1860.

378. Temporary injury. In an action against a railway company for personal injuries sustained by a passenger during an accident — negligence being admitted by the company, — the evidence of the plaintiff and his medical attendant was to the effect that he had suffered injury accompanied by dangerous symptoms, though of a temporary character, and from which he had recovered at the time of the trial. The judge, at the trial, directed the jury to find for the defendant, unless they were of opinion that

the plaintiff had sustained substantial injury, and the jury, though satisfied with the evidence given by the plaintiff, found a verdict for the defendant. *Held*, that there had been a misdirection, and that, upon the admitted facts, the plaintiff was entitled to a verdict. *Philpott v. Macroom R'y Co.*, Law Reports, 4 Ireland, 522. 1878.

VIII. GRATUITOUS PASSENGERS.

379. Child. By 7 and 8 Vict., c. 85, s. 6, railway companies are bound to carry, by certain trains, children under three years of age without charge, and are entitled to half the fare charged for an adult in respect of all children between three and twelve years of age. The plaintiff's mother, carrying in her arms the plaintiff, a child of three years and two months old, took a ticket for herself by one of these trains on the defendant's railway, but did not take a ticket for the plaintiff; in the course of the journey an accident occurred through the negligence of the defendants, and the plaintiff was injured. At the time the plaintiff's mother took her ticket no question was asked by the defendants' servants as to the age of the child, and there was no intention on the part of the mother to defraud the company. *Held*, that the plaintiff was entitled to recover against the defendants for the injury he had received. *Austin v. Great Western R'y Co.*, Law Reports, 2 Queen's Bench Cases, 442. 1867.

380. — The plaintiff, a little girl less than five years old, and another little girl about the same size, but older, were put into one of the defendant's passenger cars, at White Cloud, Kans., by an aunt of the plaintiff, with the intention that they should ride in said car to Iowa Point, and the little girls did ride in such car, along with several passengers, from White Cloud to Iowa Point, but without being in the care or custody of any person, without paying any fare, or having any ticket or money with which to pay fare, and without any intention on their part, or on the part of the plaintiff's aunt, that they should pay fare; and neither the conductor nor any other agent of the defendant asked them for fare; but it was a

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rule of the defendant not to take fare from children of the age of the plaintiff, who were in the custody of some older person who did pay fare, and such children were not allowed to ride in the cars except in the custody of some older person to take care of them; and no agent or employe of the defendant had any knowledge that the little girls had no guardian or protector on the train to take care of them, or that they wanted to get off the train at Iowa Point. The train stopped at Iowa Point a sufficient length of time for all passengers who wanted to get off or to get on to do so, and after the train had started, and while it was in motion, the little girls attempted to get off, and a man, who was a passenger on the train, assisted them; and the little girl who accompanied the plaintiff stepped off the train in safety; but when the plaintiff stepped off (being assisted by said passenger), she fell, and rolled off the station platform upon the ground between the platform and the car, and throwing her legs in front of the hind trucks of the car, the trucks ran over her legs and crushed them. *Held*, under the facts of this case, that the railroad company was not liable for damages on account of the accident. *Atchison and Nebraska R. R. Co. v. Flinn*, 24 Kans., 627, 1890; 1 Amer. & Eng. R. R. Cases, 240.

381. Free pass. Plaintiff received an injury through the alleged gross negligence of defendant's servants in charge of a train upon which plaintiff was traveling. Plaintiff was riding upon a free pass, which, with the conditions indorsed, is in these words, viz.: "St. Paul and Chicago Railway. Pass D. Jacobus upon the conditions indorsed hereon until December 31, 1871, unless otherwise ordered. Not transferable. D. C. Shepard, Chf. Eng. and Supt." "The person who accepts and uses this free ticket thereby assumes all risk of accident, and agrees that the company shall not be liable under any circumstances, whether by negligence of its agents or otherwise, for any injury of the person or for any loss or injury to his property, while using or having the benefit of it." *Held*, that the pass and conditions do not protect the defendant from liability for injury received by plaintiff through the gross negligence of defendant's employes.

Held, further, that the same degree of care was required of defendant as if plaintiff had been a passenger carried for hire. *Held*, that the distinction between different degrees of negligence is applicable to cases of this kind. *Jacobus v. St. Paul and Chicago R. R. Co.*, 20 Minn., 125. 1873.

382. — A railway company cannot limit its liability as a carrier of passengers, even when the passenger is carried free. *Buffalo, Pittsburg and Western R. R. Co. v. O'Hara*, 9 Amer. & Eng. R. R. Cases, 317 (Pa.). 1882.

383. — A., who was the owner of a patented car-coupling, for the adoption and use of which by a railway company he was negotiating, went, at the request and expense of the company, to a point on its road to see one of its officers in relation to the matter. A free pass was furnished by the company to carry him in its cars. During the passage the car in which he was riding was thrown from the track, by reason of the defective condition of the rails, and he was injured. *Held*, that the pass was given for a consideration, and that he was a passenger for hire. That, being such, his acceptance of the pass did not estop him from showing that he was not subject to its terms and conditions, exempting the company from liability for any injury he might receive by the negligence of the agents of the company or otherwise. *Railway Co. v. Stevens*, 95 U. S., 655, 1877; 15 Amer. R'y Rep., 338.

384. — A contract, contained in a free pass, limiting a carrier's liability, is valid. *Sutherland v. Great Western R'y Co.*, 7 Upper Canada (Common Pleas), 409. 1853.

385. — drover's. A drover in charge of his cattle signed a contract with a railway company which stated that the cattle were to be conveyed upon the conditions mentioned upon the back of the invoice handed to him, and on the back of the invoice there was printed, amongst other conditions, the following: "That, as a drover is allowed to attend the cattle during transit, they will allow such drover to travel free of charge, upon condition that he so travel at his own risk." On the face of the invoice there was nothing referring to passengers except the words, "Drover in charge free;" and at the foot of it were the words, "For conditions of carriage, see back hereof."

Limitation of Liability.

The drover did travel free, and in consequence of a collision occurring on the journey, he received personal injuries, for which he brought an action against the railway company. *Held*, that the condition allowing a drover in charge of his cattle to travel free, provided he did so at his own risk, was part of the written contract signed by the drover, and that as he had elected to travel free, he was bound by the conditions, and could not recover damages for the personal injuries sustained. *Duff v. Great Northern R'y Co.*, Law Reports, 4 Ireland, 178, 1878. See, also, *Gallin v. London and North Western R'y Co.*, Law Reports, 10 Queen's Bench Cases, 212, 1875; 12 Eng. (Moak), 268; *McCawley v. Furness R'y Co.*, Law Reports, 8 Queen's Bench Cases, 57; 4 Eng. (Moak), 218, 1872.

386. — Where the complaint alleged that the injuries complained of were received while traveling upon a "shipper's pass" given the plaintiff in consideration of freight paid for the carriage of stock, an answer alleging that such injuries were received while riding "upon a free pass, without paying any fare," is insufficient on demurrer. *Ohio and Mississippi R'y Co. v. Nickless*, 71 Ind., 271, 1880.

387. — one person traveling on pass of another. The defendant had issued a free pass or ticket, not transferable, to a newspaper reporter, and on the ticket was a memorandum to the effect that any person other than the person named in the pass should be subject to a penalty for using the pass, or that he should be liable to pay fare. The plaintiff, traveling on the business of the journal, was entitled by usage to this kind of a privilege, but took a ticket on which another reporter of the same journal was named. He showed this ticket to the porter. On several occasions before similar use had been made of such tickets with the knowledge of some of defendant's officers and employes. The reporter received an injury, for which he brought suit. *Held*, that it was proper for the jury to say whether he was lawfully on the train. If the use of the ticket was unauthorized, and the plaintiff thereby became liable for increased fare, he could not be considered as a trespasser. *Great Northern R'y Co. v. Harrison*, 10

Hurlstone & Gordon (Exchequer), 376; 26 Eng. Law & Equity, 443, 1854.

388. **Persons riding by permission; payment of fare.** One whose presence on a railway train is not wrongful may recover for injuries caused by the negligence of the carrier, although he was not a passenger in the ordinary sense of the term. One riding on a train, not a passenger train, of a railroad, with the consent or permission of the conductor, is not to be deemed a trespasser, and therefore barred of a recovery by his own wrong, at least in the absence of proof that the conductor had not authority to give such permission. *Gradin v. St. Paul and Duluth R'y Co.*, 30 Minn., 217, 1883; 11 Amer. & Eng. R. R. Cases, 614.

389. **Rights of passenger.** The fact that the person receiving the injury was a gratuitous passenger constitutes no defense. *Lemon v. Chanslor*, 68 Mo., 340, 1878; *Ohio and Mississippi R'y Co. v. Selby*, 47 Ind., 471, 1874; 8 Amer. R'y Rep., 177; *Waterbury v. New York Central and Hudson River R. Co.*, 17 Federal Reporter, 671, 1883.

IX. LIMITATION OF LIABILITY.

[See subdivision X, *ante*, in cases of free passes.]

390. **Contract.** A drover's ticket limited the liability of the carrier. The car in which the drover's sheep were carried was transferred to a connecting line. *Held*, that the limitation of liability protected the connecting carrier to the same extent as the original company which had issued the ticket. *Hall v. North Eastern R'y Co.*, Law Reports, 10 Queen's Bench Cases, 437, 1875; 14 Eng. (Moak), 269.

391. — A common carrier cannot, by notice or special contract, limit or avoid its common law liability for negligence. *Rose v. Des Moines Valley R. R. Co.*, 39 Ia., 246, 1874; 8 Amer. R'y Rep., 496; 9 Amer. R'y Rep., 7; 20 Amer. R'y Rep., 326; *Ohio and Mississippi R'y Co. v. Selby*, 47 Ind., 471, 1874; 8 Amer. R'y Rep., 177.

392. — **free pass.** The payment of fare is not necessary to create the relation of common carrier and passenger. A railway company was held to be liable for causing the death of a passenger by the negligence

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of its employes, notwithstanding he was at the time riding upon a free pass, upon which was a stipulation, signed by himself, releasing the company from all liability for injury to his person or property while using the same. *Rose v. Des Moines Valley R. R. Co.*, 39 Ia., 246, 1874; 8 Amer. R'y Rep., 496; 9 Amer. R'y Rep., 7; 20 Amer. R'y Rep., 326.

393. — newsboys. C. & Co. employed a newsboy to vend papers on defendant's railway, they contracting with the company to carry the boy without any liability for any injuries resulting to him. *Held*, that the contract was a valid one. *Alexander v. Nipissing R'y Co.*, 33 Upper Canada (Queen's Bench), 474, 1873; *Same v. Same*, 35 ib., 453, 1874.

X. INJURIES RECEIVED AT CAR WINDOWS.

394. Arm in window. A railway company is liable for an injury to a passenger by a collision with a freight car left too near the main line; and under the circumstances held that the passenger was not guilty of contributory negligence in leaving his arm in the window-sill. *Farlow v. Kelly*, 11 Amer. & Eng. R. R. Cases (U. S. S. C.), 104, 1883.

395. — If a passenger of mature years voluntarily or involuntarily projects his elbow or arm out of the window of a car in which he is traveling, and it is injured by coming in contact with a freight car standing on a siding near the main track of the railway, he is not entitled to recover damages for such injury. The placing of his arm out of the window is an act of contributory negligence on his part, as a matter of law, notwithstanding the company may have been guilty of negligence in permitting the car on the siding to be placed too near the track of the passing train. *Pittsburgh and Connellsville R. R. Co. v. Andrews*, 39 Md., 329, 1873; 10 Amer. R'y Rep., 485.

396. — Plaintiff, a passenger, was seated near an open window, with his elbow on the window-sill; while passing over a bridge his elbow was struck by some substance, and his arm broken. In an action to recover damages for the injury, the grounds upon

which negligence was claimed to be imputable to the defendant were, that the bridge, which was a truss bridge of wood, with the truss work sheathed on the inside with boards, was too narrow for the safe passage of the car, and that it was out of repair, some of the boards lining the truss work being warped and loose. These positions were controverted by defendant. It appeared that some months after the accident the bridge was removed and replaced by an iron bridge, the trusses of which did not come up as high as the window-sills of the cars, and the change of material left more space between the sides of the new bridge and the track. The court charged the jury that they might "take that fact into consideration in determining whether the defendants were not guilty of negligence in allowing the old bridge to remain." *Held*, error. *Dale v. Delaware, Lackawanna and Western R. R. Co.*, 73 N. Y., 468, 1873.

XI. COLLISIONS AND RUNNING OFF THE TRACK.

1. Collision of trains.

397. Burden of proof. If a passenger seated in a car is injured by a collision, or by a defect in any part of the machinery, a *prima facie* case of negligence is established, and the burden of disproving it is cast upon the company. *Delaware, Lackawanna and Western R. R. Co. v. Napheys*, 90 Pa. St., 135, 1879; 1 Amer. & Eng. R. R. Cases, 52; *Iron R. R. Co. v. Mowery*, 36 Ohio St., 418, 1881; 3 Amer. & Eng. R. R. Cases, 361.

398. Contributory negligence. The evidence showed that the decedent, being a stock drover, was riding in company with five or six others upon an engine, which was moving slowly along an approach to a stockyard. Suddenly another engine of another company was seen to approach around a curve, whereupon all the fellow-passengers of decedent jumped off. He, however, remained, and was killed in the collision which ensued. An action having been brought by his administratrix against the railway company running the engine which collided with that on which decedent was riding, the court charged the jury that if

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defendant's employes were negligent, and decedent was rightfully riding on the engine, plaintiff could recover. *Held*, under the pleadings, that the instruction was error, as it disregarded the question of the contributory negligence of decedent. *Wabash, St. Louis and Pacific R'y Co. v. Shacklet*, 12 Amer. & Eng. R. R. Cases (Ill.), 166. 1883.

399. — A passenger, on the station to which he was going being announced, and after the car had entered the station, left his seat and stood inside the closed door of the car, for the purpose of hastening his departure from the car. While he was so standing, the car came into collision with another car, and the passenger was thrown down and injured. *Held*, in an action by him against the company, that the question, whether he was in the exercise of reasonable care, was for the jury. *Barden v. Boston, Clinton and Fitchburg R. R. Co.*, 121 Mass., 426, 1877; *Worthen v. Grand Trunk R'y Co.*, 125 ib., 99, 1878.

400. — contributory negligence of carrier of the injured passenger. The driver of a horse-car is not the agent of a passenger so as to render such passenger chargeable for the negligence of such driver. When a passenger in a horse-car is injured by the carelessness of the engine-driver of a railway company in the management of his locomotive, it is no defense to show contributory negligence in the driver of the horse-car. *Bennett v. New Jersey R. R. and Transportation Co.*, 36 N. J. Law, 225, 1873; 12 Amer. R'y Rep., 79.

401. Failure to understand a warning in English language. N., who understood the English language imperfectly, was traveling upon a railway in the caboose of a freight train, and, upon the stopping of the train on the main track at a station where there were two side-tracks, stepped out upon the front platform of the car with two or three other persons, one of whom was an employe. The latter, seeing a train approaching from behind, called to N., with the others, to escape, and observing that he did not move, attempted to drag him from the platform, but was resisted, when the approaching train struck the car, and N. was killed. It was held that N. was not guilty of contributory negligence if he did not

understand the meaning of the warning addressed to him, or know the purpose of the efforts to drag him from the car. *Walter v. C., D. and M. R'y Co.*, 39 Ia., 33, 1874; 9 Amer. R'y Rep., 78; 20 Amer. R'y Rep., 319.

402. Neglect of employes of one company precludes recovery by passenger against the other company. The plaintiff, one of the traveling inspectors of the carriage and wagon department of the L. and N. W. Railway Company, was traveling under a pass from them, in one of their carriages, on a journey from Leeds to Manchester. Near C. station, and on the line of the defendant, over which the L. and N. W. Railway had running powers, the train in which the plaintiff was traveling came into collision with a number of loaded wagons, which were being shunted from a siding by the defendant, and he was injured. There was evidence of negligence on the part of the driver of the plaintiff's train in traveling at too great a speed, so as to be unable to stop when he came in sight of the danger signal, which had been hoisted by the defendant. The jury found that the accident was caused by the joint negligence of the defendant and the L. and N. W. Railway Company. *Held*, approving the decision in *Thorogood v. Bryan*, 8 C. B., 115, that the plaintiff was so far identified with the L. and N. W. Railway Company that he could not recover. *Armstrong v. Lancashire and Yorkshire R'y Co.*, Law Reports, 10 Exchequer Cases, 47, 1875. See, also, *Bridge v. Grand Junction R'y Co.*, 3 Meeson & Welsby (Exchequer), 244, 1838; 1 Eng. R. R. & Canal Cases, 609.

403. — neglect of employes of both companies. Where a passenger is injured by the mutual negligence of the employes of the company on whose train he is rightfully traveling, and of those of another company with whom he has no contract, there being no fault or negligence on his part, he or his personal representative may maintain an action against either company in default, and will not be restricted to an action against the carrier company on whose train he was traveling. *Wabash, St. Louis and Pacific R'y Co. v. Shacklet*, 105 Ill., 364. 1883.

404. — Where a passenger is injured by a collision of his train with another, through the mutual negligence of both companies, he

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exercising due care, he cannot maintain an action *ex contractu* against the company owning the rival train; but this furnishes no reason why he may not maintain an action *ex delicto* against it. *Ib.*

2. Collision with cattle or teams.

405. Cattle. At the crossings of public roads, or wherever cattle are in the habit of straying, or known to be liable to stray upon the track, it is the duty of the company to use the utmost vigilance to keep them off, and in all such places to erect cattle-guards, put up fences, or station watchmen for that purpose; and a failure to do so is negligence, rendering them liable to passengers for all injuries occasioned thereby. *Wright v. Pa. R. R. Co.*, 3 Pittsburgh, 116. 1869. See, also, *Cumberton v. Irish North Western R'y Co.*, 3 Irish Reports (Common Law), 603. 1869.

406. Team at crossing. At the intersection of a railway and highway, the railroad company placed a gate consisting of a pole about thirty-five feet long, which, when trains were passing, was swung from one side of the highway to a post on the other. As a train was approaching the crossing, a heavy runaway team dashed against the pole which was swung across the highway, and broke it or loosened it from its fastening. The pole swung obliquely across the track and the whole or a part of it was driven into one of the cars which had not slackened its speed. *Held*, in an action against the company by a passenger in the car for injuries received from the pole, that evidence of the above facts would warrant a jury in finding that the accident was caused by the defendant's negligence. *Tyrrell v. Eastern R. R. Co.*, 111 Mass., 546. 1873.

3. Running off the track.

407. Burden of proof. Where the train oversets or the wheel or axle of a car breaks such fact is *prima facie* evidence of neglect on the part of the railway company. *Baltimore and Ohio R. R. Co. v. Noell*, 32 Grattan (Va.), 394, 1879; *Baltimore and Ohio R. R.*

Co. v. Wightman, 29 Grattan (Va.), 431, 1877; *Peoria, Pekin and Jacksonville R. R. Co. v. Reynolds*, 88 Ill., 418, 1878; 21 Amer. R'y Rep., 324; *Stevens v. European and North American R'y*, 66 Me., 74, 1876; 19 Amer. R'y Rep., 48; *Flannery v. Waterford and Limerick R'y Co.*, 11 Irish Reports (Common Law), 30, 1877; *Bird v. Great Northern R'y Co.*, 4 Hurlstone & Norman (Exchequer), 842, 1858; *George v. St. Louis, Iron Mt. and Southern R'y Co.*, 34 Ark., 613, 1879; 1 Amer. & Eng. R. R. Cases, 294; *Denver, South Park and Pacific R'y Co. v. Woodward*, 4 Colo., 1, 1877.

408. Evidence. In an action by a passenger to recover damages for personal injuries occasioned by running off the track, evidence that the train on which the accident occurred, and of which witness was conductor, had run off the track seven or eight times within a month before the accident, is admissible. *Mobile and Montgomery R. R. Co. v. Ashcraft*, 48 Ala., 15, 1872; *Same v. Same*, 49 Ala., 305, 1873.

409. Jumping from car. A., a passenger, was awakened in the night by a jar, caused by the train being thrown from the track. Perceiving that the car was being dragged over the sleepers, he left his seat and, following an employe of the company, jumped from the platform and was injured. The car was dragged but a short distance beyond the point where A. jumped, and all the other passengers who remained in the cars escaped unhurt. The derailment of the train was caused by the decayed condition of the ties. In an action by A. against the company to recover damages for his injury, the court left the question to the jury whether he had jumped from apprehension of danger which did not exist, or under circumstances making it a reasonable act of prudence on his part, instructing them that in the former event he could not recover, but that in the latter event he might. *Held*, that this was not error. *Pittsburgh, Buffalo and Western R. R. Co. v. Rohrman*, 12 Amer. & Eng. R. R. Cases (Pa.), 176. 1883.

410. — If a passenger, alarmed by the peril apparently occasioned by the derailment, but acting as a person of ordinary prudence would in like circumstances in endeavoring to escape, goes to the platform of the car,

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and jumps off, or was jolted off by the car's motion, or pushed or crowded off by fellow-passengers in the excitement of the moment, any injury occasioned by fright, or by striking the ground, would be directly traceable to the derailment as its primary, proximate, responsible and judicial cause. *Smith v. St. Paul, Minneapolis and Manitoba R'y Co.*, 30 Minn., 169, 1883; 9 Amer. & Eng. R. R. Cases, 262.

411. Wrongful act of trespasser. Assuming it is *prima facie* evidence of negligence in a railway company that a train has got off the line, such evidence is entirely rebutted by proof that the accident arose from the wilful and wrongful act of a stranger. *Latch v. Rumner R'y Co.*, 3 Hurlstone & Norman (Exchequer), 930, American Reprint; 27 Law Journal (Exch.), 155. 1858.

XII. JOINT OCCUPATION OF RAILWAYS AND CONNECTING LINES.

1. Connecting lines.

412. Liability of the company selling the ticket. The plaintiff purchased a ticket at the Paddington station of the Great Western R'y Co., and paid one fare for his conveyance from thence to Milford, in Pembroke-shire. The line of the Great Western R'y Co. terminates a short distance beyond Gloucester, and the line from thence to Milford belongs to the South Wales R'y Co. By arrangement between the two companies, the lines are worked, and the fares paid by the passengers apportioned, between them. The plaintiff was conveyed, in the same carriage which he entered at Paddington, towards Milford, and after the train had passed on to the line of the South Wales R'y Co. it came into collision with a locomotive engine, left on that line by the servants of the South Wales R'y Co. There was no negligence on the part of the driver of the train. *Held*, in the exchequer chamber, that the Great Western R'y Co. was responsible to the plaintiff, since, under the circumstances, there was an implied contract on its part that it would use reasonable care to maintain the whole line from Paddington to Milford in a condition fit for traffic. *Great*

Western R'y Co. v. Blake, 7 Hurlstone & Norman (Exchequer), 987. 1862. See, also, *Horn v. North British R'y Co.*, 5 Scotch Session Cases (4th series), 1055. 1878.

413. — Ordinarily the first company selling a ticket over connecting lines of railway will be deemed the agent of the subsequent carriers, and not liable for injuries sustained upon such connecting lines. *Nashville and Chattanooga R. R. Co. v. Sprayberry*, 8 Baxter (Tenn.), 341. 1874. The first company may bind itself for the entire route, but the mere sale of the ticket does not have this effect. *Ib.*; *Hartan v. Eastern R. R. Co.*, 114 Mass., 44. 1873.

2. Two companies using same track.

414. Control of cars. One carrier is not liable for an injury to a passenger upon one of its cars, of which another carrier is the exclusive bailee. *Smith v. St. Louis and San Francisco R'y Co.*, 9 Mo. App., 598. 1881.

415. Evidence; presumption. A train of the defendant, whilst stationary on its railway, was run into by another train. The train in fault was the moving and not the stationary train. Several railway companies had "running powers" over the part of the defendant's line on which the collision occurred, and no evidence was given as to whether the moving train belonged to or was under the control of the defendant. *Held*, that in the absence of evidence to the contrary it must be presumed that the train which caused the accident belonged to or was under the control of the defendant. *Ayles v. Southeastern R'y Co.*, Law Reports, 3 Exchequer Cases, 146. 1868.

416. Leased lines. Where a railway company leases to another company the right to pass over a portion of its line, the lessor company controlling the trains and motive power on such leased line, the lessor is liable for an injury to a passenger of the lessee who is injured by the negligence of the employes of the lessor. *Wabash, St. Louis and Pacific R'y Co. v. Peyton*, 106 Ill., 534. 1883.

417. — The N. Company had statutory authority to run over a portion of the de-

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defendant's line, paying a certain toll to defendant. The signals at the point of junction between the two lines were under the control of the defendant. Owing to the servants of the N. Company negligently disobeying these signals, a train of the N. Company ran into a train of the defendant in which the plaintiff was, causing him damage. There was no negligence on the part of any of the defendant's servants. In an action for injuries sustained, brought by the plaintiff against the defendant, *held*, that he was not entitled to recover. *Wright v. Midland R'y Co.*, Law Reports, 8 Exchequer Cases, 187, 1873; 5 Eng. (Moak), 832.

418. Liability of one company for acts of another. Where a railway company, operating its own road in its own name, contracts with another company to make up its train in the depot of the latter, the former company is liable for an injury to a passenger occurring on its train while being made up by the servants of the latter, and it makes no difference that the servants were employed and paid by the latter company. *Hannibal and St. Joseph R. R. Co. v. Martin*, 11 Bradwell (Ill.), 336. 1892.

419. — The plaintiff was a passenger by the defendant's railway, to be carried from Y. to T. To reach T. it was necessary to travel over a line belonging to another company. While passing over the latter line the train in which the plaintiff was came into collision with a bullock, which had strayed on to the line from an adjoining field by breaking through the fence. The fence was in fact defective, but had been lately repaired, and was in apparently good condition. The plaintiff, being injured by the collision, sought to recover damages from the defendant. *Held*, that the contract having been made with the defendant, it was the proper party to be sued. *Buxton v. North Eastern R'y Co.*, Law Reports, 3 Queen's Bench Cases, 549. 1868. See, also, *Thomas v. Rhymney R'y Co.*, Law Reports, 5 Queen's Bench Cases, 226, 1870; *Same v. Same*, Law Reports, 6 Queen's Bench Cases, 263, 1871.

420. Motive power furnished by another company. Where two or more companies establish a connecting line and contract to carry a passenger to the terminus of said line, the terminal carrier is liable to him as a com-

mon carrier, although his injury may have arisen from the neglect of another with whom it has contracted for motive power. *Keep v. Indianapolis and St. Louis R. R. Co.*, 3 McCrary (U. S. C. C.), 203; *Same v. Same*, 9 Federal Reporter, 625. 1881.

421. — A corporation furnishing motive power to a railway company, but not acting or chartered to act as a common carrier, is not bound to use more than ordinary skill and diligence which its employment needs, and is only liable for direct negligence and unskilfulness. *Ib.*

422. — A common carrier is liable to a passenger whom it has contracted to convey to a particular point if he is injured while being so conveyed through the negligence or unskilfulness of employes of a corporation with which such carrier has contracted for motive power. *Keep v. Indianapolis and St. Louis R. R. Co.*, 10 Federal Reporter, 454; 3 McCrary (U. S. C. C.), 302. 1882.

423. — In such cases the corporation furnishing the motive power is also liable to the passenger if the injury is sustained through the direct negligence or unskilfulness of its employes. *Ib.*

3. Crossings of two railways.

424. Collision. The failure to stop a train the proper time at a level crossing, whereby a collision ensues, is negligence, for which a passenger injured by the collision may recover. *Graham v. Great Western R'y Co.*, 41 Upper Canada (Queen's Bench), 324. 1877.

XIII. FREIGHT TRAINS.

425. Burden of proof. No legal presumption of negligence on the part of a passenger arises from the fact of his being in a car, not intended for the use of passengers, when an accident happens. *Creed v. Pennsylvania R. R. Co.*, 86 Pa. St., 189. 1878.

426. — The presumption is that a stranger riding upon a freight train is not legally a passenger, and is not lawfully upon the train; and no liability for negligence can be imposed upon the company as to him, unless the special circumstances of the case rebut

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this presumption. *Eaton v. Delaware, Lackawanna and Western R. R. Co.*, 57 N. Y., 382, 1874; 7 Amer. R'y Rep., 67.

427. — Railroad companies have the right to make a complete separation between their freight and passenger business. Where this is done the conductor of a freight train has such general authority only as is incidental to the business of moving freight, and no power to carry passengers; and notice of this limited authority will be implied from the nature and apparent division of the business. An invitation by a conductor to a stranger to ride upon a freight train does not create the relation of passenger. *Ib.*

428. **Car platform.** A freight train on which the plaintiff was a passenger, when nearing its destination at East St. Louis, was signaled to stop, and did stop, upon a high trestle work. Just before the train started the plaintiff went out of the car upon the platform, and, while there, the train started with a sudden jerk, which caused him to fall off on the trestle work, and from thence to the ice, a distance of about twenty feet, from which fall he received a personal injury. If he had remained in the car he would have received no injury, and it appears that he made no inquiry of the conductor whether it was safe for him to go out or not, and that he must have known that he could not get off at the place where the train stopped, and that it would soon reach its destination. It was dark and cold at the time. *Held*, that it was highly improper and negligent in him to attempt to go upon the platform in the dark, under such circumstances, without making any inquiry as to the danger. *Rockford, Rock Island and St. Louis R. R. Co. v. Coultas*, 67 Ill., 398, 1873.

429. **Contract limiting liability.** A railway passenger took a ticket containing a printed condition which stated that, inasmuch as the holder was permitted to travel (as he did) by a passenger carriage attached to a goods train, the company should be relieved from responsibility for any personal injury to the plaintiff consequent upon, or in any way arising from, such passenger carriage being attached to a goods train. The passenger was held bound by the condition. *Johnson v. Great Western and South-*

ern R'y Co., 9 Irish Reports (Common Law), 108. 1874.

430. — As a railway company, having passenger trains sufficient to accommodate the public, is under no legal obligation to carry a passenger on its freight trains, its undertaking to do so, and the extra care and expense required in such case, form a sufficient consideration for a contract made with a passenger restricting and limiting its liability; but the same terms must be extended to, and applied to, all persons desiring to ride on such trains. *Arnold v. Illinois Central R. R. Co.*, 83 Ill., 273. 1876.

431. — **drover's pass.** A drover traveling on a freight train for the purpose of caring for his stock on the train, for which stock he paid freight, received from the company a ticket called a "stock pass," with an indorsement signed by him, as follows: "In consideration of receiving this ticket, I voluntarily assume all risk of accidents, and expressly agree that the company shall not be liable under any circumstances, whether by negligence of their agents or otherwise, for any injury to my person, or for any loss or injury to my property; and I agree that as for me, in the use of this ticket, I will not consider the company as common carriers, or liable to me as such." *Held*, in an action for damages for injury to the person of the drover, caused by the negligence of the company, that the contract was invalid. *Held*, also, that the stock drover was a passenger for hire, and was not a gratuitous passenger. *Ohio and Mississippi R'y Co. v. Selby*, 47 Ind., 471, 1874; 8 Amer. R'y Rep., 177.

432. — Where a railway company undertakes to convey a drover as a passenger on a freight car, its duty is to so run the train that he shall not, by its own carelessness, be injured. *Ib.*

433. — Evidence that the plaintiff had continued since the injury to make contracts for the shipment of stock, and to ride on stock passes in the same manner as at the time of the injury, is inadmissible. *Ib.*

434. **Degree of care required of carrier.** In an action against a railway company for injuries received by a passenger upon its road, it is not error for the court to instruct the jury "that a person taking a cattle-train is entitled to demand the highest pos-

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sible degree of care and diligence, regardless of the kind of train he takes." *Indianapolis and St. Louis R. R. Co. v. Horst*, 93 U. S., 291. 1876.

435. — The rule of law, that the standard of duty on the part of a carrier of passengers should be according to the consequences that may ensue from carelessness, applies as well to freight trains as to passenger trains. It is founded deep in public policy, and is approved by experience, and sanctioned by the plainest principles of reason and justice. *Ib.*

436. — It is not error to refuse to instruct the jury that the carrier has performed its full duty when it has furnished a car or caboose which will run with safety while upon its road, but will be unable to resist the crash when thrown from its track. *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Williams*, 74 Ind., 462, 1881; 3 Amer. & Eng. R. R. Cases, 457.

437. — Under the statutes of Mississippi a passenger on a freight train can only claim damages for gross negligence. § 1054, Code 1880. *Perkins v. Chicago, St. Louis and New Orleans R. R. Co.*, 60 Miss., 726. 1883.

438. — A freight train, with a caboose attached, in which passengers may ride, is a freight train, and not a train "intended for passengers and freight" within the meaning of the statute. *Ib.*

439. Drovers. The presumption of law is that persons riding upon trains of a railroad which are palpably not designed for the carriage of persons are not lawfully there, and if they are permitted to be there by the consent of the carrier's employes, the presumption is against the authority of the employes to bind the carrier by such consent. But such presumption may be overthrown by special circumstances; and where the company would derive a benefit from the presence of drovers upon its cattle trains, and may have allowed its employes upon such trains to invite or permit drovers to accompany their cattle, the presumption against a license to the person thus carried may be overthrown. *Waterbury v. New York Central and Hudson River R. R. Co.*, 17 Federal Reporter, 671. 1883.

440. Riding in freight car. The owner of certain horses and goods destined for the

village of L. shipped them in a common box car of the defendant, which was to run on defendant's line to A., and thence on its branch road to L., and plaintiff, who was employed by the owner to accompany him and aid in taking care of the property, rode with it in the box car to A., with the knowledge and consent of the conductor who ran the train to that point. Such conductor in fact received fare for plaintiff's ride from A. to L. (which was not in his run), though he had no authority to do so. Some hours after the arrival of the car at A., when the train of which it was then a part was about starting for L., plaintiff went into the car without the knowledge or consent of the conductor or other persons in charge of that train, and without doing anything to bring the fact to their attention before the accident complained of. Before the train started the car was locked by one of defendant's employes; and afterwards, while in motion, goods therein took fire through defendant's alleged negligence, and plaintiff was injured before he could procure the door to be opened. *Held*, that defendant was not chargeable with notice of plaintiff's presence in the box car between A. and L. merely by reason of the knowledge possessed by the first conductor. *Jenkins v. Chicago, Milwaukee and St. Paul R'y Co.*, 41 Wis., 112. 1876.

441. Violation of rules. Where the carriage of passengers on freight trains is forbidden by the rules of the company, and such rule is known to the passenger, and the conductor had no authority to relax the rules in that respect, a passenger riding upon a freight train cannot recover for an injury caused by the wrecking of such train. *Houston and Tex. Central R'y Co. v. Moore*, 49 Tex., 31. 1878.

442. What constitutes a passenger. The plaintiff, while traveling on a freight train on the defendant's road, was injured by a collision. The defendant provided a surgeon, but there was a conflict of testimony as to the advice and treatment rendered the plaintiff by him. The plaintiff sued for compensation for the injury. The only question at issue was the amount of damages for which the defendant was liable. The court, in charging the jury, *held*, that if

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the plaintiff was on the car in which the defendant allowed people to travel, with the knowledge of the defendant or of any of its agents, for the purpose of being carried, and was properly there, he was a passenger; and the defendant was bound to use all fair means in its power to carry him safely. Whether the plaintiff had a ticket or not was immaterial. The defendant is liable for any negligence on its part whereby the plaintiff was not carried safely. *Secord v. St. Paul, Minneapolis and Manitoba R'y Co.*, 13 Federal Reporter, 221. 1893.

443. — In an action for injuries received by plaintiff in being thrown from the platform of a caboose attached to a freight train of the defendant, where it appeared that the company permitted passengers to be carried on some of its freight trains, and that plaintiff went aboard not knowing that the train was not one of those authorized to carry passengers, and not being advised to the contrary before going aboard, nor before receiving such injuries, but having been directed to the train and permitted to go aboard of it by a person whom the jury, from the evidence, might have found to be an employe of the company, and perhaps one of the conductors of said train, held, that upon these facts the jury might find plaintiff was lawfully aboard such caboose as a passenger. *Lucas v. Milwaukee and St. Paul R'y Co.*, 33 Wis., 41. 1873.

444. — It appearing that the defendant's ticket-office was not opened for the sale of tickets except at or about the time of the departure of regular passenger trains, though passengers were allowed to be carried on some freight trains, and it not appearing that the train came to the passengers' platform, nor that there was anything in the external appearance of the caboose to indicate that it was not adapted to the carrying of passengers, plaintiff is not chargeable with notice that the train in question would not carry him as a passenger, from the fact that it was not brought to the platform, nor from the fact that the caboose was not convenient for passengers, nor from his knowledge that the ticket-office was not open at or about the time of its departure. *Id.*

445. — The conductor of a train is charged with the administration of the company's

rules, and if he permits a passenger to ride in a caboose attached to the train, and an accident occurs through the negligence of the company, whereby the passenger is injured, he may recover damages. *Creed v. Pennsylvania R. R. Co.*, 86 Pa. St., 139. 1878.

XIV. EVIDENCE.

446. **Burden of proof.** When a passenger is injured without fault of his own, there is a legal presumption of negligence by the carrier, and the burden to disprove it is on the carrier. *Pittsburgh and Connellsville R. R. Co. v. Pillow*, 76 Pa. St., 510, 1874; *Ohio and Memphis Packet Co. v. McCool*, 8 Amer. & Eng. R. R. Cases (Ind.), 390, 1882; *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Williams*, 74 Ind., 462, 1881; 3 Amer. & Eng. R. R. Cases, 457; *Railroad Co. v. Pollard*, 22 Wallace, 341. 1874.

447. — Upon proof of an injury to a passenger, no presumption against either the carrier or passenger arises. It is incumbent upon the plaintiff to go further and show, not simply the injury, but that it was the result of some negligence of the carrier. *Railroad Co. v. Mitchell*, 11 Heiskell (Tenn.), 400. 1872.

448. — The mere fact of a train being thrown from the track does not make such a *prima facie* case as to devolve upon the company the burden of showing that the injury "was occasioned without the least negligence" upon its part. *Heazle v. Indianapolis, Bloomington and Western R'y Co.*, 76 Ill., 501. 1875.

449. — A collision is *prima facie* evidence of negligence. *Skinner v. London, Brighton and South Coast R'y Co.*, 2 Eng. Law & Equity, 360; 15 Jurist, 299. 1850.

450. **Damages.** Where the verdict is not excessive, and newly discovered evidence relates only to the age of the injured party, and the difference between the age proven and that sworn to by the newly discovered witness is so slight as hardly to authorize a reduction of the damages, the new trial was properly refused on this ground, especially in the absence of all diligence. *Ga. R. R. Co. v. Kicklighter*, 63 Ga., 708. 1879.

451. — It is not competent for the plaintiff

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to state as evidence his estimate of the amount of damages he has sustained on account of the injuries received; and the supreme court cannot say that such testimony was harmless, though the jury returned a verdict for a less amount than was estimated by the plaintiff. *Ohio and Mississippi R'y Co. v. Nickless*, 71 Ind., 271. 1880.

452. — In an action by a passenger for injury from collision on a railway, *held*, that evidence might be given that one part of his business "was dealing in land; that he had a quantity of land on hand, and to show the value of the business and the profits arising therefrom." *Pennsylvania R. R. Co. v. Dale*, 76 Pa. St., 47. 1874.

453. Death; identity. For the purpose of showing that a person who came to his death by an accident on defendant's railway was the plaintiff's intestate, plaintiff was permitted to show that the deceased was buried at the instance of the superintendent of the company, and then to inquire whether any name was inscribed upon the head-board which marked the place of burial. *Kansas Pacific R'y Co. v. Miller*, 2 Colo., 442, 1874; 20 Amer. R'y Rep., 215.

454. Declarations of agent. The declarations or admissions of an agent or employe concerning the infliction of a personal injury upon a passenger, made the same night, but after the injury, is not admissible against the company. The same rule applies to the acts of the agent. *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Theobald*, 51 Ind., 246. 1875.

455. — A conversation between the plaintiff and the offending employe, following immediately upon the principal act complained of and serving to illustrate its character, held admissible in evidence as a part of the *res gestæ*. *Bass v. Chicago and Northwestern R'y Co.*, 42 Wis., 654, 1877; 15 Amer. R'y Rep., 45.

456. Declarations of injured party. In a suit against a railway company for injuries sustained by a passenger by falling or being precipitated into a ditch when in the act of alighting from a car, it is not competent for the plaintiff to prove what the party said immediately afterward, and while being helped out of the ditch, as to the cause of the accident, it being no part of the *res*

gestæ, but a mere account of a past transaction. *Cleveland, Columbus and Cincinnati R. R. Co. v. Mara*, 28 Ohio St., 183, 1875; 18 Amer. R'y Rep., 335.

457. — A passenger was injured in returning from the smoking car to the ladies' car. Evidence of a conversation between himself and his mother before he went to the smoking car was admitted. *Held*, that such evidence could not have wrought any prejudice. *Downs v. New York Central R. R. Co.*, 56 N. Y., 664. 1874.

458. — In a suit against a railway company for injury, which the plaintiff alleged he had received while a passenger, from the negligent and wrongful management of its train, his expressions indicating pain, uttered after the alleged injury, are admissible in evidence as part of the *res gestæ*. Whether his suffering was real or feigned was a question for the jury. *Houston and Texas Central R. R. Co. v. Shafer*, 54 Tex., 641, 1881; 6 Amer. & Eng. R. R. Cases, 421.

459. — Exclamations of pain should be excluded from evidence in an action for personal injury, where they were made at a medical examination conducted after the controversy arose, for the purpose of obtaining testimony and not for treatment. *Grand Rapids and Indiana R. R. Co. v. Huntley*, 38 Mich., 587. 1878.

460. Defective roadway and machinery. Where the testimony had already been introduced in an action for damages for injuries caused by a railway accident, to the effect that, in the vicinity of the place of the accident, the ties were in a bad condition and rotten, the further testimony of another witness, that he knew there were rotten ties in the track at a distance of more than fifteen rods from the point where the accident occurred, was admissible. *Allison v. Chicago and Northwestern R'y Co.*, 42 Ia., 274. 1875.

461. — Proof that the injury occurred from the breaking, giving way or improper working of the vehicle or any of the machinery or appliances employed in carrying the passengers makes a *prima facie* case of negligence on the part of the carrier. *Wilson v. Northern Pacific R. R. Co.*, 26 Minn., 278. 1879.

462. — Evidence that other parts of the

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track are in bad condition is not admissible in an action for an injury caused by a broken rail. *Louisville and Nashville R. R. Co. v. Fox*, 11 Bush (Ky.), 495, 1875; 14 Amer. R'y Rep., 374; *Grand Rapids and Indiana R. R. Co. v. Huntley*, 33 Mich., 537, 1878.

463. — It appeared that at the time of the accident one of the cars turned over; that that car had no guard chains connecting the truck with the body of the car, such as are usually attached to keep the wheels in line of motion; and that one side of the truck being then raised, fell back on the track, and in so falling caused the alleged injury. Plaintiff claimed that if there had been chains on the car, the truck would not have fallen back, and that the defendant was negligent in not having them there. The conductor of the train, who was looking at the car when it went over, was introduced as a witness, and asked if it was his opinion that if there had been chains on the car the accident would have happened, and he replied that if the chains had been strong enough, and so attached as to have held the trucks to the car, they would have done so. He was then asked if it was his opinion that if such chains had been on the car as were subsequently put on when the car was repaired, they would have held the truck to the car, and he answered that they would not. *Held*, that the testimony was not admissible as that of an expert, but that as it was not to the prejudice of the defendant, there was no error in its admission upon which defendant could sustain exceptions. *Birby v. Montpelier and St. Johnsbury R. R. Co.*, 49 Vt., 123, 1876.

464. — An experienced conductor is presumed to know whether ties are fit for use. *Grand Rapids and Indiana R. R. Co. v. Huntley*, 38 Mich., 537, 1878.

465. — Where, in an action to recover damages sustained by the plaintiff by reason of the failure of the defendant to keep its track in repair, it was in evidence that the cars of the defendant ran off the track between A. and B., which points were twenty-five miles apart, *held*, that evidence was admissible to show that the witness had passed over the same road two days before the plaintiff received the injury, and that, at some point on the road, witness had felt a

severe jar, and that, on the day the cars ran off, witness was in the cars, and predicted that, at a point ahead, the passengers would feel a severe jar, and that the prediction was verified, although the point at which the jar occurred was not shown to be the point at which the cars ran off. *Hedges v. Wilmington and Weldon R. R. Co.*, 73 N. C., 558, 1875.

466. **Expulsion from car.** In an action for damages against a railroad company for ejecting a passenger from a train at a station short of that for which she had procured a ticket, evidence offered by the defendant to prove a regulation of the company forbidding such train to stop at the station to which the ticket had been purchased, when such regulation was not set up in the answer, was properly rejected as not relevant under the issues made by the pleadings. *Hicks v. Hannibal and St. Joseph R. R. Co.*, 68 Mo., 329, 1878.

467. — It is competent for a party who has been forcibly ejected from a train, in a suit for damages therefor, to prove what was the state of his health and the condition of his clothing shortly after the expulsion, as tending to show the character of the treatment he received from the employes and the danger to which he was subjected by reason of his sickness and exposure; but his own statements to a witness as to such condition of his clothing and what caused it are not admissible. *Indianapolis, Peru and Chicago R'y Co. v. Anthony*, 43 Ind., 183, 1873.

468. — **belief of conductor.** Evidence on the part of the conductor that at the time he ejected plaintiff he believed that he had not surrendered a ticket entitling him to be carried, also that he believed it to be his duty to put plaintiff off if he did not pay his fare, is competent upon the question of damages, where punitive damages are claimed. *Yates v. New York Central and Hudson River R. R. Co.*, 67 N. Y., 100, 1876; 15 Amer. R'y Rep., 137.

469. **Husband and wife; declarations.** Where husband and wife were traveling together on a railroad, and she was injured, his narration of how the injury occurred, made in response to an inquiry by a third person, not under such circumstances as

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called on her to respond to the narration, is not evidence against her in an action by her to recover for the injury. *Keller v. Sioux City and St. Paul R. R. Co.*, 27 Minn., 178. 1880.

470. Other accidents. In an action against a railroad company to recover damages for an injury sustained by one of its passengers in consequence of alleged negligence on the part of the company, evidence of another accident having occurred at the same place, under similar circumstances, is inadmissible. *Davis v. Oregon and California R. R. Co.*, 8 Oreg., 172. 1879.

471. Physicians. Where the inquiry is as to the extent of personal injuries, a physician may be called as an expert to testify concerning them, giving his opinion based upon a personal examination of the party as well as upon statements made by such party, as to his *present* condition, feeling and pains, and may also give in evidence such statements. *Atchison, Topeka and Santa Fe R. R. Co. v. Frazier*, 27 Kans., 463, 1883; 8 Amer. & Eng. R. R. Cases, 72.

472. — But the physician may not testify as to what the party said in respect to the past history of the case and the cause or duration of the injury; neither can he give an opinion based partially upon his personal examination and partially upon what the party told him in reference to the past history of the case, and also upon statements of third persons in the presence of the party in reference thereto. *Ib.*

473. — payment of doctor's bills by the company. The payment of the doctor's bills by the company is not an admission of liability. *Weeks v. New Orleans and Carrollton R. R. Co.*, 32 La., 615. 1879.

474. Presumption; payment of fare. Where one is traveling by a passenger train and is not connected with the railway company, the legal presumption is that he is a passenger and traveling for a consideration. *Creed v. Pennsylvania R. R. Co.*, 86 Pa. St., 139. 1878.

475. Vertigo. In an action against a railway company for having wrongfully drenched the plaintiff, while a passenger, with water, it being specially alleged that the injury caused a recurrence of dizziness and vertigo, it was competent, without offering

medical testimony on the subject, to prove, among instances of such dizziness after the injury, the falling of the plaintiff upon a sidewalk. *Terre Haute and Indianapolis R. R. Co. v. Jackson*, 81 Ind., 19, 1881; 6 Amer. & Eng. R. R. Cases, 178.

476. Wealth of parties. Where evidence was admitted concerning the plaintiff's dependence for his support upon his labor, but the court, in laying down the rules as to the elements of damages, in the instructions to the jury omitted the dependence of the plaintiff upon his personal labor for his support, *held*, that the error, if any, in admitting such evidence was cured by the charge. *Mackoy v. Missouri Pacific R'y Co.*, 18 Federal Reporter, 236. 1883.

477. — On the trial of an action against a street railway company and the conductor to recover for personal injuries for the acts of the servants of the company, the court received evidence of the pecuniary ability of the company in aggravation of damages. *Held*, that the admission of the evidence was improper, as the conductor was liable for the judgment, and the evidence as to him was highly prejudicial. *Chicago City R'y Co. v. Henry*, 62 Ill., 142, 1871; 6 Amer. R'y Rep., 365.

478. Rules. In a suit against a railway company to recover damages sustained by a passenger, through the alleged fault of the employes of the defendant, at the trial of which it was claimed that the neglect consisted in whole, or in part, of a violation of the established rules of the company, a book containing the rules and regulations of the company, and intended for the use of their employes, to direct them in the discharge of their duties, is admissible in evidence. *Hobbs v. Eastern R. R. Co.*, 66 Me., 572, 1876; 19 Amer. R'y Rep., 210.

479. Speed. Evidence as to the speed of trains should not be merely relative without some standard of rapidity, but should, at least approximately, show the actual rate, and should show that it was unsafe, before the question whether it was negligent can be left to the jury. *Grand Rapids and Indiana R. R. Co. v. Huntley*, 38 Mich., 537. 1878.

480. — The speed of trains is not a matter for scientific testimony, but it cannot be

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proven by the opinions of passengers observing only from the inside, unless their experience and observation is such as to make their judgment reliable. *Ib.*

481. — Ordinary railway passengers are not presumed to form such habits of observation as will make their opinion as to the speed of trains reliable. *Ib.*

482. — Whether the structure of a railway is such as to warrant fast travel is not usually a question for ordinary witnesses. *Ib.*

483. — Testimony as to the cost of rolling-stock is not relevant to the question of improper speed in the running of passenger trains. *Ib.*

484. — Evidence may be admitted of the rate of speed at which a train was run at the time of an accident by comparison with the speed of trains at other times; so is, also, evidence of the condition of the track at the time of the accident, by comparison with its condition at other times. *Ohio and Mississippi R'y Co. v. Selby*, 47 Ind., 471, 1874; 8 Amer. R'y Rep., 177.

485. Sufficiency. Judgment in favor of a passenger permitted to stand under the evidence. *Canning v. Central Pacific R. R. Co.*, 50 Cal., 166. 1875.

486. — In an action for an injury alleged to have been caused by the negligence of the defendant's employes, the fact of such negligence, and whether any fault of the plaintiff contributed to the injury, are questions for the jury, and where the evidence, though conflicting, tends to support the verdict, the supreme court will not disturb it. *Evansville, Rockport and Eastern R'y Co. v. Harrington*, 82 Ind., 534, 1882; 8 Amer. & Eng. R. R. Cases, 395.

487. — Something more must be shown than a probability that the carrier was negligent; there must be some element of moral certainty and exclusion of reasonable doubt. *Payne v. Forty-Second Street, etc., R. R. Co.*, 40 N. Y. Superior Ct., 8. 1875.

XV. PLEADING.

[See also the various other subdivisions for questions of pleading.]

488. Act of God. In an action by a passenger against a carrier for negligence, where the allegations of the petition are such as to involve the issue, it is not neces-

sary to plead specially that the injury occurred through the act of God. Evidential facts should not be pleaded. *Gillespie v. St. Louis, Kansas City and Northern R'y Co.*, 6 Mo. App., 554. 1879.

489. Carriage beyond station. In an action by a passenger to recover damages for being carried beyond the station for which he had purchased a ticket, it is necessary that he aver in his complaint that the train upon which he took passage was one which, by its running arrangements, under the rules and regulations of the company, should have stopped at such station, or that, by a special contract, the company had agreed to carry him to that station on that train. *Ohio and Mississippi R'y Co. v. Hatton*, 60 Ind., 12. 1877.

490. Condition of track. The complaint alleged that the defendant did not use due care, diligence and skill in carrying the plaintiff; but, on the contrary, the track was in bad condition and repair, and the defendant by its servants, etc., negligently, unskillfully and carelessly ran its train of cars, whereby, etc. *Held*, on demurrer, that the allegation of the condition of the track was not too general. *Held*, also, that if defendant desired a more particular description of the condition of the track, a motion to make the averment more specific should have been made. *Ohio and Mississippi R'y Co. v. Selby*, 47 Ind., 471, 1874; 8 Amer. R'y Rep., 177.

491. Contract limiting liability. A plea setting up an agreement of a passenger to assume all risks in consideration of a free passage amounts to a general issue, and is not a special issue. *Kimball v. Boston, Concord and Montreal R. R. Co.*, 55 Vt., 95. 1882.

492. Distinction as to color. The allegation that a railway company "injuriously and unlawfully made a distinction on account of the color and supposed race of the plaintiff, so as to damage and actually damaging her standing and happiness," does not state a good cause of action. *Redding v. Railroad Co.*, 5 So. Car., 67. 1873.

493. Evidence. The plaintiff averred that he was a passenger, and "that while the train was in rapid motion, he, actuated by a reasonable fear of the loss of his life if he remained on the train, and in view of an ap-

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parently unavoidable collision with another train of the defendant on the same track, and impelled by ordinary prudence, jumped from the train to escape the collision, and was injured by violent contact with the ground, and that immediately afterwards the trains collided with great force." *Held*, that the plaintiff could not introduce evidence that he remained on the cars and was injured by the collision. *Shepard v. New Haven and Northampton Co.*, 45 Conn., 54. 1877.

494. Evidence cannot be excluded by admitting negligence. In an action for damages, by the children of a party who had been killed by an accident on a railway, the defendant, with the view of excluding from the consideration of the jury evidence as to the alleged culpable negligence through which the accident occurred, offered an issue with the admission that the accident had been caused by negligence for which it was liable, and putting to the jury the question *only* of the amount of damages. *Held*, that the extent of wrong on the part of the defendant was a proper element for the jury to consider in assessing damages; and that the plaintiff was entitled to the ordinary form of issue, whether the death in question was caused by the negligence of the company. *Morton v. Edinburgh and Glasgow R'y Co.*, 8 Scotch Session Cases (2d series), 288. 1845.

495. Expulsion from car. Where the complaint did not allege any mental sufferings of the plaintiff, it was error to allow him, over objection, to prove the delicate condition of his wife, awaiting his arrival at his destination, and his consequent distress of mind on her account. *Indianapolis, Bloomington and Western R. R. Co. v. Milligan*, 50 Ind., 392. 1875.

496. Form of action. Where a railway company agrees to carry a passenger for hire over its road, and by its negligence an injury results to the passenger, he may sue upon the contract or in tort, at his election. *Pennsylvania R. R. Co. v. Peoples*, 31 Ohio St., 537. 1877.

497. Getting on wrong train. A passenger trying to get upon the wrong train fell and was killed in consequence of the sudden movement of the train. *Held*, that there

could be no recovery for the passenger's death as caused by the wrongful act, neglect or default of the company, on a declaration alleging it to have been the company's duty to receive and transport such passenger by that train. *Flint and Pere Marquette R'y Co. v. Stark*, 38 Mich., 714. 1878.

498. Husband and wife. The fortieth section of the Common Law Procedure Act, 1852, which provides that "in any action brought by a man and his wife for injury done to the wife, in respect of which she is necessarily joined as a plaintiff, it shall be lawful for the husband to add thereto claims in his own right," is permissive only, not imperative. *Brockbank v. Whitehaven Junction R'y Co.*, 7 Hurlstone & Norman (Exchequer), 834. 1863.

499. Joinder of actions; husband and wife; parent and child. Where by means of the same negligence of one person, bodily injuries are inflicted upon another, his wife and his minor child, resulting in the loss to him of his wife's services, and the expenditure by him of means and labor in healing and caring for himself and his child, all constitute but one cause of action, and may be united in a single paragraph of a complaint. But an action for the death of the child cannot be so joined. *Cincinnati, Hamilton and Dayton R. R. Co. v. Chester*, 57 Ind., 297. 1877.

500. Statute of sister state. An action for an injury predicated upon the statute of another state may be brought in Tennessee, but the declaration must aver the statute under which it is brought. *Nashville and Chattanooga R. R. Co. v. Sprayberry*, 9 Heiskell (Tenn.), 852, 1874; 20 Amer. R'y Rep., 55.

501. Sufficiency. A count alleging that the plaintiff was in the car of the defendant, and was thrown therefrom by the carelessness of the defendant, is too general in its description of the mode of the injury. *Central R. R. of New Jersey v. Van Horn*, 38 N. J. Law, 133. 1875.

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502. Act of God. If the road is built of earth, in the channel of a watercourse, where it may be swept away by a great tor-

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rent, the company is negligent. But, having reference to all the conditions of climate and situation, and especially that provision was made for the water that would ordinarily flow in such watercourse, the company was not wilfully indifferent to consequences in so constructing its road. *Kansas Pacific R'y Co. v. Lundin*, 3 Colo., 94. 1876.

503. — This *prima facie* presumption, arising from the cars being derailed, may be overcome by proof, to the satisfaction of the jury, that the injury complained of resulted from inevitable accident, or from something against which no human prudence or foresight could provide. *Philadelphia and Reading R. R. Co. v. Anderson*, 94 Pa. St., 351, 1880; 6 Amer. & Eng. R. R. Cases, 407.

504. — train behind time. Where a train of cars was running three-quarters of an hour behind the usual, ordinary and advertised time for the running of trains, and was upset by a sudden gust of wind which crossed the track, but not that portion of the track where the train would have been if running on time, whereby a passenger was injured, *held*, that the injury complained of was not the natural result of the train being behind time, and that the damages sustained were too remote to entitle a recovery against the carrier. *McClary v. Sioux City and Pacific R. R. Co.*, 3 Neb., 44. 1873.

505. Act of third party. While in many cases the mere fact of injury to a passenger upon a car raises the presumption of a want of care, as where the injury results from defective track, cars, machinery or motive power, yet where a passenger in a railway car is injured by the act of a third party, over whom the railway company has no control, the burden of proof is upon the passenger to show not only that he was not guilty of contributory negligence, but that the company was guilty of negligence, and that thereby the injury was caused. *Federal Street and Pleasant Valley R'y Co. v. Gibson*, 96 Pa. St., 83, 1880; 11 Amer. & Eng. R. R. Cases, 142.

506. Car doors. The plaintiff, a passenger by the defendant's railway, in getting into a railway carriage at a station, placed his left hand on the back of the open door to aid him in mounting the step. There was conflicting evidence as to whether there

was a proper handle affixed to the carriage to the right hand of the door. The night was dark, and the plaintiff did not see any handle. He had a parcel in his right hand. Before he had completely entered the carriage the guard, without any previous warning, closed the door, and crushed his hand between the back of the door and the door-plate. In an action for the injury thus sustained, *held*,—affirming the judgment of the majority of the court of common pleas,—that there was evidence of negligence on the part of the company's servant, and no evidence of such contributory negligence on the part of the plaintiff as to entitle the defendant to a non-suit. *Fordham v. London, Brighton and South Coast R'y Co.*, Law Reports, 4 Common Pleas Cases, 619. 1869.

507. — The plaintiff was a passenger by the defendant's railway. At G. station the compartment in which the plaintiff was being already full, three extra passengers got in, notwithstanding the plaintiff's remonstrances. At the next station the plaintiff again remonstrated, and there being a large number of persons on the platform and few porters in attendance, the carriage door was opened, and more attempted to enter the carriage, but were prevented by the plaintiff and the other passengers. After the train had moved on, the carriage door remaining open all along the platform, a porter slammed the door to just as it was entering the tunnel; and the hand of the plaintiff, in consequence, as he swore, of the inconveniently crowded state of the carriage, was crushed in the hinge. *Held*, that, though taken singly these several circumstances might not have been sufficient evidence of negligence to charge the defendant, yet, combined, they showed such a careless and improper mode of conducting the business of the company as to justify the jury in finding it guilty of negligence which was a cause of the accident. *Jackson v. Metropolitan R'y Co.*, Law Reports, 10 Common Pleas Cases, 49, 1874; 11 Eng. (Moak), 244; *Same v. Same*, Law Reports, 2 Common Pleas Division, 125, 1877; 20 Eng. (Moak), 402. But see *Metropolitan R'y Co. v. Jackson*, Law Reports, 3 Appeal Cases, 193, 1877; 24 Eng. (Moak), 121.

508. — In an action against the defendant

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for negligence it was proved that the plaintiff, being a passenger on defendant's railway, got up from his seat and put his hand on the bar which passed across the window of the carriage with the intention of looking out to see the lights of the next station, and that the pressure caused the door to fly open, and the plaintiff fell out and was injured. There was no further evidence as to the construction of the door and its fastenings. The jury having found for the plaintiff, leave being reserved to enter a non-suit on the ground that there was no evidence of the defendant's liability, *held* by the queen's bench and exchequer chamber, that there was evidence, and that the verdict ought to stand. *Gee v. Metropolitan R'y Co.*, Law Reports, 8 Queen's Bench Cases, 161; 5 Eng. (Moak), 169. 1878.

509. — In an action of damages brought by a passenger who had been injured by a fall from a train, in consequence of the carriage door against which he was leaning flying open, it was proved that neither the injured party nor any one else in the compartment opened the door. *Held*, that the accident had been caused by the fault of the servants of the defendant in failing to fasten the door, and that the defendant was liable in damages. *Cassidy v. North British R'y Co.*, 11 Scotch Session Cases (3d series), 341. 1878.

510. — The plaintiff, a boy twelve years of age, had entered a third class railway carriage at night time, and was about to seat himself when he placed his fingers on a part of the door. His father was behind him getting into the carriage, when a porter violently closed the door, which crushed the plaintiff's fingers and struck his father on the back. *Held*, that there was evidence of negligence on the part of the porter, which was properly submitted to the jury, and that there was no contributory negligence on the part of the plaintiff. *Coleman v. South Eastern R'y Co.*, 4 Hurlstone & Coltman (Exch.), 699. 1866.

511. — The door of a carriage, in which the plaintiff was being carried as a passenger, on the defendant's railway, flew open several times through the negligence of the defendants. There was room in the carriage for the plaintiff to sit away from the door, and the train would have stopped at a

station in three minutes. The plaintiff shut the door three times. The door opened a fourth time, and in endeavoring to shut it again the plaintiff fell out and was hurt. The train stopped at three stations between the time when the door first opened and the occurrence of the accident. *Held*, that, as the inconvenience that the plaintiff would have suffered if he had not shut the door was slight, and the peril incurred in his attempt to shut it considerable, the injury he suffered was not the necessary or natural result of the company's negligence, and that defendant was therefore not liable for such injury. *Adams v. Lancashire and Yorkshire R'y Co.*, Law Reports, 4 Common Pleas Cases, 739. 1869.

512. Communication between passengers and employes in charge of train; statute. The Regulation of Railways Act, 1863, s. 22, enacts that "every company shall provide, and maintain in good working order, in every train worked by it which carries passengers, and travels more than twenty miles without stopping," means of communication between the passengers and the servants of the company in charge of the train. *Held*, that the section applies to every passenger train which is intended to travel more than twenty miles without stopping. *Blamires v. Lancashire and Yorkshire R'y Co.*, Law Reports, 8 Exchequer Cases, 233; 7 Eng. (Moak), 237. 1873.

513. Constitutional law; operation of trains. The statute requiring stoppage of trains five minutes at stations will not be held unconstitutional unless it should plainly appear that it impairs some vested right. *Galveston, Harrisburg and San Antonio R. Co. v. Le Gierse*, 51 Tex., 189. 1879.

514. Contractors. A passenger riding upon a construction train, upon a line not yet finished, upon a train controlled and operated by a contractor, cannot maintain an action against the railway company for an injury received while being thus transported. *Cunningham v. International R. Co.*, 51 Tex., 503. 1879.

515. — The plaintiff, while traveling by the defendant's railway, was injured by the fall of a girder through the negligence of workmen employed by a contractor (unconnected with the defendant) whilst placing it

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across the retaining walls of the railway. It was proved that the work in question was extremely dangerous, though none of the witnesses had ever known of a girder falling; that it was the practice, when such work was being done over railways, for the company to place a man to signal to the work-people the approach of a train; and that this precaution was not adopted on the occasion in question; but there was no evidence that the company's servants knew that the girder was in the course of being moved at the time the train was passing, or of the means used by the contractor for moving it. *Held*, upon a case in which the court were to be at liberty to draw inferences of fact,—reversing the decision of the court of common pleas,—that as a fact the defendant was not guilty of negligence, although the evidence of negligence was such that it could not have been withdrawn from the jury. *Daniel v. Metropolitan R'y Co.*, Law Reports, 3 Common Pleas Cases, 591. 1868.

516. — A railway company is not responsible for injuries occurring to a passenger upon a train, operated by construction contractors on a part of the railway which has not been accepted by the company. *Union Pacific R. R. Co. v. Hause*, 1 Wyoming, 27. 1871.

517. — employe of railway contractor. A railway company, carrying an employe of a contractor, engaged in repairing its road, to and from his work, is responsible for neglect in carrying such employe. *Torpy v. Grand Trunk R'y Co.*, 20 Upper Canada (Queer's Bench), 446. 1831.

518. Degree of care required of carrier. The highest degree of care and skill is required in the transportation of passengers. *Railroad Co. v. Varnell*, 98 U. S., 479, 1878; *George v. St. Louis, Iron Mt. and Southern R'y Co.*, 34 Ark., 613, 1879; 1 Amer. & Eng. R. R. Cases, 294; *Delaware, Lackawanna and Western R. R. Co. v. Dailey*, 37 N. J. Law, 526, 1874; *Brunswick and Albany R. R. Co. v. Gale*, 56 Ga., 322, 1876; *Baltimore and Ohio R. R. Co. v. Wightman*, 29 Grattan (Va.), 431, 1877; *Mackoy v. Missouri Pacific R'y Co.*, 18 Federal Reporter, 236, 1833; *Jamison v. San Jose and Santa Clara R. R. Co.*, 55 Cal., 593, 1880; 3 Amer. & Eng. R. R. Cases, 350; *Pittsburgh and Connells-*

ville R. R. Co. v. Pillow, 76 Pa. St., 510, 1874; *Pennsylvania Co. v. Roy*, 102 U. S., 451, 1880; 1 Amer. & Eng. R. R. Cases, 225.

519. — Railway companies fulfil their duty if they furnish and operate their roads in the manner generally found and believed to be safe by prudent railway companies engaged in carrying passengers. *Grand Rapids and Indiana R. R. Co. v. Huntley*, 38 Mich., 537. 1878.

520. — A charge to the jury, that carriers of passengers are “legally bound to exert the utmost care and skill in conveying their passengers and are responsible for the slightest negligence or want of skilfulness either in themselves or their servants;” that they are “bound to the utmost care and skill in the performance of their duty;” that the degree of responsibility to which they are subjected is “not ordinary care which will make them liable for ordinary neglect, but extraordinary care which renders them liable for slight neglect,” etc., is too exacting in its requirements. Railroad companies are only held to the duty of being prudent and to the diligence embraced by the common rules of good railroad management. *Michigan Central R. R. Co. v. Coleman*, 28 Mich., 410, 1874; 12 Amer. R'y Rep., 59. See, also, *Gilson v. Jackson County Horse R'y Co.*, 76 Mo., 282. 1882.

521. — An instruction that “the defendant, as a carrier of passengers for hire, was bound, as far as human foresight and care would enable it, to carry the plaintiff with safety, and that its obligation to the plaintiff did not cease until she had alighted and freed herself from defendant's car, or until she had alighted and had reasonable time to free herself,” etc., etc., is erroneous, as requiring too high a degree of care. The instruction requires the utmost care and largest foresight belonging to mankind as the measure of care which appellant, by its agent, was bound to exercise. *Louisville R'y Co. v. Weams*, 80 Ky., 420, 1882; 8 Amer. & Eng. R. R. Cases, 399.

522. — The correct rule is that a carrier of passengers for hire must use the utmost care and skill which prudent men are accustomed to use under the circumstances. *Id.*

523. — As a carrier of passengers, a railroad company, its officers and servants, are

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bound to exercise more than "all ordinary and reasonable care and diligence." That is to say, the company will be liable to passengers for injuries to them unless extraordinary care and diligence be used; and slight neglect on the part of the agents and servants of the company will be sufficient to fix its liability. *Crawford v. Ga. R. R. Co.*, 62 Ga., 566, 1879.

524. — A carrier of passengers is not an insurer, but is held only to the utmost care and diligence of a cautious person. An instruction, therefore, that a carrier was liable for an injury to a passenger from a defect in his vehicle unless he had used the "greatest possible care and diligence that was necessary" is erroneous. *Gilson v. Jackson County Horse R'y Co.*, 12 Amer. & Eng. R. R. Cases, 182; 76 Mo., 282, 1882.

525. — Where, for a consideration, a railway company undertakes to carry a passenger from one point upon its line to another, there arises an implied contract on the part of the company that it has, for that purpose, provided a safe and sufficient road, and that its cars are safe and trustworthy. *Philadelphia and Reading R. R. Co. v. Anderson*, 94 Pa. St., 351, 1880; 6 Amer. & Eng. R. R. Cases, 407.

526. — Where a passenger is injured by an accident arising from a collision or a defect in the machinery or roadway he is required, in the first place, to prove no more than the fact of the accident and the extent of the injury. A *prima facie* case is thus made out, and the burden is cast upon the carrier to disprove negligence. *Ib.*

527. Excursion train. A declaration against a railway company stated that the plaintiff, at the request of the defendant, became a passenger in one of its trains, to be carried for hire; that, through the carelessness, negligence and improper conduct of the defendant, the train in which the plaintiff was such passenger collided with another train, whereby the plaintiff was injured. At the trial it appeared that the train in question had been hired of the company by a benefit society for an excursion, the tickets for which were sold and distributed by the treasurer of the society; from whom the plaintiff purchased one; and that the accident was occasioned by the train in

which the plaintiff was running against a train standing at the station, it being then dark. *Held*, first, that the mere fact of the accident having occurred was *prima facie* evidence of negligence on the part of the defendant. Secondly, that there was evidence for the jury that the plaintiff was a passenger to be carried by the defendant. *Skinner v. London, Brighton and South Coast R'y Co.*, 5 Welsby, Hurlstone and Gordon (Exchequer), 787, 1850.

528. Explosion of fog signal. Where it appeared that plaintiff was injured in the eye by the explosion of a fog signal upon the track, and it did not appear how the signal got upon the track; that its use at the time was wholly unnecessary; that the employes of defendant, called by the plaintiff as witnesses, knew nothing about it; that it appeared that some third person might have obtained it from one of defendant's servants and have placed it there, — *held*, that a nonsuit was properly directed. *Jones v. Grand Trunk R'y Co.*, 45 Upper Canada (Queen's Bench), 193, 1880.

529. Express messenger. An express messenger assumes the risk incurred by being carried in a more dangerous place than other passengers, but he does not assume the risk of the negligent management of trains by the railway company. *Pennsylvania Co. v. Woodworth*, 26 Ohio St., 585, 1875.

530. — Where there is no express exemption provided by contract, a railway company is liable for the consequences of its own or its employes' negligence to persons traveling upon its trains, as messengers of an express company, to the same extent as to other passengers, although no charge is made for their fare. One temporarily supplying the place of a messenger stands in the same position with him, and is entitled to the same protection. *Blair v. Erie R'y Co.*, 66 N. Y., 318, 1876.

531. Failure to provide with seats. *Semble*, that, as a general rule, and under ordinary circumstances, it is the duty of a railway company to provide every passenger with a seat, and that, if a passenger, exercising reasonable care and prudence, is injured in consequence of the company's neglect in this regard, the latter must respond in damages. *Camden and Atlantic*

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R. Co. v. Hoosey, 99 Pa. St., 492, 1882; 6 Amer. & Eng. R. R. Cases, 454.

532. Failure to stop train. The failure, through negligence, to stop a train at a station to take on a passenger who has properly applied for transportation will render the carrier liable for the resulting damages. *Houston and Texas Central R. R. Co. v. Rand*, 9 Amer. & Eng. R. R. Cases (Tex.), 399, 1882.

533. Ferry boats. The want of sufficient light and suitable guards on a ferry boat, held, under the facts of this cause, to have caused the death of a passenger. *Holmes v. Oregon and California R'y Co.*, 6 Sawyer (U. S. C. C.), 262, 1880; *Same v. Same*, 5 Federal Reporter, 523, 1881.

534. Getting off between stations. If the conductor of a train agree to put a passenger off at a particular place which is not a station or regular stopping place, it would be the duty of the conductor to stop the train at that place, so that the passenger could get off in safety. This rule would apply although the passenger had a ticket only to the last station passed before reaching the place at which he was to be put off. *Western R. R. Co. v. Young*, 51 Ga., 489, 1874; 7 Amer. R'y Rep., 352.

535. — Under the facts of this case it was not error in the court to refuse to charge the jury "that if the train slacked up so that the plaintiff might have gotten safely off, it was for the plaintiff to determine whether he would get off or not; and if he did get off, and in so doing was injured, he is not entitled to recover." *Ib.*

536. Hand-car. A foreman of a section acts beyond the scope of his authority by accepting a person for transportation on his hand-car. *Hoar v. Maine Central R. R. Co.*, 70 Me., 65, 1879.

537. — To entitle an administratrix to recover for an injury to her intestate, caused by being negligently run over by defendant's train, while he was on a hand-car at the invitation of a section foreman, it must appear that the company was a common carrier of passengers by hand-cars. *Ib.*

538. — It having been decided that the allegations of the complaint that the plaintiff sat upon the hind end of a hand-car with his feet hanging down, under the direction

of the person in charge of the car, and without being aware of the danger of the position, did not show negligence on his part contributing to an injury caused by plank placed on the defendant's road between the rails being loose, warped and sticking up so as to hit his heels, additional facts, brought out by the evidence on the trial, in regard to the dimensions of the car, the height of the platform on which the plaintiff sat above the road-bed, and the danger which he would be in from the handle of the lever with which the car was worked, are held not to be sufficient to justify the court in taking the question of negligence from the jury. *Pool v. Chicago, Milwaukee and St. Paul R'y Co.*, 56 Wis., 227, 1882; 8 Amer. & Eng. R. R. Cases, 360.

539. Husband and wife. In an action by a married woman and her husband, against a railway company, to recover damages for putting her off at a wrong and improper place, evidence that she was so put off at the request of her husband, made without her knowledge, is inadmissible. *Baltimore, Pittsburgh and Chicago R'y Co. v. Pizley*, 61 Ind., 22, 1878.

540. — Under the statute (Comp. L., §4804), an action for the personal sufferings of a married woman from an injury received in a railway accident should be brought by the wife alone, and not by the husband and wife jointly; the statute supercedes the common law in this respect. *Michigan Central R. R. Co. v. Coleman*, 23 Mich., 440, 1874; 12 Amer. R'y Rep., 59.

541. — A judgment in *assumpsit*, brought by a husband and wife, on a contract by a carrier of passengers to carry her safely, for injuries to her while being carried, is a bar to another action of *assumpsit* on the same contract, by the husband alone, to recover for the same injuries. *Pollard v. Railroad Co.*, 101 U. S., 223, 1879.

542. — A different rule prevails when the action is in tort against the carrier for a breach of his public duty, except, perhaps, in states where, as in New Jersey, the husband, in such an action, may by statute add claims in his own right to those of his wife. *Ib.*

543. — *wife of an employee.* The rule that an employe cannot recover of his employer

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for damages caused by the negligence of his fellow-servant does not prevent his recovering against his master for consequential damages by him sustained through an injury to his wife from such negligence. *Gannon v. Housatonic R. R. Co.*, 112 Mass., 234. 1873.

544. Injury to person who had previously been injured. Where a passenger had been injured by the negligence of the employes of a railroad company, and while suffering from the injury received another by an accident to a train upon the road of the same company, it was held that he could recover for the latter injury, although a person well and sound might have suffered no ill effects therefrom. *Allison v. Chicago and Northwestern R'y Co.*, 42 Ia., 274. 1875.

545. — It is no defense to an action for damages for personal injuries, that the plaintiff was not in sound bodily health at the time the injuries were received. *Id.*

546. Insulting language. A conductor on one of defendant's trains took up from plaintiff and his wife tickets purchased by them for South Livonia, telling them that the train did not generally stop there, but that it probably would on that occasion, to take in water. The train did not stop there. Subsequently the conductor came into the car, asked plaintiff why he did not get out, and, in the course of a discussion which ensued, used insulting language to him. *Held*, that the conductor, in returning to the car and using insulting language to the plaintiff, was not acting in the discharge of his duty, and that the company was not liable therefor. *Parker v. Erie R'y Co.*, 5 Hun, 57. 1875.

547. Intoxication of passenger. Intoxication is not such negligence *per se* as will prevent a party injured from recovering the damages sustained by him from the negligence of a common carrier. *Holmes v. Oregon and California R'y Co.*, 6 Sawyer (U. S. C. C.), 232. 1880.

548. — It is the duty of passenger carriers to repress all disorderly and indecent conduct in their cars, and persons guilty of rude or profane conduct should be at once expelled. *Pittsburgh and Connellsville R. R. Co. v. Pillow*, 76 Pa. St., 510. 1874.

549. — If one voluntarily becomes drunk,

and consequently falls down, or lies down, in a state of insensibility on a railroad track, so that he is injured by a passing train, he cannot recover for injuries so received, even though there may have been negligence on the part of employes of the road. *Southwestern R. R. Co. v. Hankerson*, 61 Ga., 114. 1878.

550. — Intoxicated persons should not be allowed on the cars, or, if so, should be so guarded or separated from the orderly part of the passengers as to prevent injury from them. *Pittsburgh and Connellsville R. R. Co. v. Pillow*, 76 Pa. St., 510. 1874.

551. Mail agents. A mail agent who is transported by a railway company under a contract with the government to carry its mail agents free of charge may maintain an action against the company to recover damages for injuries arising from negligence. Such action is not founded on the contract with the government, but upon the duty which the law imposes upon the company. *Hammond v. Northeastern R. R. Co.*, 6 So. Car., 180. 1874.

552. — The act of April 4, 1838, provides "That when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action in all such cases against the company shall be only such as would exist if such person were an employee, provided this section shall not apply to passengers." *Held*, that a route or mail agent in the employ of the United States postoffice department, while traveling on a railway in the performance of his duties, is not a passenger within the meaning of the act. *Pennsylvania R. R. Co. v. Price*, 96 Pa. St., 256, 1880; 1 Amer. & Eng. R. R. Cases, 284.

553. — Declaration in case alleged that defendant was a carrier; that the mails from L. to T., among others, had been required to be, and were, carried by defendant in and on its railway, pursuant to Stat. 1 and 2 Vict., c. 98; that plaintiff was an officer of the postoffice whom the postmaster-general had reasonably required defendant to carry and convey in and upon the carriage conveying

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the said mails, and defendant was then carrying and conveying plaintiff as such officer on the said railway, in a carriage in which the mails were, and plaintiff, as such officer, was lawfully in the said carriage, and thereupon it became the duty of defendant to use proper care and skill in carrying and conveying plaintiff; yet defendant did not use due and proper care and skill in carrying and conveying plaintiff, but neglected so to do, so that the said carriage received a concussion, whereby plaintiff was injured, etc. *Held*, on demurrer, that by said statute a duty was imposed on defendant to use proper care and skill in conveying plaintiff, and that it was liable to plaintiff for injury sustained by him through neglect to use such care and skill. *Collett v. London and North Western R'y Co.*, 16 Adolphus & Ellis (N. S.), 984; 71 E. C. L., 984, 1851; 20 Law Jour. Rep. (N. S.), Q. B., 411; 6 Eng. Law & Equity, 305.

554. Making up train. When a passenger enters a car by the invitation of an employe, or in obedience of an announcement that the cars are ready to receive passengers, the relation of passenger and carrier is created. *Hannibal and St. Joseph R. R. Co. v. Martin*, 11 Bradwell (Ill.), 386, 1882.

555. Master and servant. An action will not lie against a railway company, as a carrier of passengers for hire, at the suit of a master, for a personal injury sustained through its negligence by his servant, whereby the master lost the benefit of the services of the servant,—the contract out of which arose the duty to carry safely being a contract between the company and the servant. *Alton v. Midland R'y Co.*, 19 Common Bench (N. S.), 213; 115 E. C. L., 213, 1865. See, also, *Berringer v. Great Eastern R'y Co.*, Law Reports, 4 Common Pleas Division, 168, 1879; 30 Eng. (Moak), 466.

556. — apprentice. A declaration in tort alleged that the plaintiff's apprentice was on the defendant's car on a day stated, for hire paid by the apprentice in the absence of the master; that by the defendant's negligence in carrying the apprentice, he was injured, and the plaintiff thereby lost his services. *Held*, on demurrer, that the declaration disclosed a good cause of action. *Ames v.*

Union R'y Co., 117 Mass., 541, 1875; 6 Amer. R'y Rep., 260.

557. Murder by fellow passenger. A railroad company is not liable for damages for a wanton and unprovoked injury to a passenger committed by a fellow passenger, unless it be shown that the servants of the company knew that the wrong-doer was an unsafe or dangerous man, and that there was reason to apprehend his injuring other passengers. Mere intoxication is not sufficient to make it the duty of a conductor to expel a passenger from a public conveyance. *Putnam v. Broadway, etc., R. R. Co.*, 15 Abbott's Practice, N. S. (N. Y.), 383; 55 N. Y., 108, 1873.

558. — The fact that the blow causing the injury was struck with a car hook belonging to the car is not sufficient to render the company liable, without proof of negligence or wrong on the part of the servants and agents of the company. *Ib.*

559. Railway operated by government. McL., the suppliant, purchased in 1880 a first-class railway ticket to travel from Charlottetown to Souris on the Prince Edward Island R'y, owned by the Dominion of Canada, and operated under the management of the minister of railways and canals, and while on said journey was injured, the result of an accident to a train. By petition of right he alleged that the railway was negligently and unskilfully conducted and maintained by her majesty; that her majesty, disregarding her duty in that behalf and her promise, did not carry him safely and securely, and that he was greatly and permanently injured in body and health, and claimed \$50,000. The attorney-general pleaded that her majesty was not bound to carry safely and securely, and was not answerable by petition of right for the negligence of her employes. The judge at the trial found that the line was in a most unsafe state from the rottenness of the ties, and that the safety of life had been recklessly jeopardized by running trains over it with passengers, and that there had been a breach of a contract to carry the suppliant safely and securely, and awarded \$33,000 damages. On appeal to the supreme court of Canada, *held*, that the establishment of government railways in Canada, of which the

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minister of railways and canals had the management, direction and control, under statutory provisions, for the benefit and advantage of the public, is a branch of the public police created by statute for the purposes of public convenience, and not entered upon or to be treated as a private and mercantile speculation, and that a petition of right does not lie against the crown for injuries resulting from the non-feasance or misfeasance, wrongs, negligences or omissions of duty of the subordinate officers or agents employed in the public service on said railways. That the crown is not liable as a common carrier for the safety and security of passengers using said railways. *Queen v. McLeod*, 8 Canada Supreme Court, 1. 1883.

560. — stock owned by state. The fact that the state is the sole owner and stockholder does not exempt the corporation from liability and suit. *Hutchinson v. Western and Atlantic R. R. Co.*, 6 Heiskell (Tenn.), 434, 1871; 12 Amer. R'y Rep., 16.

561. Pay-car. A railroad company in Georgia, providing sufficient trains and cars to accommodate all the traveling public over its line, has the legal right to run special trains over its road for the purpose of carrying provisions and paying its employes, and to prohibit any person from traveling on such trains; and if plaintiff entered a car attached to the same, knowing its character, without the consent of the corporation or its agent, he becomes a trespasser. *South-western R. R. Co. v. Singleton*, 66 Ga., 252. 1880.

562. — If one enters a pay-train for the purpose of riding thereon, and by the rules and regulations of the company passengers were not allowed to ride on such trains, it would be his duty to leave the train as soon as he prudently could, when notified of such rule. *Ib.*

563. Payment of damages into court. In a case against a railway company for negligence, whereby the plaintiff, a passenger, was injured, the defendant pleaded payment into court of \$5l., and no damages *ultra*. *Held*, that the payment into court admitted the contract to carry, and the breach of the duty founded upon that contract, so as to dispense with proof of negligence,—the damages being single, and depending upon

nothing beyond the mere breach of duty admitted. *Perren v. Monmouthshire R'y Co.*, 11 Common Bench, 855; 73 E. C. L., 855, 1852; 20 Eng. Law & Equity, 258; 22 Law Jour. Rep. (N. S.), C. P., 162; 17 Jurist, 532.

564. Reading law to the jury. The statement of Judge Redfield, in his work on Carriers, § 539, that juries rose to a higher plane of justice in relation to the duty of carriers of passengers than courts or lawyers, was read to the jury by plaintiff's counsel against defendant's objection. *Held*, to be sufficient ground for a new trial. *Houston and Texas Central R. R. Co. v. Nichols*, 9 Amer. & Eng. R. R. Cases (Tex.), 361. 1832.

565. Right to sue. The liability of a railway company for an injury to a passenger grows out of its obligations as a common carrier. A statute, incorporating the company, provided that it should not be held liable "for anything done or omitted in pursuance of the act," without twenty days' notice in writing. *Held*, that the liability for personal injury was independent of the act of incorporation. *Carpue v. London R'y Co.*, 5 Adolphus & Ellis (N. S.), 747; 48 E. C. L., 746, 1844; *Carpue v. London and Brighton R'y Co.*, 3 Eng. R. R. & Canal Cases, 692, 1844.

566. Robbery. Upon the arrival of defendant's train at New York, the car in which plaintiff was a passenger was detached from the others and allowed to remain unguarded, while awaiting the arrival of horses by which it was to be drawn to the station. The plaintiff got up and went toward the door to ascertain the cause of the stoppage, when he was seized by three men who had just entered the car and robbed of securities of the value of over \$16,000. In an action by him to recover the amount thereof from the company, *held*, that he was not entitled to recover. *Weeks v. New York, New Haven and Hartford R. R. Co.*, 9 Hun (N. Y.), 609. 1877.

567. — A carrier of passengers is bound to exercise the utmost vigilance in protecting his passengers from violence of strangers; but, for a neglect to perform this duty his liability is not more extensive than in cases of negligence by which injury comes to the person or property of the passenger from other causes. *Weeks v. New York, New*

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Haven and Hartford R. R. Co., 72 N. Y., 50. 1878.

568. Rules — reasonableness. The question of the reasonableness of the rules of a railway company, affecting third persons, is generally a mixed question of law and fact, and it is always proper to submit such a question to the jury under instructions. *Bass v. Chicago and Northwestern R'y Co.*, 36 Wis., 450, 1874; 9 Amer. R'y Rep., 101.

569. — right of conductor to vary rules. Where a passenger, having a ticket to a certain station, takes passage upon a train which, under the rules of the company, does not stop at that station, the fact that the conductor takes up his ticket and agrees to stop the train at that station will not bind the company. The conductor cannot vary the rules of running the trains to accommodate a single passenger. *Ohio and Mississippi R'y Co. v. Hatton*, 60 Ind., 12. 1877.

570. — waiver. A conductor cannot waive a rule which by its very terms he is required to enforce. He may neglect to enforce it, and, where the rule is a mere police arrangement of the company, such request may, perhaps, amount to a waiver as between the passenger and the company. But where the rule is for the protection of human life the case is very different. *Pennsylvania R. R. Co. v. Langdon*, 92 Pa. St., 21. 1879.

571. Settlement and release; fraud. Claim, stating that the defendant was a carrier of passengers by railway, and the plaintiff was received by it as a passenger in an express train, which by its negligence came into collision with an engine and he was injured. Defense, that after the collision the plaintiff accepted money from the defendant's officer in satisfaction of his cause of action, and executed a release. Reply, that the defendant's officer procured the plaintiff to execute the release by fraudulently representing to him for that purpose that his injuries were of a trivial and temporary nature, and that if they should afterwards turn out to be more serious than he then anticipated, he would still, though he had executed the deed, be in a position to obtain further compensation from the defendant, and that the plaintiff was thereby in-

duced to execute the deed, and that after he had executed it his injuries turned out to be of a more serious nature than he had anticipated. *Held*, that the reply was good, as it contained a separate and independent statement that the plaintiff was induced to execute the deed in consequence of a fraudulent representation that his injuries were of a trivial and temporary character. *Hirschfield v. London, Brighton and South Coast R'y Co.*, Law Reports, 2 Queen's Bench Division, 1. 1876.

572. Sleeping cars. A passenger, traveling in the coach of a sleeping-car company, may properly assume, in the absence of notice to the contrary, that the whole train is under one management; and in such case, where he sustains injury by the negligence of one in the employ of the sleeping-car company, he may maintain an action against the railroad company. What the effect of such notice would be is not determined. *Railroad Co. v. Walrath*, 38 Ohio St., 461. 1882.

573. — A passenger purchased from a railway company a ticket over its line, and, at the same time, from a sleeping-car company a ticket entitling him to a berth in one of its sleeping cars, constituting a part of the train of the railway company. In transit he was injured by the falling of a berth in the sleeping car in which he was at the time riding. *Held*, that for the purposes of the contract with the railway company for transportation, and in view of its obligation to use only cars that were adequate for safe conveyance, the sleeping-car company, its conductor and porter, were in law the servants and employes of the railway company, and that the negligence of either of them, as to any matters involving the safety or security of passengers, was that of the railroad company. *Pennsylvania Co. v. Roy*, 102 U. S., 451, 1880; 1 Amer. & Eng. R. R. Cases, 225.

574. Statute — Tennessee. The statutory rules in regard to the means to be used in stopping a train when an obstruction, animal or person is seen upon the track, is only intended to apply to injuries to such persons or animals. The common law rules are ample for the protection of passengers. *Louisville and Nashville R. R. Co. v. McKenna*,

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7 Lea (Tenn.), 313, 1881; 2 Amer. & Eng. R. R. Cases, 114.

575. Stock shipper. If defendant has, by its own act, thrown the plaintiff off his guard and given him good reason to believe that vigilance was not required, lack of such vigilance would not bar an action for an injury. So *held*, where a stock shipper, under advice of the conductor, went to see to his stock on the side-track and was told that the road was clear, but, while trying to compel a steer to get upon its feet, was injured by a passing express train. *Fowler v. Baltimore and Ohio R. R. Co.*, 18 West Va., 579, 1881; 8 Amer. & Eng. R. R. Cases, 480.

576. Successor to corporate rights. A railroad company which succeeds to the rights and privileges conferred upon another by its charter becomes also subject to the same liabilities. *Montgomery and West Point R. R. Co. v. Boring*, 51 Ga., 583. 1874.

477. Sunday laws. The duty imposed by law upon the carrier of passengers to carry them safely, as far as human skill and foresight can go, exists independently of contract. For a negligent injury to a passenger an action lies against the carrier, although there be no contract, and the service he is rendering is gratuitous; and whether the action is brought upon contract or for failure to perform the duty, the liability is the same. *Carroll v. Staten Island R. R. Co.*, 58 N. Y., 126, 1874; 7 Amer. R'y Rep., 25.

578. — One violating the statute prohibiting travel upon Sunday (1 R. S., 628, § 70) is not without the protection of the law. The carrier owes to him the same duty as if he were lawfully traveling, and is responsible for a failure to perform it, the same in the one case as in the other. *Ib.*

579. — In an action against a railway company for personal injuries to a passenger it appeared that he was a traveling agent for an insurance company; that his sister, who was ill and was temporarily residing in a distant state, had written to him that she had had a severe attack of illness, and desired to be carried to her home; that he had written to her, stating his situation, that he was traveling, and asking her to arrange with a friend to bring her as far as a certain city, and that he would make arrangements for some one to accompany her from that place

to her home if her friend could not come with her any farther; that he expected an answer to his letter would reach B. in a week, which would decide whether he would have to go after her, or whether her friend would take her home; that, after writing this letter, he was absent from B. for about three weeks, traveling on business, but expected to reach there on the evening of a certain Saturday, for the purpose of getting his mail, procuring funds and attending to his business; and that he missed a connection of trains, and, being desirous to reach B. in order that he might receive the expected reply from his sister, took passage on a freight train of the defendant on the following Sunday morning, and received the injuries complained of. *Held*, that there was no evidence which would justify the jury in finding that the plaintiff was traveling from necessity or charity, within the meaning of the statute. *Bucher v. Fitchburg R. R. Co.*, 131 Mass., 156, 1881; 6 Amer. & Eng. R. R. Cases, 212.

580. — The statute of 1877, ch. 233, enacting that the provisions of the General Statutes, ch. 84, § 2, "prohibiting traveling on the Lord's day, shall not constitute a defense to an action against a common carrier of passengers for any tort or injury suffered by a person so traveling," will not apply to a suit brought after it went into effect for an injury received before its passage. *Bucher v. Fitchburg R. R. Co.*, 131 Mass., 156, 1881; 6 Amer. & Eng. R. R. Cases, 212.

581. — One who travels from one town to another on Sunday for the sole purpose of visiting a sick friend, who he thinks may need assistance, is traveling from charity; and in a suit against a railway company for injuries sustained while a passenger on that day, on putting in evidence that he was traveling for such purpose, he is entitled to submit to the jury the question whether he was traveling lawfully or not, although he offers no evidence of the ground of his belief that his friend was in need of assistance. *Doyle v. Lynn and Boston R. R. Co.*, 118 Mass., 195, 1875; 9 Amer. R'y Rep., 277.

582. Ticket. A passenger who, without any wrongful intent, travels beyond the point named in his ticket, is still a passen-

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ger, and in case of an injury the carrier is responsible to him as a passenger. *Hamilton v. Caledonian R'y Co.*, 19 Scotch Session Cases (2d series), 437. 1857.

583. — The defendants, a railway company, had running powers between H., a station upon their own line, and R., a station of the S. Company, over the line of that company. The defendants and the S. Company divided the profits of the traffic between H. and R. The plaintiff took a return ticket from R. to H., which was issued to him by a clerk of the S. Company. Upon the return journey from H. to R. he traveled in a train belonging to the defendants, and driven by their servants. Owing to the carriage being unsuited to the platform at R., which belonged to the S. Company, the plaintiff sustained bodily injury. At the trial the jury found that the defendants had been guilty of negligence. *Held*, that an action lay against the defendants, for they, having permitted the plaintiff to travel by their train, were bound to make provision for his safety. *Foulkes v. Metropolitan District R'y Co.*, Law Reports, 5 Common Pleas Division, 157, 1880; 30 Eng. (Moak), 740; *Same v. Same*, 4 Common Pleas Division, 267, 1879; 30 Eng. (Moak), 536.

584. Trespassers. A mere trespasser, a person who steals a ride upon a train, or who is employed thereon, is not a passenger within the meaning of the act of 1868, nor entitled, as such, to protection. *Pennsylvania R. R. Co. v. Price*, 96 Pa. St., 256, 1880; 1 Amer. & Eng. R. R. Cases, 234.

585. — The act of a railway employe in removing a trespasser from a train cannot be considered the act of the company, unless he was employed generally to remove trespassers, or specifically to remove the particular trespasser. The question whether or not it was the purpose of the employe to serve his employer is relevant only in cases of wilful injury done in the course of his employment. *Marion v. Chicago, Rock Island and Pacific R. R. Co.*, 59 Ia., 428, 1892; 8 Amer. & Eng. R. R. Cases, 177.

586. — If a person stealthily, and without the knowledge of any of the employes of a railway company, gets upon a train and secretes himself, for the purpose of passing from one place to another, no recovery can

be had from the company for any personal injury he may sustain. *Toledo, Wabash and Western R'y Co. v. Brooks*, 81 Ill., 245, 1876. See, also, *Chicago and Alton R. R. Co. v. Michie*, 83 Ill., 427. 1876.

587. — A party traveling on a free pass issued to a different person, which is not transferable, and passing himself as the person therein named, is guilty of such fraud as to bar his right to recover for a personal injury, except for gross negligence on the part of the company amounting to wilful injury. *Toledo, Wabash and Western R'y Co. v. Beggs*, 85 Ill., 80. 1877.

588. — No recovery can be had of a railway company for a personal injury to a passenger on its train of cars, or for his death, caused by mere negligence, when he knowingly and fraudulently induces the conductor to disregard his duty and defraud the company out of the amount of his fare for his own profit. *Toledo, Wabash and Western R'y Co. v. Brooks*, 81 Ill., 245, 1876; *Same v. Same*, ib., 292, 1876.

589. What constitutes a passenger. It seems that a person riding on a freight train on which passengers are allowed to be carried is to be regarded as a passenger, although he may have boarded the train without the knowledge or permission of the conductor and paid no fare, if the conductor, after becoming aware of his presence, permits him to remain. *Sherman v. Hannibal and St. Joseph R. R. Co.*, 72 Mo., 62, 1890; 4 Amer. & Eng. R. R. Cases, 589.

590. — A passenger, in the legal sense of the word, is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as the payment of fare or that which is accepted as an equivalent therefor. *Pennsylvania R. R. Co. v. Price*, 96 Pa. St., 256, 1880; 1 Amer. & Eng. R. R. Cases, 234.

591. — when relation of passenger ceases. The plaintiff took a seat in a car, to be carried to the next station on defendant's road, but not having the usual fare for that point, twenty-five cents, handed the conductor a five-dollar bill, out of which to take the fare. Being unable to change the bill or to get it changed on the train, he promised plaintiff to get it changed when they arrived at the next station, and to return the balance, after

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deducting the fare, to which plaintiff assented. On arriving there, the plaintiff being at the end of his journey, left the train, but waited on the platform while the train remained, some twenty or thirty minutes, expecting the conductor to return him his money, but did not demand it, because he thought the conductor was busy; but seeing the train starting, and the conductor, who had forgotten or neglected his promise, get aboard as it moved away, he ran some distance beyond the platform and got upon the car as it was moving off with increasing speed, for the sole purpose of getting his money. The conductor handed him back the same bill, and, as plaintiff claims, told him to get off the train as quick as possible, and immediately he jumped from the train, voluntarily and without compulsion, while it was running at the rate of four or five miles per hour, and at a place not intended for passengers to alight. It did not appear that the remark of the conductor caused plaintiff to act differently from what he otherwise would have done, nor that he requested that the train be stopped or slackened up to enable him to get off in safety. *Held*, that the relation of a passenger had terminated at the time of the injury. The question of negligence and contributory negligence under these facts was one of fact for the jury. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Krouse*, 30 Ohio St., 222, 1876; 15 Amer. R'y Rep., 298.

592. Wilful wrongs. While it is a general rule that where an employe goes outside the line of his employment, and, for purposes of his own, inflicts an injury upon the person of one who has no claim upon the employer arising from any special relation existing between them, the employer is not liable, yet, in the case of a common carrier of passengers, the rule does not apply. *Chicago and Eastern Illinois R. R. Co. v. Flexman*, 9 Bradwell (Ill.), 250. 1881.

593. — Where a passenger, lawfully upon a train of cars, is wilfully assaulted by a brakeman upon such train, the railroad company is liable for the injury inflicted. *Ib.*

594. — A railway company is liable for the wilful, wanton and malicious acts of its agents while acting in the course of its business and of their employment, although the

act was not directly or impliedly authorized nor ratified by the corporation. *Quigley v. Central Pacific R. R. Co.*, 11 Nev., 850. 1876.

INJURIES TO PERSONS GENERALLY.

See HIGHWAYS; INDICTMENT; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; INJURIES TO PERSONS ON THE TRACK; NEGLIGENCE.

1. Acts of employes; children. Where the conductor had exclusive control of a train and of all persons on it, but a brakeman, nevertheless, without the knowledge of the conductor, assumed to direct a boy on the train to perform a certain service, and in the attempt to comply with the order the boy was injured, *held*, that the company was not liable, as the act of the brakeman was not in the line of his employment. *Sherman v. Hannibal and St. Joseph R. R. Co.*, 72 Mo., 63, 1880; 4 Amer. & Eng. R. R. Cases, 539.

2. Child on engine; permission of employes. In an action for injuries occasioned to a deaf and dumb child upon the cars of defendant, by reason of the negligence of defendant's servants, an averment that he was upon the car with the knowledge of the servants of the company, and with the permission of the company, is sufficient. *Lammert v. Chicago and Alton R. R. Co.*, 9 Bradwell (Ill.), 338. 1881.

3. — If a child of the age and condition of plaintiff, ignorant as to the danger and legal nature of the act, is led to frequent the cars of the company by the well-meant though injudicious kindness of the employes, and is hurt through their negligence, while performing services within the scope of their employment, the company cannot escape liability on the mere ground that he was there without having lawful permission of the company. *Ib.*

4. — The place of an engineer is on his engine, and his duties and authority, so far as respects the management of the train, are subordinate to the conductor. An engineer has no authority to permit persons to ride upon the train, and the granting of any such permission by him is an act beyond the scope of his employment, and for which the rail-

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road company cannot be held liable. *Chicago, Burlington and Quincy R. R. Co. v. Casey*, 9 Bradwell (Ill.), 632. 1881.

5. Depot grounds. In a suit for injuries alleged to have been caused by defendant's neglect in leaving a narrow way between its depot and a canal undefended by any railing along the canal, the passageway being the only way of access for teams delivering or receiving freight at said depot, and being so narrow as to leave hardly sufficient room for two wagons going in opposite directions to pass each other without forcing the outer one into the canal, the complaint shows that plaintiff, with knowledge of the danger, voluntarily attempted to drive his wagon loaded with goods along the canal side of such passage, and past another wagon thereon, and in so doing met the injury to person and property complained of, from his horse becoming frightened and backing into the canal. *Held*, that these averments show contributory negligence. *Goldstein v. Chicago, Milwaukee and St. Paul R'y Co.*, 46 Wis., 404, 1879; 21 Amer. R'y Rep., 391.

6. — collision with team. The fact that the deceased was permitted by the company to unload freight at a dangerous place, and that the servants of the company knew that the deceased was using a restive, skittish horse, afraid of the cars, does not impose upon them the exercise of especial care in the management of their engine to avoid any accident by frightening such horse. *Chicago and Northwestern R'y Co. v. Clark*, 2 Bradwell (Ill.), 116. 1878.

7. — constitutional law. The statute of Pennsylvania, providing that in case of any person receiving an injury while engaged in or about depot grounds of a railway company his rights should only be the same as those of an employe, is constitutional. *Kirby v. Pennsylvania R. R. Co.*, 76 Pa. St., 506. 1874. The statute is a police regulation forbidding individuals from undertaking a dangerous employment except at their own risk. *Ib.*

8. — crane. A railway company carried goods at mileage rates, stipulating that the owners should unload them at the station. The company kept a crane at the station, the use of which it allowed gratuitously to such owners, the company using it when it

unloaded goods there. While an owner of goods, carried at mileage rates, was so using the crane, it broke owing to its being in an unsafe condition, as the company knew. In a declaration against the company for mischief thereby occasioned, plaintiff alleged that the company had, for the purpose of enabling the owner to deliver the goods, provided the crane, which was necessary, and that the company professed to the public that the crane was placed at the station for the purpose, and it was intended to be used for the purpose. The defendant having traversed this allegation, *held*, that the finding should be in the affirmative. *Blakemore v. Bristol and Exeter R'y Co.*, 8 Ellis & Blackburn, 1035; 92 E. C. L., 1034. 1858.

9. — defective platform. The facts admitted by the pleadings and established by proof show that the railway company's original act of negligence in permitting an opening in the floor of its platform to remain out of repair made it impossible for it or its agents to be aware of appellee's peril in time to avoid the injury; the company was therefore held liable for the injury. *Louisville and Nashville R. R. Co. v. Wolfe*, 80 Ky., 82, 1882; 5 Amer. & Eng. R. R. Cases, 625.

10. — Where there had been a defect in the floor of the platform of a railroad company for nearly two years, occasioned by the decay of a plank, exhibiting a hole, which fact was known to the station agent having charge during that time, and the plaintiff, by direction of his employer, to look after freight belonging to the latter, lawfully entered upon the platform, and while there, between five and six o'clock P. M., for such purpose, and looking for the agent, he accidentally stepped through the hole and received a severe internal injury, he being free from negligence on his part, this court refused to set aside a verdict in favor of the plaintiff for \$1,000. *Toledo, Wabash and Western R'y Co. v. Grush*, 67 Ill., 262. 1873.

11. — Plaintiff went to defendant's railway station for the purpose of helping to carry a trunk for a friend, who was about to take passage on one of defendant's trains. Having bought a ticket, plaintiff and his friend took the trunk to a platform pointed

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out by the ticket agent. There was at that time no train in sight, but one was due and expected to arrive at any moment. The view of the track was unobstructed as far as a bridge about four hundred yards distant in the direction from which the train was to come. Plaintiff and his friend, carrying the trunk between them, were walking in the other direction, along the platform, when plaintiff was suddenly struck from behind and severely injured by the bumper of the engine drawing the expected train. The bumper projected eighteen inches over the platform, which was from five to eight feet wide. There were a number of other persons on the platform. The testimony was conflicting as to whether a bell was rung or whistle sounded after the train passed through the bridge, but it tended to show that the grade from the bridge to the platform was an up-grade; that the engine was being run at an unusual rate of speed; that the engineer, after crossing the bridge, saw the persons on the platform; that he saw plaintiff before he was struck, sounded the alarm whistle and reversed the engine, but the brakes were not put down; that after being struck plaintiff was carried about eight feet, when the engine stopped. *Held*, that on this testimony the trial court was warranted in submitting to the jury the question whether plaintiff was injured by his own fault or that of defendant. *Langan v. St. Louis, Iron Mountain and Southern R'y Co.*, 72 Mo., 392, 1880; 3 Amer. & Eng. R. R. Cases, 355; reversing *Same v. Same*, 5 Mo. App., 311, 1878.

12. — falling building. The plaintiff sought shelter from the rain underneath a building belonging to the defendant, which had formerly been used as a freight house, but not being in use had been permitted to become dilapidated and insecure. While at the freight house he noticed that a portion of the roof was lifted by wind and in danger of falling. While running to escape the falling fragment he was struck by it and injured. *Held*, that the plaintiff was a trespasser and could not recover damages for the injury. *Leary v. Cleveland, Columbus, Cincinnati and Indianapolis R. R. Co.*, 3 Amer. & Eng. R. R. Cases (Ind.), 493, 1882.

13. — insufficient lighting. The defendant is organized to manage and control the state railways. It is liable as a common carrier. Where, owing to insufficient lighting of a station, the plaintiff, while accompanying a female passenger to a train to see her safely off, fell into an ash-pit and was injured, the defendant was held liable in an action of tort. *Sweeney v. Board of Land and Works*, 4 Victorian Law Rep. (Australia), 440, 1878.

14. — weighing machine. The defendant had on its platform, standing against a pillar which passengers passed in going to and coming from the trains, a portable weighing machine, which was used for weighing passengers' luggage, and the foot of which projected about six inches above the level of the platform. It was unfenced, and had stood in the same position, without any accident having occurred to persons passing it, for about five years. The plaintiff, being at the station on Christmas day inquiring for a parcel, was driven by the crowd against the machine, caught his foot in it, and fell over it. *Held*, that there was no evidence of negligence to go to the jury on the part of the company, the machine being in a situation in which it might have been seen, and the accident not being shown to be one which could have been reasonably anticipated. *Cornman v. Eastern Counties R'y Co.*, 4 Hurlstone & Norman (Exchequer), 781, 1859.

15. Engineer's stakes; street. The plaintiff sued the Western North Carolina R'y Co. for damages for personal injuries alleged to have resulted from its erection of an "engineer-stake" in the street of the town of Marshall, over which the plaintiff fell and broke his leg. *Held*, that the wrong complained of was the personal act of those engaged in running the line for the proposed road, and, in law, the act of those by whose authority the work was done, and that the plaintiff had the right to elect to sue one or more of them alone. *Gudger v. Western North Carolina R. R. Co.*, 87 N. C., 325, 1882.

16. Person not a passenger. Plaintiff having entered defendant's passenger train, for a lawful purpose, on its arrival at a station, was detained by his business until after

Streets — Trespassers.

the train had started on its journey; and while the train was moving from the depot, its speed increasing each moment, he, of his own accord, to prevent being carried off, and without notifying any of defendant's employes of his presence, and without requesting any of them to slow or stop the train, and without any effort to arrest its progress, walked from one platform to another, and with papers in his right hand, descended the steps of the car and jumped from the moving train and fell, and his left arm was caught under the wheel of the car and crushed. *Held*, that the injury sustained by the plaintiff was attributable directly and immediately to his own reckless act, and he could not therefore recover, though the defendant was negligent in not giving the signals required by the statute, before and at the time the train left the station. *Central R. R. and Banking Co. of Georgia v. Letcher*, 69 Ala., 106, 1881; 12 Amer. & Eng. R. R. Cases, 115.

17. — The agents of railroad companies are liable for injuries caused by the want of ordinary care, where the person injured was at the train to meet with, or part from, a passenger, or though not himself a passenger or employe. And in case plaintiff had in charge a lady and her infant child, *held*, that he was entitled to have sufficient time to escort her to a seat and then to leave the train. If the time of stopping was too short, or if the agent of the road failed to give the usual notice of the starting of the train, there was not an exercise of such ordinary care as the company was bound to employ in order to escape liability. *Doss v. Missouri, Kansas and Texas R. R. Co.*, 59 Mo., 27, 1875; 8 Amer. R'y Rep., 462.

18. — Whether an attempt of such person to step from a train when in motion is, under the particular circumstances of a given case, such negligence as will relieve the company of responsibility, is a question of fact for the jury. *Ib.*

19. — Where defendant's passenger train was temporarily stopped some distance from the depot for receiving and delivering passengers until two freight trains in advance of it could be moved out of the way, and the plaintiff boarded such train in search of his wife and child, who were thereon as passengers, and in attempting to move from one

car to another, by passing around an intervening car, stepped off the platform into a culvert fifteen or twenty feet deep, which he could not see on account of the darkness of the night, thereby sustaining serious personal injury, the company was not liable therefor, even though the lights in some of the cars had been blown out by drunken and disorderly men. The exercise of ordinary care on the part of the plaintiff would have avoided the injury. *Stiles v. Atlanta and West Point R. R. Co.*, 65 Ga., 370, 1880; 8 Amer. & Eng. R. R. Cases, 195.

20. — Where the plaintiff, while lawfully passing along the passenger platform of a railway company, to the depot building, to ascertain the time of departure of a certain train, was struck and injured by a piece of timber, thrown from a box car standing on the track, which car the employes of the company were, at the time, unloading, he having no previous warning of danger, *held*, that the railway company was liable to the plaintiff for the injury. *Toledo, Wabash and Western R'y Co. v. Maine*, 67 Ill., 293, 1873.

21. **Streets.** In an action against a railway company for injuries to plaintiff's intestate, caused by his falling into a culvert constructed by the defendant under its track in a public street of a city, and by defendant negligently permitted to remain open, a complaint which avers that the intestate, "while exercising due and reasonable care, and without any fault or negligence on his part," fell into and through the opening, sufficiently alleges that he was not guilty of contributory negligence. *Toledo, Wabash and Western R'y Co. v. Brannagan*, 75 Ind., 490, 1881; 5 Amer. & Eng. R. R. Cases, 630.

22. — Where the evidence showed that the person injured and killed lived near the culvert into which he fell, and was familiar with its character and location, and no evidence was given to show that he was free from contributory negligence, there is an utter failure of proof. *Ib.*

23. **Trespassers.** Where a person is upon the platform of a station, not as a passenger, or upon any business connected with the railway company, but merely loitering there for his own purposes or for personal enjoyment, the company owes him no duty.

Unloading Cars.

Hence, if he be injured by a passing train, he cannot recover of the company for his injuries upon the theory that they have failed to discharge toward him a legal duty, and hence have been guilty of negligence. *Baltimore and Ohio R. R. Co. v. Schwindling*, 8 Amer. & Eng. R. R. Cases (Pa.), 544. 1883.

24. — children. In a suit by a boy seven years of age against a railway company to recover damages for an injury alleged to have been caused by the negligence of defendant's employes, plaintiff offered to prove that while he, being in company with some older boys, playing upon a flat-car loaded with sand, which stood upon defendant's switch, on the outskirts of a city, the said car was shifted by defendant's employes to another switch a few yards distant, and that while the car was in motion defendant's employes, by threats, compelled the plaintiff and his companions to jump off, in doing which plaintiff fell and was run over, receiving the injury to recover damages for which suit was brought. *Held*, that, conceding that the plaintiff had not been guilty of contributory negligence, the offer entirely failed to show any negligence on the part of the company, and that, therefore, the evidence was rightly excluded. *Cauley v. Pittsburgh, Cincinnati and St. Louis R'y Co.*, 98 Pa. St., 498, 1881; 4 Amer. & Eng. R. R. Cases, 533.

25. — An offer to prove that the car was, at the time the plaintiff was forced to jump therefrom, in the above case, in rapid motion, was held to have been rightly refused, as it was a physical impossibility that the car could have attained rapid speed in being moved from one switch to another only a few yards distant. *Id.*

26. — newsboy. A person riding on the train to sell newspapers in violation of the regulations of the company, with or without the knowledge of the company's employes, cannot recover damages for injuries received while so riding. This is not like a passenger who has been permitted to ride without paying fare, for in that case the passenger would be liable for the fare. *Duff v. Allegheny Valley R. R. Co.*, 91 Pa. St., 458, 1879; 2 Amer. & Eng. R. R. Cases, 1.

27. Unloading cars. The deceased was killed while rightfully engaged in unloading

wood from a car standing upon the main side track of the defendant's road. South of the car, distant several feet, were two flat cars and several box cars. While he was so engaged, a freight train of defendant, coming from the north, passed near by on the main track, so that the deceased could readily have been seen by the employes of the company thereon. The servants of the company at the station either knew that he was so engaged at the time, or had reason to know the fact. The train passed on until it passed the south end of the switch, when it commenced backing slowly on the side track for the purpose of leaving certain cars, and thus pushed the detached car next to that where the deceased was, so that he was crushed between the bumpers and killed. The only diligence on the part of the company was the ringing of its bell some forty rods south of the deceased, and on the main track. No other warning was given to the deceased, who was not acquainted with the mode of switching cars, or aware that he was in danger. He could not see the train on the south on account of the box cars. *Held*, that the company was liable for causing his death. *Illinois Central R. R. Co. v. Hoffman*, 67 Ill., 287. 1873.

28. — The liability of a master for the negligence of his servant extends only to such acts or omissions as come within the scope of the servant's employment. Therefore, where the servant of a railway corporation, not having authority from the corporation to employ other servants, engaged one G. to assist him in removing a crate of crockery, and, through the negligence or inefficiency of G., combined with the carelessness of the servant, the crate was overturned, striking the plaintiff, whereby it was claimed he suffered a severe injury, *held*, that the corporation was not liable for the negligence of G., nor for the fault of its servant in employing G. to assist him, even admitting G. to have been an unsuitable and improper person to engage for that service. *Jewell v. Grand Trunk R'y Co.*, 55 N. H., 84, 1874; 11 Amer. R'y Rep., 496.

29. — statute of Pennsylvania. A boy who was employed by a coal-dealer was engaged in unloading cars standing upon a

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siding constructed by the dealer upon his own land. By reason of the neglect of the railway employes to change the switch leading to the siding from the main track, several cars were propelled from the main track upon the siding, and, colliding with the cars on which the boy was employed, he received injuries from which he lost his leg. In a suit against the company for damages, *held*, that the lad was employed on or about the company's road within the very terms of the act of April 4, 1868, and could not recover, as he fell under the same rule as an employe. *Cummings v. Pittsburgh, Cincinnati and St. Louis R'y Co.*, 92 Pa. St., 82, 1879; 4 Amer. & Eng. R. R. Cases, 524.

30. — The act of April 4, 1868, provides that when any person shall sustain personal injury or loss of life, while lawfully engaged or employed on or about the roads, works, depots and premises of a railway company, his right of action against such company shall be such only as belongs to an employe in like cases. *Held*, that the act applied to one who was injured while unloading his own goods from the cars of the company, permission to do which had been granted by the agent of the company. *Ricard v. North Pennsylvania R. R. Co.*, 89 Pa. St., 193, 1879.

31. Warehouse near track. On the line of defendant's road, plaintiff owned a lumber and coal yard, in which his son was employed. A siding ran from the track to a warehouse in plaintiff's yard. A lumber car was left standing on the siding, beyond the period when the rules of the company required its removal. It had a defective brake, and it was not shown that it had been sufficiently blocked. A number of cars from a freight train were started on to the siding from the main track, and, striking the lumber car, forced it down towards the warehouse, into which it crashed with great violence. There was evidence also that the nearest of these cars had a defective brake. The son of the plaintiff, hearing the sound of the approaching train, hurried towards the warehouse and entered it, and was found crushed to death against the doors. *Held*, that it was properly left to the jury to determine whether defendant was guilty of negligence, and whether the deceased by his own negli-

gence contributed to the accident. *North Pennsylvania R. R. Co. v. Kirk*, 90 Pa. St., 15, 1879; 1 Amer. & Eng. R. R. Cases, 45.

INJURIES TO PERSONS ON THE TRACK.

See DAMAGES; HIGHWAY; INJURIES TO EMPLOYES; NEGLIGENCE; RECEIVER; SLAVES.

I. STREET AND HIGHWAY CROSSINGS.

1. *Negligence of railway companies.*
2. *Negligence of injured party.*
3. *Rights of both parties.*

II. STREETS.

III. SIGNALS.

IV. NEGLIGENCE.

1. *Contributory negligence.*
2. *Comparative negligence.*
3. *Negligence of railway company.*
4. *Gross negligence.*
5. *By whom the question of negligence is to be determined.*

V. INJURIES TO CHILDREN.

VI. INJURIES CAUSING DEATH.

VII. DAMAGES.

VIII. DEFECTS IN ROADWAY, MACHINERY, ETC.

IX. DEPOT GROUNDS.

X. EVIDENCE.

XI. FRIGHTENED TEAMS.

XII. GENERAL MATTERS.

I. STREET AND HIGHWAY CROSSINGS.

1. *Negligence of railway companies.*

1. **Building bridge.** A city made a contract with a person to take down and rebuild a bridge used as a highway over the tracks of a railway. In taking down and rebuilding the abutments of the bridge, if more men were needed temporarily on one side than were there at work, they were called to that side from the other, and were in the habit of crossing the track for that purpose. If a larger force had been employed, there would have been no necessity for crossing. *Held*, that an action would not lie against the railway company for an injury sustained by a workman by being struck by a locomotive while so crossing

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the track. *Sweeney v. Boston and Albany R. R. Co.*, 128 Mass., 5, 1879; 1 Amer. & Eng. R. R. Cases, 138.

2. Defects. Every corporation owning and operating a railway is required by statute to construct crossings at all points where it intersects a public highway, and it is liable for all injuries resulting from a neglect of this duty. *Farley v. Chicago, Rock Island and Pacific R. R. Co.*, 42 Ia., 234, 1875.

3. — In an action against a railway company for injuries inflicted by defendant's train at a highway crossing, upon a person traveling on the highway, the question whether the railway was constructed with proper care, so as to render the crossing as little dangerous as possible to the public in the use of the highway, is a pure question of fact for the jury upon the evidence. *Roberts v. Chicago and Northwestern R'y Co.*, 35 Wis., 679, 1874.

4. — The railway company could only be held responsible for the injuries plaintiff received, upon the theory that the street where the accident occurred was a public highway prior to the construction of the railway. In such event it would be the duty of the company to keep it in repair. *Ferguson v. Virginia and Truckee R. R. Co.*, 13 Nev., 184, 1878.

5. — A paragraph of complaint by an administrator against a railway company, charging gross negligence in the construction of a crossing over a certain public highway, and that such negligent construction caused injuries which resulted in the death of the plaintiff's intestate, was held sufficient; and another paragraph of said complaint, charging negligence in the construction of the railway at the crossing, and also in the running of a train by which said injuries were caused, was held to be unquestionably good. *Indianapolis and St. Louis R. R. Co. v. Stout*, 53 Ind., 143, 1876.

6. Degree of care required of employees. In a suit for damages resulting from the alleged negligence of railway employees in running over a traveler at a road crossing, it is not error, on a proper state of facts, to submit to the jury the question whether the employees of the company, in the exercise of proper watchfulness and caution in approaching the crossing, should not

have discovered the plaintiff on the track, or in danger, in time to have stopped the train. *Texas and Pacific R'y Co. v. Chapman*, 57 Tex., 75, 1882.

7. — The mere fact that a railway is constructed and operated in close proximity to a highway, although it may render the use of the highway less safe, does not of itself constitute negligence on the part of the company. Such increase of danger is necessarily incident to and attendant upon this improved mode of transportation. *Beatty v. Central Iowa R'y Co.*, 58 Ia., 242, 1882; 8 Amer. & Eng. R. R. Cases, 210.

8. — Plaintiff, while crossing the railway of defendant upon a public street, driving a span of horses with a wagon, was struck by a train. Evidence that the train was propelled at an unlawful rate of speed; that no bell was rung, or signal given, as required by law; that it was an unusually dangerous crossing, and that no flagman was stationed there to warn travelers; and that a view of the passing train was obstructed from any one approaching on the street by a train of cars left standing upon a side track, extending across the street, with an opening in the train for passage upon the street, — held, sufficient evidence to charge defendant with negligence. *Kelly v. St. Paul, Minneapolis and Manitoba R'y Co.*, 29 Minn., 1, 1881; 6 Amer. & Eng. R. R. Cases, 93.

9. Delayed train. Railroad trains are liable to be detained by various causes, without any fault of the company, and negligence cannot be imputed to the company from the fact that a train may be behind the usual time. The fact of the train being behind time might have a bearing upon the question of contributory negligence. *State v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 47 Md., 76, 1877; 18 Amer. R'y Rep., 253.

10. — The fact that a train is behind time does not relieve the traveler of this duty of care; railroad companies have the right to run trains at all times. Those having occasion to cross their tracks are entitled to no exemption from care and vigilance because trains are irregular or extra trains are put on. *Salter v. Utica and Black River R. R. Co.*, 75 N. Y., 273, 1878; reversing *Same v. Same*, 13 Hun (N. Y.), 187, 1878.

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11. Derailed car. Where a person seeks to charge a railway company with negligence in not seasonably removing a car which incumbered a highway crossing, and in consequence of which an accident occurred to the plaintiff, an instruction by the court that, if the jury should find that the servants of the company honestly believed they could not move the car without help, and that they exercised ordinary care and prudence in that judgment, they are not guilty, is sufficiently favorable to the defendant, and furnishes no ground of exception. *Paine v. Grand Trunk R'y Co.*, 58 N. H., 611. 1879.

12. Efforts used by engineer to prevent collision. An engine-driver in charge of a moving train has a right to assume that persons past the age of childhood will heed the usual alarm signals. If, after giving such signals without effect, he uses such means as in his judgment are, in the emergency, most advisable to prevent collision with a person standing on the track, he is not chargeable with negligence, and the company cannot be held liable for the consequences of a collision, although he failed to use other means which were at hand, provided he is competent and experienced in his business. In this instance he applied the air brakes to the train, but did not attempt to reverse the engine. *Bell v. Hannibal and St. Joseph R. R. Co.*, 72 Mo., 50, 1880; 4 Amer. & Eng. R. R. Cases, 580.

13. Evidence. Evidence held sufficient to submit the question of defendant's negligence to the jury. *Carr v. New York Central and Hudson River R. R. Co.*, 60 N. Y., 633. 1875.

14. — The fact that defendant has been guilty of negligence, followed by an accident, does not make him liable for the resulting injury, unless that was occasioned by the negligence. *Harlan v. St. Louis, Kansas City and Northern R'y Co.*, 65 Mo., 22. 1877.

15. — Evidence that the company, immediately after an accident at a street crossing, adopted certain precautions to prevent similar accidents, is admissible to prove that such precautions would have been proper at and prior to the accident, and that the omission of them was negligence. *Shaver v. St. Paul, Minneapolis and Manitoba R'y Co.*,

28 Minn., 103, 1881; 2 Amer. & Eng. R. R. Cases, 185.

16. Flagmen. Where a person driving a team in a city on a very cold and blustering day, being muffled up to protect himself from the severity of the cold, while driving across a track near a public elevator was struck by a car being propelled by an engine in the rear, and severely injured, and there was no one stationed on the car or on the ground to give warning, and it appeared, if there had been, the injury might have been avoided, it was held that, as the injury was the result of negligence on the part of the company, it was liable in damages to the injured party. *Illinois Central R. R. Co. v. Ebert*, 74 Ill., 399. 1874.

17. Flying switch. In an action against a railway company, for injuries caused by a train colliding, at a highway crossing, with a carriage in which the plaintiff was driving in the daytime, it appeared that the plaintiff, in attempting to cross, was struck by a freight car which had been separated from the rest of the train for the purpose of making a running switch. The plaintiff's testimony tended to show that she was driving with care, and saw the train pass, but saw no flagman and received no warning that another car was coming. At a point forty-six feet from the crossing she could have seen along the track forty-six feet in the direction from which the car came; at thirty feet from the crossing, she could have seen the track for more than half a mile, but she did not look in that direction from those points, and gave as a reason therefor that she did not suppose that one train would follow another so closely. Held, that the question whether the plaintiff was in the exercise of due care was for the jury. *French v. Taunton Branch R. R. Co.*, 116 Mass., 537, 1875; 7 Amer. R'y Rep., 460.

18. — The plaintiff's evidence showed that he was employed by a corporation other than the defendant to watch the track at a crossing and give notice when any cars or engines of either company were about to pass over the highway; that he saw the smoke of the engine when it first came in sight, went to the crossing and gave the usual signal; that, after the engine passed, he looked up and down the track and saw nothing, and

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started to recross the track, and was struck by a train of cars which was making a flying switch, and which came upon him from behind; that the usual signal for cars making a flying switch was not given, but one was given indicating that only an engine or a train was coming, and there was no brakeman on the cars; that a person could see up the track from where he stood nearly seven hundred feet; that he could not tell whether any smoke prevented him from seeing the cars coming, but, if it did, he should have waited until it passed away. *Held*, that the action could not be maintained. *Clark v. Boston and Albany R. R. Co.*, 128 Mass., 1, 1879; 1 Amer. & Eng. R. R. Cases, 184.

19. Gates. Where a railway company crosses a public highway on the level, and there are (under the 8 Vict., c. 20, s. 47) gates for the protection of "horses, cattle, carts or carriages" passing along the highway, it is the duty of the railway company's employes to keep them closed when any train is approaching. If this duty is not performed, and a passenger along the highway is, in attempting to cross the line of railway, injured, the leaving of the gates open is, in an action brought by him, evidence of negligence to go to the jury. It is so, even though, with care and circumspection, he might have been able to see, at a distance, the approach of the train which occasioned the injury. Per the lord chancellor (Lord Cairns): The gates of the railway, at a place where it crossed the highway at a level, being open, amounted to a statement and a notice to the public that the line, at that time, was safe for crossing. *North Eastern Ry Co. v. Wanless*, Law Reports, 7 English & Irish Appeals, 12; 9 Eng. (Moak), 1, 1874; *Wanless v. North Eastern Ry Co.*, Law Reports, 6 Queen's Bench Cases, 481, 1871.

20. — A railway company acting under the provisions of special acts, which embodied the Railways Clauses Consolidation Act, 1845 (8 and 9 Vict., c. 20), constructed a railway crossing a highway on a level, and in compliance with ss. 46 and 47 of that statute erected at the crossing sufficient gates, but did not employ persons to open and shut them. The plaintiff coming along the highway at night arrived at the crossing, and, finding no person in attendance to open the

gates, proceeded to open them himself, and was injured in consequence. *Held*, per Cockburn, C. J., Crompton and Shee, JJ., *dissentiente* Blackburn, J., that he had no right of action against the company. *Wyatt v. Great Western Ry Co.*, 6 Best & Smith, 709; 118 E. C. L., 709. 1865.

21. — The plaintiff, while passing along an occupation road which crossed the defendant's railway on a level, was knocked down and injured by a train of the defendant, owing, as was alleged, to the defendant's negligence. There were gates across the road left unfastened, and the defendant had at one time kept a gate-keeper, but had ceased to keep one some time before the accident. About three years before the accident the defendant had obtained powers under an act to make a new road and discontinue the level occupation road; the powers of the act were to be exercised within five years, and then to cease; and nothing had been done as to the road till after the accident. The jury negatived negligence in the driver of the engine; but found for the plaintiff on the ground generally of "negligence as to the crossing." The judge, in summing up, had left to the jury as evidence of negligence in the defendant *inter alia*, the omission to keep a gate-keeper, and the omission to exercise the powers of the act; *held*, a misdirection. *Cliff v. Midland Ry Co.*, Law Reports, 5 Queen's Bench Cases, 258. 1870.

22. Lookout. The lookout upon an engine must be as efficient as circumstances require, and especially so when the chances of access to the track are greater than usual. *Marcott v. Marquette, Houghton and Ontonagon R. R. Co.*, 47 Mich., 1, 1881; 4 Amer. & Eng. R. R. Cases, 548; *East Tenn., Va. and Ga. R. R. Co. v. White*, 5 Lea (Tenn.), 540, 1880; 8 Amer. & Eng. R. R. Cases, 65.

23. — Where a train of cars was moving backwards, within the limits of an incorporated town, while the deceased was walking on the track in the direction in which the train was moving, and no person was stationed to keep a lookout, and the cars ran over and killed the deceased, the company is guilty of negligence. *Savannah and Memphis R. R. Co. v. Shearer*, 58 Ala., 672, 1877; 20 Amer. Ry Rep., 451.

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24. Obstructed view. The fact that the view of the track may have been obscured by other cars left standing on the side track does not lessen the caution required of a person attempting to cross, but imposes upon him the duty of exercising a higher degree of diligence. *Garland v. Chicago and Northwestern R'y Co.*, 8 Bradwell (Ill.), 571, 1881; *Haas v. Grand Rapids and Indiana R. R. Co.*, 47 Mich., 401, 1882; 8 Amer. & Eng. R. R. Cases, 268; *Cordell v. New York Central and Hudson River R. R. Co.*, 70 N. Y., 119, 1877; 18 Amer. R'y Rep., 511. See *Same v. Same*, 64 N. Y., 535. 1876.

25. — A person crossing the track at a private crossing, at a place where the view is obstructed by standing cars, has the right to presume that the company at such crossing will use more care than ordinarily. *Thomas v. Delaware, Lackawanna and Western R. R. Co.*, 19 Blatchford (U. S. C. C.), 533. 1881. See, also, *Same v. Same*, 8 Federal Reporter, 729. 1881.

26. — Evidence that, by reason of excavations, the formation of the land in the vicinity, and the presence of timber near the crossing, it was somewhat difficult for persons near it on the highway to see an approaching train, would support a finding that a failure to signal the approach of the train was negligence, although such signals were not then required by statute. *Eilert v. Green Bay and Minnesota R. R. Co.*, 48 Wis., 606, 1879; *Roberts v. Chicago and Northwestern R'y Co.*, 35 ib., 679, 1874.

27. — Where a railroad company permits brush and other obstructions on its right of way so as to prevent the view of approaching trains by travelers on the highway crossing its track, and neglects to give any signal of danger by a train approaching a crossing, either by ringing a bell or sounding a whistle, whereby a party, in attempting to cross the track on the public road, is killed, the company will be guilty of negligence. *Dimick v. Chicago and Northwestern R'y Co.*, 80 Ill., 338. 1875.

28. — It cannot be said, judicially, that a person about to drive across a railroad at a point where the line of the track could not be seen before reaching the crossing, should go on foot to look for approaching trains before driving upon the crossing with a team.

Pittsburgh, Cincinnati and St. Louis R'y Co. v. Wright, 80 Ind., 236, 1881; 6 Amer. & Eng. R. R. Cases, 114.

29. — A railway company is not, as a matter of law, required to station a flagman at a road crossing in the country because of the approach to it being partially concealed by embankments or otherwise. *Haas v. Grand Rapids and Indiana R. R. Co.*, 47 Mich., 401, 1882; 8 Amer. & Eng. R. R. Cases, 268.

30. — Plaintiff was injured by a backing engine while crossing defendant's track. In an action to recover for the injury, it appeared that there were some empty cars standing on another track between the track upon which was the engine and plaintiff as he approached the track. Defendant's counsel asked the court to charge that there was no negligence on the part of the defendant in using that particular engine; also, that leaving the empty cars standing on the track was not negligence; the court refused so to charge. *Held*, no error. *Kissenger v. New York and Harlem R. R. Co.*, 56 N. Y., 538, 1874; 6 Amer. R'y Rep., 154.

31. — A railway crossed on a level a public carriage and foot-way at a spot which, from the fact of there being a considerable curve in the line, and a bridge near, trains coming in one direction were not seen until very close, was peculiarly dangerous. There were gates across the carriage-way which were kept locked; but the foot-way was protected only by a swing-gate on either side, no person being there to caution people passing. The plaintiff, while using the foot-way, was knocked down by a passing train and injured. *Held*, that it was properly left to the jury to say whether or not the company had been guilty of negligence. *Bilbee v. London, Brighton and South Coast R'y Co.*, 18 Common Bench (N. S.), 584; 114 E. C. L., 583. 1865.

32. Rate of speed. While unusual speed of railway trains does not of itself constitute negligence, yet it may be considered with other circumstances in determining the degree of care exercised. *Artz v. Chicago, Rock Island and Pacific R. R. Co.*, 44 Ia., 284, 1876; *Terre Haute and Indianapolis R. R. Co. v. Clark*, 73 Ind., 168, 1880; 6

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Amer. & Eng. R. R. Cases, 84; *Salter v. Utica and Black River R. R. Co.*, 88 N. Y., 42, 1882; 8 Amer. & Eng. R. R. Cases, 487.

33. — The court instructed the jury that it is the duty of the employees of a railroad company "to approach a crossing at such rate of speed as would enable them to check the train, if necessary." *Held*, erroneous. *Cohen v. Eureka and Palisade R. R. Co.*, 14 Nev., 376. 1879.

34. — The law does not require the speed of trains to be slackened on approaching the crossing of a public highway in the country when a team is seen approaching the same. *Chicago and Alton R. R. Co. v. Robinson*, 9 Bradwell (Ill.), 89. 1881.

35. — The running of a train at a street crossing, where many are constantly passing, at a greater speed than is allowed by law, is not only carelessness, but the act is also wilful. At such places the engine-driver, as well as persons crossing the railroad, must exercise more care than at other places of less peril. *Wabash R. R. Co. v. Henkes*, 91 Ill., 406. 1879.

36. — A miner was run over and killed by a passing engine while he was using a level crossing, on a dark morning in November. His view of the line in the direction from which the engine came was obscured by a fence, a signal-man's box and a shunted train. The engine of the shunted train was blowing off steam, which served to drown the noise of the approaching engine. The engine-driver, if he had whistled at all, had not given an "alarm" whistle. *Held*, that the railway company's servants were in fault, and that there was no contributory negligence on the part of the miner, and that the company was liable in damages. *Ritchie v. Caledonian R'y Co.*, 7 Scotch Session Cases (4th series), 148. 1879.

37. — **sign-board.** The omission to erect a sign-board at a crossing will not render a railway company liable for a personal injury at the crossing, where the party injured was guilty of contributory negligence. *Field v. Chicago, Burlington and Quincy R'y Co.*, 4 McCrary (U. S. C. C.), 573, 1882; *Lang v. Holiday Creek R. R. Co.*, 49 Ia., 469, 1878; *Payne v. Chicago, Rock Island and Pacific R. R. Co.*, 39 ib., 523, 1874; *Payne v. Chicago, Rock Island and Pacific R. R. Co.*, 44 ib.,

236, 1876; *Field v. Chicago, Burlington and Quincy R'y Co.*, 14 Federal Reporter, 332, 1882; 8 Amer. & Eng. R. R. Cases, 425.

38. — The intention of the statute was not to create an absolute liability on the part of the railroad company, but to make the failure to provide sign-boards at highway crossings conclusive evidence of negligence on the part of the company. *Field v. Chicago, Burlington and Quincy R. R. Co.*, 14 Federal Reporter, 332. 1882.

39. — In a suit against a railway company for injuries sustained by being run into at a highway crossing, evidence that there was no sign-board at the crossing at the time of the accident is admissible on the issue of due care on the part of the plaintiff. *Elkins v. Boston and Albany R. R. Co.*, 115 Mass., 190, 1874; 7 Amer. R'y Rep., 456.

40. — Evidence that the company had no sign over the crossing to warn persons approaching of its presence is proper, although there be no statute or ordinance requiring the company to have such a sign. It is for the jury to say whether the omission to have such a sign is negligence; and it is for them to say whether it contributed to the injury, even where it appears that the person injured was familiar with the crossing. *Shaber v. St. Paul, Minneapolis and Manitoba R'y Co.*, 28 Minn., 103, 1881; 2 Amer. & Eng. R. R. Cases, 185; *Baltimore and Ohio R. R. Co. v. Whitacre*, 35 Ohio St., 627. 1880.

41. **Where crossing commences.** Under the facts found in this case, that portion of the highway from the point where the railway track first infringes upon the highway to the point of actual crossing cannot be regarded as a part of the highway crossing. *Beatty v. Central Iowa R'y Co.*, 58 Ia., 242, 1882; 8 Amer. & Eng. R. R. Cases, 210.

2. Negligence of injured party.

42. **Defective crossing.** The fact that a person attempts to pass over a crossing on a highway, after he has notice that it is unsafe by reason of being out of repair, does not necessarily constitute negligence, nor is he necessarily bound absolutely to refrain from pursuing his course. This would depend upon the circumstances of the case. If under the circumstances, he had reason-

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able cause, in the exercise of ordinary care and discretion, for believing that he could pass over in safety, and exercised due care in attempting to do so, he would not be guilty of negligence. *Kelly v. Southern Minnesota R'y Co.*, 28 Minn., 98, 1881; 6 Amer. & Eng. R. R. Cases, 264.

43. Degree of care required of traveler. The plaintiff in his declaration averred that he being in a narrow fenced lane leading to the crossing over defendant's railway, and distant about two and a half rods from the track, and seeing the defendant's train forty rods from, but approaching the crossing, he being distant seven rods therefrom, attempted to pass before the train should reach the crossing; that his attempt was unsuccessful, and that he was injured. *Held*, on demurrer, that on the plaintiff's statement of facts he was not in law entitled to recover. *Grows v. Maine Central R. R. Co.*, 67 Me., 100, 1877; 16 Amer. R'y Rep., 326.

44. — If a person while crossing the track of a railroad on a public highway is injured by a passing train, his negligence, if it contributes at all to the injury, contributes directly and proximately. *Hearne v. Southern Pacific R. R. Co.*, 50 Cal., 482. 1875.

45. — While crossing a railway track the plaintiff's intestate was killed by a train which had left a station on schedule time and attained a speed of twenty miles an hour; the deceased was working at a steam-mill located near the track; when first seen by the engine-driver he was about one hundred feet distant, and making no effort to get out of the way; the engine-driver put on brakes and shut off steam, but gave no signal by bell or whistle; *held*, that the contributory negligence of the deceased will prevent a recovery against the company. *Parker v. Wilmington and Weldon R. R. Co.*, 86 N. C., 221, 1882; 8 Amer. & Eng. R. R. Cases, 420.

46. — It is not sufficient to exonerate a party from a charge of contributory negligence in attempting to cross a railway track in the face of an approaching locomotive, to show that he might reasonably have supposed that if the locomotive ran at its usual and lawful rate of speed for that place, he could cross without harm. He has no more right to presume that the men in charge of

the locomotive will obey the requirements of the law than they have that he will obey the instinct of self-preservation. *Kelley v. Hannibal and St. Joseph R. R. Co.*, 75 Mo., 138. 1881.

47. — Where a person, as he approaches a crossing, with a single track and infrequent trains, sees a train with the rear towards him, going apparently in an opposite direction, and is deceived by appearances, and his attention distracted by the actions of persons at a distance attempting to warn him of his danger from the train which is backing rapidly and quietly towards him, and a wagon has crossed just before him, it will be left with the jury to say whether there is want of proper care. *Bonnell v. Delaware, Lackawanna and Western R. R. Co.*, 39 N. J. Law, 189, 1877; 14 Amer. R'y Rep., 220.

48. — Where one knows a train to be approaching, which may injure him if he attempts to cross the track before it, the slightest care for his own safety requires him to wait for it to pass. So, where it appears that the deceased was acquainted with the way in which the trains were run, and saw or might have seen the whole situation precisely as it was, but in her eagerness to secure a passage on the train attempted to cross the track and was struck, there was gross negligence on her part. In such case, the absence of the flagman from his post, or the failure to give warning of the approaching train by bell or whistle, is not such wilful or wanton negligence on the part of the railroad company as to charge it with responsibility for the accident. *Lake Shore and Michigan Southern R'y Co. v. Sunderland*, 2 Bradwell (Ill.), 307. 1878.

49. — The mere fact that a party, from the nature of his employment, is authorized to cross the tracks of a railroad, will not warrant such crossing at a place other than is provided by the railroad. *Morgan v. Pennsylvania R. R. Co.*, 7 Federal Reporter, 78. 1881.

50. — On a track, where cars frequently pass, every one is bound to be vigilant in his own protection, according to the common experience of men of ordinary prudence under like circumstances; but the want of such vigilance is a matter of defense in an

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action against the railroad company to recover damages for injuries sustained because of its negligence. *Kansas Pacific R'y Co. v. Twombly*, 3 Colo., 125, 1876. Affirmed on writ of error, *Railway Co. v. Twombly*, 100 U. S., 78, 1879; 21 Amer. R'y Rep., 447.

51. — Where deceased crossed the railway track of defendant, and was met in a hurried manner by a friend on the adjacent parallel track of another road, thence turned back to defendant's track, and held there in conversation during the passage of a long train running at the speed of five or six miles an hour on the adjacent road, and having separated, the deceased was then killed by a switch-engine backing up on defendant's track in a direction opposite that of the passing train, the survivor having got twenty feet away before being apprised of the accident, and not having seen the switch-engine nor heard it because of the noise of the passing train,—*held*, that the turning back of deceased was not an act of negligence which the law will recognize as such, but that it was properly left to the consideration of the jury. *Held*, also, that it was properly left to the jury to determine whether or not the deceased was guilty of negligence, under the circumstances, in not observing the approaching engine. *Kansas Pacific R'y Co. v. Twombly*, 3 Colo., 125, 1876. Affirmed on writ of error, *Railway Co. v. Twombly*, 100 U. S., 78, 1879; 21 Amer. R'y Rep., 447.

52. — Plaintiff's intestate, who, with his horses and wagon, was approaching a railroad crossing, was prevented from seeing a coming train by some freight cars which stood upon a switch track near the crossing, until it was too late for him to avoid a collision with such train, whereby he was killed. A moment previous a freight train had passed and was not out of hearing. *Held*, that the intestate was not guilty of contributory negligence in not seeing or hearing the coming train. *Ingersoll v. N. Y. Central and Hudson River R. R. Co.*, 6 Thompson & Cook (N. Y. Supreme Ct.), 416, 1875; *Same v. Same*, 4 Hun, 277; 66 N. Y., 612, 1876.

53. — It is deemed culpable negligence to attempt to drive a team across the track of a railroad in full view of an approaching

engine. *Chicago, Rock Island and Pacific R. R. Co. v. Bell*, 70 Ill., 102, 1873; *Gothard v. Alabama Great Southern R. R. Co.*, 67 Ala., 114, 1880.

54. — The court cannot say, as matter of law, that ordinary care required plaintiff to stop his team and listen for the train, or that trotting his team to within a rod of the track was negligence, even though he knew that the train usually passed the crossing at about that time in the day; but these questions are for the jury. *Eilert v. Green Bay and Minnesota R. R. Co.*, 48 Wis., 606, 1879.

55. — While, where the severity of the weather requires a traveler upon the highway to protect himself from it, if the means taken materially impair his ability to perceive coming danger and he is injured at a railroad crossing, he is not to be freed from a charge of contributory negligence, yet, unless it is certain that the means used did have that effect, it is a question for the jury, not the court. *Salter v. Utica and Black River R. R. Co.*, 59 N. Y., 631, 1874; reversing 3 Thompson & Cook (N. Y. Supreme Ct.), 800, 1874.

56. — A person approaching a railway at a road crossing is bound to use such precautions as a prudent man would resort to under like circumstances; but any attempt by the court to prescribe the precise thing he should do in exercising such caution would be an invasion of the province of the jury, by charging on the weight of evidence. *Texas and Pacific R'y Co. v. Chapman*, 57 Tex., 75, 1882; *Houston and Texas Central R'y Co. v. Waller*, 56 Tex., 331, 1882; 8 Amer. & Eng. R. R. Cases, 431; *Philadelphia and Reading R. R. Co. v. Carr*, 99 Pa. St., 505, 1882; 6 Amer. & Eng. R. R. Cases, 185.

57. — A. was walking upon the street of a city, which was intersected at an angle by several parallel lines of railway. On nearing the intersection, A. saw a train approaching on one of the tracks, and stepped until it had passed. When the last car had gone by, she looked both ways and also listened, but neither saw nor heard anything to alarm her, and accordingly, when the rear of the train was about a car's length off, attempted to cross. While doing so, she tripped and fell upon the track next beyond that upon

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which the train had just passed, and after lying there prostrate about fifteen seconds, was run over and injured by a train running upon that track in the opposite direction from the train which had just passed. A's view of the train by which she was injured was totally cut off by the train which had just passed. The rear car of the last named train passed the engine of the first named train about three hundred feet from the place of the accident. In a suit by A. against the company to recover damages for her injuries, the defendant requested the court to charge that the plaintiff had been guilty of contributory negligence in attempting to cross while the train which had just passed prevented her seeing the train by which she was injured. The court declined to so charge, but left the question of the plaintiff's contributory negligence to the jury. *Held*, under the circumstances, that this was not error. *Philadelphia and Reading R. R. Co. v. Carr*, 99 Pa. St., 505, 1892; 6 Amer. & Eng. R. R. Cases, 185.

58. — A traveler is bound to look out and listen for engines and trains; but he is not bound to make inquiry as to the schedules or the time when the trains are expected to pass. *South and North Ala. R. R. Co. v. Thompson*, 62 Ala., 494. 1878.

59. — To instruct the jury that "plaintiff's testimony shows that deceased was familiarly acquainted with the crossing and the time of the passing of trains, and it was his duty to have avoided being run against by the train by keeping off the track at crossing-time, and, if he failed so to avoid the train," etc., is error. *Louisville, Cincinnati and Lexington R. R. Co. v. Goetz*, 79 Ky., 442. 1881.

60. — It was held to be error to instruct the jury that it was the duty of the deceased "to make such use of his eyes and ears, and all his faculties, as would enable him to avoid danger, provided the managers of the train were doing their duty; if he did that he was free from blame." *Toledo, Wabash and Western R'y Co. v. Shuckman*, 50 Ind., 42. 1875.

61. — One cannot recover for an injury received while crossing a railroad track, if he failed to look and listen, unless the circumstances were such that it would have been

of no avail to do so; and this though the defendant neglected to take the statutory precautions and was otherwise negligent in the management of its cars. *Drain v. St. Louis, Iron Mountain and Southern R'y Co.*, 10 Mo. App., 531. 1881.

62. — Under the circumstances in this case, *held*, that a person who, in passing from the depot to the train he was about to take, was obliged to cross an intervening track, was not guilty of contributory negligence, in that he did not, before approaching the train, look up or down the track to see whether there was danger from an approaching train, and in that he approached the train diagonally from the platform of the station, and before his train had come to a full stop. *Jewett, Receiver, v. Klein*, 27 N. J. Eq., 550. 1876.

63. — When a traveler approaching a railway crossing in a covered buggy, with the sides and back of the cover fastened down, so that he could not see to his right or left without bending forward, stopped about twenty rods from the crossing and looked to the east, in which direction he could see about fifty rods, and then started forward looking toward the west, and was injured by a train coming from the east, *held*, that he was guilty of contributory negligence in causing the accident, and should have been non-suited, even if the train gave no signal of its approach. *Stackus v. New York Central and Hudson River R. R. Co.*, 7 Hun (N. Y.), 559. 1876.

64. *Effort to escape danger.* The mere fact that a person jumps from a vehicle in which he is traveling, where there is imminent danger of collision with an approaching train at a crossing, does not bar a recovery against the railroad company, although it appears that he made a mistake and would have escaped injury had he remained quiet. *Dyer v. Erie R'y Co.*, 71 N. Y., 228. 1877.

65. *Evidence.* The facts considered upon which a non-suit was held proper. *Connelly v. N. Y. Central and Hudson River R. R. Co.*, 88 N. Y., 346, 1892; 8 Amer. & Eng. R. R. Cases, 459.

66. — At the trial of an action against a railway company for personal injuries occasioned to the plaintiff while attempting to cross the tracks in a wagon at a grade cross-

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ing, the evidence as to how far the view of the track towards the south (the direction from which the train came which caused the accident) was obstructed by buildings and fences was conflicting. The plaintiff's evidence tended to show that, before crossing, he looked up the track towards the south; that the track was obscured by the smoke of a train which had just passed the crossing going south; that he listened for the whistle of any train going north, and could hear no whistle or other signal of its approach. *Held*, that the question whether the plaintiff used due care in crossing the track was for the jury. *Randall v. Connecticut River R. R. Co.*, 132 Mass., 269. 1882.

67. Failure to let down buggy-top. When the plaintiff came near to the sign-board, warning travelers to look out for the cars, he stopped his team and looked east and west for trains; he could see about fifty rods east; seeing no train, he started on to cross the track, looking and listening both ways as well as he could without getting out or off from his seat, but he neither heard nor saw anything. A train from the east struck his buggy, and he was injured. Plaintiff was non-suited on the ground of contributory negligence. *Held*, error; that the failure of the plaintiff to let down his buggy-top when he started up was not, as matter of law, negligence. *Stackus v. New York and Hudson River R. R. Co.*, 79 N. Y., 464. 1880.

68. Gates. In an action against a railway company to recover for injuries caused by an engine colliding, at a crossing, with a wagon in which the plaintiff was driving at about half past five in the morning, in December, it appeared that there were six tracks across the highway; that the plaintiff was prevented by the buildings on either side from seeing the approaching engine until he had driven upon the first track; that he then saw the engine on the further track; that the place was one across and near which engines and cars of all kinds were constantly moving; that the gates, which were arranged to swing across the highway when a train was passing, and across the railway when the highway was safe for travel, were in the night time swung back, so as to leave both the highway and the railway open; that there was no

flag or lantern at the crossing, as had been customary when an engine was about to pass while the gates were not so shut; that the plaintiff's horse was gentle; that the plaintiff did not, on seeing the engine, stop or whip up his horse, which was walking; and that he thought he could have stopped the horse on seeing the engine, if he had tried. *Held*, that the question whether the plaintiff was in the exercise of due care was for the jury. *Craig v. New York, New Haven and Hartford R. R. Co.*, 118 Mass., 481. 1875.

69. Inference. W., driving a horse and light wagon over a crossing of a county road, was killed by a locomotive. There was no express testimony as to whether he stopped and looked and listened before going on the railroad. *Held*, that the question of his negligence was for the jury. *Pennsylvania R. R. Co. v. Weber*, 76 Pa. St., 157. 1874.

70. — Although from the uncontradicted testimony it might have been inferred that if the traveler had stopped and looked and listened he would have seen the approaching train, it was for the jury to determine the fact. *Ib.*

71. — The presumption, in the absence of other evidence, is that the traveler stops and looks and listens, before crossing a railroad. *Ib.*

72. — The decedent was seen about to cross a railway in a village, at a time when a train was approaching from one direction and one backing towards her from the other direction. She was soon after found dead outside the street limits on railway grounds, having been run over by the backing train. *Held*, that being found where she was, outside the street limits, did not of itself make out against her a case of contributory negligence. *Hassenyer v. Michigan Central R. R. Co.*, 48 Mich., 205, 1882; 6 Amer. & Eng. R. R. Cases, 59.

73. Master and servant. A servant driving a carriage along a street crossing a railroad, and having, while yet at a point distant over thirty feet from the railroad track, a view of the same for a mile to the south, drove across the track, and the rear of his wagon was struck by a train coming from the south, and the wagon was demolished and the persons within it injured. *Held*,

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that the negligent act of the servant contributed to the injury. *Pennsylvania R. R. Co. v. Richter*, 42 N. J. Law, 180, 1880; 2 Amer. & Eng. R. R. Cases, 220.

74. Negligence of driver. The contributory negligence of a cab driver held to defeat the right of action of a passenger in the cab, where the cab was run into by a train. *Nicholls v. Great Western R'y Co.*, 27 Upper Canada (Queen's Bench), 382. 1868. See, also, *Payne v. Chicago, Rock Island and Pacific R. R. Co.*, 39 Ia., 523. 1874.

75. — A woman who has accepted an invitation to take a ride with a person competent to manage a horse is not chargeable with his negligence, and contributory negligence on his part is no defense to an action against a railroad company for injuries resulting from a collision. Accordingly, *held*, that a charge in such an action, that if defendant was negligent and the plaintiff was free from negligence herself, she was entitled to recover, although the driver might be guilty of negligence which contributed to the injury, was proper. *Robinson v. New York Central and Hudson River R. R. Co.*, 66 N. Y., 11. 1876.

76. — Plaintiff's testator was, by the invitation of the driver, a stranger, riding in a wagon upon a highway crossed by defendant's road. A wheel of the wagon went into a hole in the road between the rails of defendant's track, and he was thrown from the wagon and killed. In a suit for damages the court charged in substance that "carelessness upon the part of the driver, assuming he was a competent driver and a sober man, and there was no reason which the deceased could discover why he should not ride with him, would not defeat a recovery, unless the death was caused by his wrongful and wilful act." Defendant's counsel requested a charge "that if the driver's negligence was the proximate cause of the jar the plaintiff cannot recover." The court refused to alter its charge. *Held*, no error; that the charge in this respect was sufficient. *Masterson v. New York Central and Hudson River R. R. Co.*, 84 N. Y., 247, 1881; 3 Amer. & Eng. R. R. Cases, 408.

77. — Where one travels in a vehicle over which he has no control, but at the invitation of the owner and driver, no relationship

of principal and agent arises between them. He is not responsible for the negligence of the driver, where he himself is not chargeable with negligence, and where there is no claim that the driver was not competent to control and manage the team. *Dyer v. Erie R'y Co.*, 71 N. Y., 228. 1877.

78. Obstructions to view. Where a person, when approaching a railroad crossing, looks and listens for an approaching train before passing a cornfield which obstructed the view, and after passing the same again looks and listens, and no warning is given him by bell or whistle, he will be guilty of no negligence on his part in going upon the track, and the fact that he is told to stop, that the cars are coming, which he does not hear, will not change the rule. *Dimick v. Chicago and Northwestern R'y Co.*, 80 Ill., 338. 1875.

79. — It appearing that plaintiff, before going through the opening in the train and upon the track where the accident occurred, brought his horses to a walk, but did not stop them nor leave his wagon and go forward where he could see an approaching train; that he looked and listened for a train, but could not see or hear any signal of its approach, — *held*, that the evidence did not show, as a matter of law, contributory negligence on the part of the plaintiff. *Kelly v. St. Paul, Minneapolis and Manitoba R'y Co.*, 29 Minn., 1. 1881.

80. — If the traveler cannot see the track by looking out from his carriage, he should get out and lead his horse. *Pennsylvania R. R. Co. v. Beale*, 73 Pa. St., 504. 1873.

81. — F. approached a crossing with which he was perfectly familiar and with a manageable team. He drove by an open space, through which he had an extended view of the track, and stopped directly in front of a railway watch-house, which intercepted his view in the same direction. In this position he stood still for an instant, turning his head around as if looking for the train, and then whipped up his team as if to cross the track, and collided with a passing train and was killed. He was partially deaf, but did not leave the wagon to look beyond the watch-house. *Held*, that he was guilty of contributory negligence, and the court should have instructed the jury that there

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could be no recovery. *Central R. R. Co. of New Jersey v. Feller*, 84 Pa. St., 226, 1877; 18 Amer. R'y Rep., 869.

82. — An old man, who was somewhat deaf, while driving a team of colts towards a railway, down a narrow road, from which the track was concealed on one side by a high embankment, stopped to listen, but hearing nothing drove on, and when close by the track a train appeared within a few rods. Fearing that he could not control his horses where they were, he whipped them up and tried to cross the track, and the rear of the buggy was struck by the engine. *Held*, that in an action for the resulting injury, the question whether plaintiff was guilty of contributory negligence was for the jury. *Chicago and Northeastern R'y Co. v. Miller*, 46 Mich., 532, 1881; 6 Amer. & Eng. R. R. Cases, 89.

83. — A team collided with a train at a crossing, and the driver was killed. The track and the highway were both below the general surface of the ground, and an approaching train could only be seen occasionally by one driving towards the crossing. The driver was familiar with the crossing, but, except that he checked his team for a moment some four rods from the crossing, he did not appear to have taken any precaution. The whistle was sounded when the crossing was approached. *Held*, that the team-driver was chargeable with negligence, and that no action would lie for the injury. *Haas v. Grand Rapids and Indiana R. R. Co.*, 47 Mich., 401, 1882; 8 Amer. & Eng. R. R. Cases, 268.

84. — The plaintiff was driving his wagon upon the street at a slow trot towards the railroad crossing, and upon approaching the track his horses were frightened by the passage of the locomotive, and ran away, throwing him from the wagon and seriously injuring him. It appeared from the evidence of the plaintiff that the street was built up on each side, and lined with piles of lumber in such a manner that a train could not be seen until the plaintiff approached very near to it; and, also, that the engine bell was not rung, as required by § 486, Civil Code. *Held*, that the evidence failed to show contributory negligence. *Strong v. Sacramento and Placerville R. R.*

Co., 61 Cal., 326, 1882; 8 Amer. & Eng. R. R. Cases, 273.

85. **Ordinance of city.** A traveler has no right to omit proper precautions, upon the assumption that a railway company will comply precisely with a city ordinance in the running of its trains. *Calligan v. N. Y. Central and Hudson River R. R. Co.*, 59 N. Y., 651. 1874.

86. **Persons unacquainted with the crossing.** Plaintiff and his companions were strangers in Eureka, and ignorant of the existence of the defendant's railroad. At the close of the plaintiff's case there was no evidence to show that plaintiff could have seen the train, as it approached the crossing, in season to avoid the accident, except that other people in different localities, near where the collision occurred, heard and saw the approaching train in time to have avoided the accident. *Held*, that a non-suit was properly refused. The fact that plaintiff and his companions were strangers in Eureka, and did not know they were approaching a railroad crossing, was an important fact to be considered by the jury. *Cohen v. Eureka and Palisade R. R. Co.*, 14 Nev., 376. 1879.

87. **Sign-board.** The caution board is for the purposes of notifying those who are passing; and where a party is familiar with the crossing, and has frequently been over it, and had it in mind on the occasion in question as he approached it, he cannot be said to have been injured by the failure to set up the sign-board. *Haas v. Grand Rapids and Indiana R. R. Co.*, 47 Mich., 401, 1882; 8 Amer. & Eng. R. R. Cases, 268.

3. *Rights of both parties.*

88. **Degree of care required by both parties.** While it is the duty of persons crossing or attempting to cross a railway to exercise proper care and caution, it is also the duty of the railway employees, or those in charge of the train, to exercise such care and caution at such places as to prevent injury to those traveling on public highways. The duty in this regard is reciprocal. *Louisville, Cincinnati and Lexington R. R. Co. v. Goetz*, 79 Ky., 442, 1881; *Pennsylvania Co. v. Krick*, 47 Ind., 368, 1874; *Cohen v. Eureka*

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and *Palisade R. R. Co.*, 14 Nev., 376. 1879. Neither are bound to exercise *extraordinary* care. *Willoughby v. Chicago and Northwestern R. R. Co.*, 37 Ia., 432. 1873.

89. — Where a railroad company has a dangerous crossing in a crowded city, it must exercise a degree of care to avoid injuring persons and property commensurate with the danger of accident; on the other hand, persons using such a crossing must exercise care and watchfulness commensurate with the danger to which they are exposed. *Harlan v. St. Louis, Kansas City and Northern R'y Co.*, 65 Mo., 22. 1877.

90. — The rights of a traveler upon the highway, and a railway company, are equal at a crossing; but a traveler approaching a crossing must yield the right of way to a train drawing near. *Black v. Burlington, Cedar Rapids and Minnesota R'y Co.*, 38 Ia., 515. 1874.

91. — A railroad corporation is not only required to construct its tracks at a public crossing so that they may be reasonably safe to persons driving across the same, but to maintain them in a reasonably safe condition. In such construction, as well as in maintaining them in a safe condition, it is bound only to ordinary care and skill, the rights and duties of the corporation and individuals being mutual. *Hurley v. Railroad Companies*, 1 Indianapolis Superior Court Rep., 295. 1873.

92. — No one is bound to keep a constant lookout against dangers which could not be expected to exist so long as ordinary care is used. *Grand Rapids and Indiana R. R. Co. v. Martin*, 41 Mich., 667. 1879.

93. **Foot-path.** Where a person crosses a railway by a common and well-known foot-path, used by the public for many years, without let or hindrance on the part of the employees of the railway company, he cannot be regarded as a trespasser. *Philadelphia and Reading R. R. Co. v. Troutman*, 6 Amer. & Eng. R. R. Cases (Pa.), 117. 1882.

94. **Public use.** It appeared that the decedent was run over in attempting to cross defendant's tracks at a place where the owners of adjoining lands had a right of way, and where the public for thirty years had been in the habit of crossing. *Held*, that defendant's acquiescence for so long a

time in this public use amounted to a license to all persons to cross there, and imposed a duty upon it as to persons so crossing to exercise reasonable care in the movement of its trains, so as to protect them from injury. *Barry v. New York Central and Hudson River R. R. Co.*, 92 N. Y., 289. 1883.

II. STREETS.

95. **Authority to use street.** A railway company whose track is laid upon a public street has no exclusive right to use such street for the purpose of running its trains thereon. *Neier v. Missouri Pacific R'y Co.*, 12 Mo. App., 35. 1882.

96. — If the street on which the accident occurred had been dedicated to public use as a street, and was in use as such at the time of the injury, the defendant's right thereon is not exclusive. *Otto v. St. Louis, Iron Mountain and Southern R'y Co.*, 12 Mo. App., 168. 1882.

97. — **railway originally laid by the military.** The United States military authorities had the right, during the late war, to construct a line of railroad along a public street of the city of Memphis, connecting the line of the Mississippi and Tennessee Railroad with the depot of the Memphis and Charleston R. R. Co., and no one using such line of road for military purposes, under the orders of the military authorities, could be deemed a trespasser. But the charters of neither of said companies authorizing the construction of such line of road, they could, as against the public, the state or municipal authorities, derive no right, through a license from the military authorities, to use the same for their private benefit. The Mississippi and Tennessee R. R. Co., by using such road for its own purposes, became a trespasser and liable for any damage occurring in consequence of the passage of its trains. *Miss. and Tenn. R. R. Co. v. Wilson*, 10 Heiskell (Tenn.), 496. 1878.

98. **City ordinances.** The defendant offered in evidence the ordinance of the city authorizing it to locate, construct, maintain and operate its railroad through and across a particular street; also offered to prove compliance with the ordinance in every respect.

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The rejection of such evidence held to be erroneous. *Colorado Central R. R. Co. v. Mollandin*, 4 Colo., 154. 1878.

99. — Proof that the defendant was moving its cars in violation of a city ordinance at the time the injury was inflicted, while not sufficient *per se* to create a liability, is yet competent to go to the jury as tending to show negligence. *Meek v. Pennsylvania Co.*, 38 Ohio St., 632. 1888.

100. — The running of a locomotive, or train of cars, at a rate of speed declared to be unlawful by the ordinance of a city, or running the same backward without a watchman on the rear, contrary to such ordinance, is not, merely on account of the violation of the ordinance, an act indicating or tending to prove wilful purpose, or intent to commit an injury, if, without the ordinance, the running under such circumstances would only be an act of negligence. The violation of such ordinance is not of itself evidence of anything more than negligence, and is not conclusive evidence of negligence. *Scudder v. Indianapolis, Peru and Chicago R'y Co.*, 1 Indianapolis Superior Court Reporter, 481. 1878.

101. Crossing of unopened street. Plaintiff was injured by a passing locomotive while crossing defendant's railroad track. At the place where the accident occurred a street had been laid out across the track, but had not been opened, and the title to defendant's land had not been acquired. The street had been partially graded, and had been for some time used by persons going to several places. Held, that plaintiff had no right upon the track at that place, and was guilty of negligence in being there. *Matze v. New York Central and Hudson River R. R. Co.*, 3 Thompson & Cook (N. Y. Supreme Ct.), 513; 1 Hun (N. Y.), 417. 1874.

102. Backing train. If the track passes along the street of a city, crossing another street, and a train of cars is stopped in the first street, so that the last car in the train stands in the cross-street, and while a person is walking along the cross-street over the track, behind the train, the train, without any notification, is suddenly backed, and the person is knocked down and injured by the cars, the employees of the company are guilty of gross negligence. *Robinson v.*

Western Pacific R. R. Co., 48 Cal., 409, 1874; 7 Amer. R'y Rep., 244.

103. — It is no defense to an action for the injury in such case, that the plaintiff, by his own act, has contributed to his injury, but it must appear that by his own fault he has so contributed. *Ib.*

104. — The person injured in such case is exercising an undoubted right in crossing the track on a public street, and is not guilty of such want of care or diligence as contributes to the injury, and the company is not released from liability on the ground of contributory negligence. *Ib.*

105. — The person injured in such case had a right to presume that he would be notified that the train was about to move, and was not bound to wait because the train was on the street, or assume that it might move suddenly backward without notice. *Ib.*

106. — If the engine bell was rung, this does not of itself establish proper care by the employees of the company; for, although the bell is intended to give notice to all, it is the duty of the engine-driver to see that all have acted on the notice. *Ib.*

107. — In such case the railway company should provide a lookout, upon whose signal, that the track was clear, the engine-driver should have acted. *Ib.*

108. — Whether there was not want of ordinary care on the part of the defendant in this case, in running a freight train backward within the city limits, at the rate of seven or eight miles an hour, with many pedestrians passing along the side of its track, with a beam projecting a foot and a half beyond the side of the car, without brakemen, lookout or signal to give warning, was a question properly submitted to the jury. *Kansas Pacific R'y Co. v. Ward*, 4 Colo., 80. 1877.

109. — Where a person has been run over by a train and injured, in an action for damages therefor, a finding that the injury was caused by the gross negligence of the company will not be set aside when it appears that he was run over by a train consisting of a locomotive, tender, one baggage and two passenger cars, which was started backward over a public crossing, in a populous city, with the brake on the engine out of repair and useless, with no brakemen at the

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other brakes, with no flagman or other person at the rear of the train, or at the crossing, to warn persons of their danger, and no one on the train except three persons, who were all on the locomotive, without the blowing of any whistle, though with the ringing of a bell, and along a track which from the locomotive could not be seen for a distance of from forty to fifty feet from the rear of the train. *Kansas Pacific R. R. Co. v. Pointer*, 14 Kans., 37. 1874.

110. Children. A railway company operating its cars through a populous street, on which many children live, must omit nothing which can be done to prevent injury to the children on the street. *Norfolk and Petersburg R. R. Co. v. Ormsby*, 27 Grattan (Va.), 455. 1876.

111. Defective sidewalk. If a party falls and is run over by a train of cars before he can arise, and his fall is occasioned by a hole in a sidewalk of a city, and the city is guilty of negligence in not repairing it, the city will be liable for all the immediate and proximate injuries following. *Schmidt v. Chicago and Northwestern R'y Co.*, 83 Ill., 405. 1876.

112. Degree of care required. In an action to recover damages for injuries received by plaintiff at a crossing on defendant's road, the court charged "that, considering the nature of the business in which the defendant was engaged and the hazard attending the running of cars in the streets of a city, and particularly on a dark night, the defendant was bound to exercise the utmost care and diligence, and to use all the means and measures of precaution which the highest prudence could suggest and which it was in his power to employ." *Held*, error. *Weber v. New York Central and Hudson River R. Co.*, 58 N. Y., 451, 1874; 7 Amer. R'y Rep., 188.

113. — Where a railway company is regularly running its trains on a public street, it must do so in such a way as to be consistent with the safety of persons and property on the street. *Barley v. Chicago and Alton R. R. Co.*, 4 Bissell (U. S. C. C.), 430. 1865.

114. — Irrespective of any city ordinance, the speed must be such as to permit the stoppage of the train within a reasonable

time, and the train must be provided with all usual means and appliances for stopping. *Ib.*

115. — When the engine is backing a train there should be a lookout to give notice of any persons or obstruction. If there is steam or smoke upon the track great care and diligence is required. *Ib.*

116. — It is negligence to run a train in a street when, because of the coldness of the weather, all the train men are upon the engine, and the only means used for checking or stopping the train are such as can be commanded and used by the engineer. *St. Louis and South Eastern R'y Co. v. Mathias*, 50 Ind., 65, 1875; 8 Amer. R'y Rep., 381.

117. — Where a railway company is authorized by municipal law to construct and operate its road through and across a street under such municipal control, it is in the exercise of a lawful right, and is not liable in a common law action, except for injuries done wantonly or without reasonable care. *Colorado Central R. R. Co. v. Mollandin*, 4 Colo., 154. 1878.

118. — A railway company is to be held to the exercise of a very high degree of care in operating its road through the public streets of a city, and will not be permitted to omit with impunity any reasonable duty that may tend to the safety of the public, who have an equal right with themselves to the free use of these thoroughfares. *Chicago, Burlington and Quincy R. R. Co. v. Stumps*, 69 Ill., 409. 1873.

119. — At street crossings a high degree of vigilance should be exercised. The signals required by law for the protection of travelers upon the highway should be given, and the servants of the company in charge of the train should be at their posts, observant of the track, and ready at a moment's notice to avert, if possible, any apprehended danger. A less degree of vigilance will ordinarily be required between streets than at crossings or when the train is running longitudinally in a street. In any case the requisite degree of vigilance may be properly designated by the words "ordinary care," that is, such care as would ordinarily be used by prudent persons performing a like service under similar circumstances. *Frick v. St. Louis, Kansas City and Northern R'y Co.*, 75

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Mo., 505, 1882; 8 Amer. & Eng. R. R. Cases, 280; *Same v. Same*, 5 Mo. App., 485, 1878.

120. Flagman. Where a flagman has been uniformly stationed at a street crossing, the negligence of the flagman to give warning and properly to discharge his duty, or in absenting himself from his post, is imputable to the corporation. *Dolan v. Delaware and Hudson Canal Co.*, 71 N. Y., 285. 1877.

121. Foot passenger. A foot passenger is not debarred the use of the street because a train of cars occupies a portion of such street. *Robinson v. Western Pacific R. R. Co.*, 48 Cal., 409, 1874; 7 Amer. R'y Rep., 244.

122. — guard rail. When a street crosses a railway, a foot passenger has a right to cross the track anywhere in the street, and to cross otherwise than by a footpath made for convenience is not negligence, though thereby his foot became so fastened between the rail of the track and a guard rail that he could not escape from an approaching train, and in consequence was injured. *Louisville, New Albany and Chicago R'y Co. v. Head*, 80 Ind., 117, 1881; 4 Amer. & Eng. R. R. Cases, 619.

123. "Kicking" car. Where a person is injured in the street by the unexpected "kicking" of a car, the question of negligence is for the jury. *Mahar v. Grand Trunk R'y Co.*, 26 Hun (N. Y.), 82. 1879.

124. Rate of speed. In cases where what constitutes a proper rate of speed for a railroad train depends upon the length and character of the train, the location and particular surroundings of the track, and other circumstances, and no law or ordinance regulating the speed of trains is in evidence, whether the rate of speed is improper or dangerous is a question of fact for the jury. *Frick v. St. Louis, Kansas City and Northern R'y Co.*, 75 Mo., 595, 1882; 8 Amer. & Eng. R. R. Cases, 280.

125. — A child of tender years, whilst on a railway in a street in a city, was killed by a train; under the evidence it was held to be for the jury to say whether the train was running too fast, or there was negligence otherwise; and whether the child was in the street through the negligence of the parents. *Philadelphia and Reading R. R. Co. v. Long*, 75 Pa. St., 257. 1874.

126. — Irrespective of any ordinance or law regulating the speed of railroad trains at crossings, the running at an excessive rate of speed is negligence, and if a collision is caused thereby, the company is liable. As to whether the speed is excessive or dangerous in the locality is a question of fact for the jury. *Massoth v. Delaware and Hudson Canal Co.*, 64 N. Y., 524. 1876.

127. — city ordinance. Where a city ordinance, duly authorized by law, expressly requires railroad trains, while passing through the city limits, to observe a certain rate of speed, to keep head-lights burning, and the bell ringing, failure to comply with such ordinance amounts to negligence *per se*. But those violations do not fasten liability on the company, where they did not cause the damage. *Karle v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 55 Mo., 476. 1874.

128. — Where a train is run through a populous city at an unusual hour, it is incumbent on its employees to take unusual precautions to avoid accidents, and a failure to do so would authorize a jury to infer negligence. *Ib.*

129. — If ordinary care and prudence, and due regard for the safety of third persons, require engines and trains to be run at a less rate of speed than that limited by an ordinance of the city, the company must observe such care and prudence. *Shaver v. St. Paul, Minneapolis and Manitoba R'y Co.*, 28 Minn., 103, 1881; 2 Amer. & Eng. R. R. Cases, 185.

130. — The fact that the rate of speed at which the train was run was prohibited by an ordinance of the city is competent evidence of negligence and may be proved, although the existence of the ordinance has not been alleged in the proceedings. *Faber v. St. Paul, Minneapolis and Manitoba R'y Co.*, 29 Minn., 465, 1882; 8 Amer. & Eng. R. R. Cases, 277.

131. — It is improper to submit to the jury the question of the reasonableness of a city ordinance limiting the rate of speed of trains along the streets of a city. *Neier v. Missouri Pacific R'y Co.*, 12 Mo. App., 25. 1882.

132. — Where the ordinances of a city prohibit railway companies from running

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their trains in the city at a greater rate of speed than six miles an hour, the running of a train at the rate of fifteen miles an hour, resulting in the death of one wrongfully upon the track, will not make the injury wilful or wanton on the part of the company. *Illinois Central R. R. Co. v. Hetherington*, 83 Ill., 510. 1876.

133. — In an action against a railway company for an injury caused by negligence in running a train in a city, an ordinance of the city regulating the speed of trains in the city, the ringing of the bell, etc., and the violation of the ordinance, may be shown in evidence as matter to be considered in deciding the question of negligence. *St. Louis and South Eastern R'y Co. v. Mathias*, 50 Ind., 65, 1875; 8 Amer. R'y Rep., 381.

134. — It is negligence to run a train with twice the rapidity allowed by a city ordinance, and without ringing the bell, sounding the whistle, or giving any signal of approach. *Ib.*

135. — The charter of Janesville authorizes the city to enact ordinances "not repugnant to the constitution and laws of this state," *inter alia*, "to regulate and restrain the speed of cars in passing through said city." An ordinance of the city prohibits, under penalty, the running of trains in certain parts of the city at a greater speed than five miles an hour. *Held*, that in this respect the ordinance is repugnant to the general statute, and void, as the state law fixes the rate at six miles an hour. *Horn v. Chicago and Northwestern R'y Co.*, 38 Wis., 463. 1875.

136. — In an action for an injury caused by a train within a city, the court takes notice of public statutes regulating the rate of speed, and they need not be pleaded; but a private statute, or a local custom or by-law, if relied upon, must be pleaded. *Ib.*

137. — It is improper to admit in evidence a city ordinance not pleaded in the complaint, and tending to vary the legal conditions of defendant's liability. *Ib.*

138. — The franchise to lay tracks along Poplar street, in the city of St. Louis, does not authorize the running of engines thereon at the rate of fifteen miles an hour, in violation of a city ordinance. *Neier v. Missouri Pacific R'y Co.*, 12 Mo. App., 25. 1882.

139. — In a suit against a railway company to recover damages for causing the death of the plaintiff's intestate through negligence, it appeared that the deceased was struck by the train while attempting to cross the track on a public street in a populous city; that there were a great many tracks at the place, and much switching of trains, and that the deceased at the time was watching for another train a few feet ahead of him to pass, and while so waiting was struck by another train coming from behind, and which was running at the rate of ten miles an hour, in violation of the ordinances of the city. The jury found the defendant guilty. *Held*, that if the deceased was guilty of negligence it was but slight, as compared with that of the company, which was guilty of gross negligence in running its train at such speed in a public thoroughfare. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Knutson*, 69 Ill., 103. 1873.

140. — statute. The statute regulating the speed of railway trains in cities was passed to preserve life, and its strict observance will be enforced by the courts. *Haas v. Chicago and Northwestern R'y Co.*, 41 Wis., 44. 1876.

141. — The statute does not license a speed of ten miles per hour, if that rate under the circumstances would be negligence. A railroad company must conform the rate of speed of its trains to the safety of the public at all places in a city where persons have as equal a right to travel as the company has to run trains. *Chicago, Burlington and Quincy R. R. Co. v. Dougherty*, 12 Bradwell (Ill.), 181, 1882; *Wabash R. R. Co. v. Henks*, 91 Ill., 406, 1879.

142. — Defendant's charter authorizes unlimited speed, in general, in operating its trains; while the railway law of 1872 limits the rate of speed within incorporated cities to six miles an hour. *Held*, that the franchise and the regulation, taken together, are positive authority for the rate last named in cities. *Horn v. Chicago and Northwestern R'y Co.*, 38 Wis., 463. 1875.

143. Signal; statute. While the statute of 1879, requiring signals, was in force, a violation of it was negligence; and where the evidence showed this, an instruction, that if there were obstacles to prevent the

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seeing of an approaching train until the plaintiff got near the track, it was his duty to stop before reaching it, and look and satisfy himself that no train was approaching, and if he did not, but by so doing he could have seen the train, he was negligent, and could not recover, was properly refused. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Martin*, 82 Ind., 476, 1882; 8 Amer. & Eng. R. R. Cases, 253.

144. Usefulness impaired by railway. The defendant operated its road through Washington street, between Market and Mulberry streets, in the city of Syracuse. The rails projected about four and a half inches above the paved surface of the street, and the spaces between them were not planked or filled in except at the places where Washington street was crossed by the other streets. The north rail was about ten feet from the north curb of Washington street. The plaintiff's intestate turned into Washington street from Market street, driving eastwardly towards Mulberry street, to deliver ice at a hotel in the middle of the block. Both sides of the street were filled with buildings used for business purposes. While delivering the ice a train came from the east. When the engine came near to the horses they became frightened and the wagon was backed against the train, whereby the deceased was killed. *Held*, that it was error to non-suit the plaintiff. *Bell v. New York Central and Hudson River R. R. Co.*, 29 Hun (N. Y.), 560. 1893.

145. Walking on the track. The rights of the public are not subordinate to those of the railroad company at the crossing of a public street; but where the track runs along the street, the rights of the public are subordinate, and persons walking on the track must keep out of the way of trains. *Zimmerman v. Hannibal and St. Joseph R. R. Co.*, 71 Mo., 476, 1880; 2 Amer. & Eng. R. R. Cases, 191.

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146. Cities and towns. A railroad company has not discharged its whole duty to the public by simply causing the bell to be rung or the whistle sounded for the distance required by statute, before crossing a street

or highway, and particularly in populous cities and villages. *Zimmer v. New York Central and Hudson River R. R. Co.*, 7 Hun (N. Y.), 552, 1876; affirmed, *Same v. Same*, 67 N. Y., 601, 1876.

147. City ordinance forbidding signals. In a suit against a railway company to recover damages for injuries alleged to have been caused by the defendant's train, through the negligence of the defendant's employes, the complaint alleged the negligent construction, by the defendant, of a number of parallel tracks across a street at a point where the plaintiff was attempting to cross when injured; also the bad condition of the sidewalk crossing the tracks; also the failure of the defendant to keep a watchman at the crossing, as required by an ordinance of the city; also the failure of the employes to sound the whistle and ring the bell when approaching the crossing. The failure to sound the whistle having been proved by the plaintiff, the defendant offered in evidence another ordinance of the city prohibiting the sounding of whistles and ringing of bells on engines while passing through the city. *Held*, that the exclusion of such evidence was erroneous. *Pennsylvania Co. v. Hensil*, 70 Ind., 569, 1880; 6 Amer. & Eng. R. R. Cases, 79.

148. Contributory negligence. In a suit by the personal representative of a person killed upon a railroad crossing, on the alleged ground of negligence of the company, it appeared that the country was level at the place of the accident, and that the deceased could readily have seen the approaching train, by the use of ordinary care, but drove upon the crossing without looking for a train, and there was no proof that he was seen by the company's servants until it was too late to check the speed of the train. *Held*, that a verdict in favor of the plaintiff could not be sustained, owing to the gross negligence on the part of the deceased, although the signal required by law was not given. *Chicago, Burlington and Quincy R. R. Co. v. Lee*, 68 Ill., 576. 1873.

149. — The neglect of the railway employes, in not making the proper signals on approaching a crossing, will not render the company liable for damages, where the undisputed facts show that by the exercise of

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proper care the injured party might have avoided the injury. *Cleveland, Columbus, Cincinnati and Indianapolis R'y Co. v. Elliott*, 28 Ohio St., 340, 1875; 14 Amer. R'y Rep., 123; *Shaw v. Jewett*, 86 N. Y., 616, 1831; 6 Amer. & Eng. R. R. Cases, 111.

150. — The statute (sec. 493, Civil Code) provides, in substance, that a locomotive bell must be rung when the engine is approaching a crossing, under a penalty for failing so to do; and declaring that the railroad corporation is also liable for all damages sustained by any person, and caused by its locomotives, trains or cars, when the bell is not rung; *held*, that a failure to ring the bell does not abrogate the doctrine of contributory negligence. *Meeks v. Southern Pacific R. R. Co.*, 52 Cal., 602, 1878; 20 Amer. R'y Rep., 115.

151. — If the injured person had notice of the approach of the train, the failure to ring the bell would become an immaterial matter. *Houston and Texas Central R. R. Co. v. Nixon*, 52 Tex., 19, 1879.

152. — A stranger, in stepping out from behind a train of cars standing upon a side-track of a railroad, to cross another track, seven feet removed, was run over by a "pony" engine and killed. The engineer failed to ring the bell, but the locomotive could have been heard, while moving, at a distance of from one to two hundred yards. The engineer did not see the deceased, but, had he done so, could not have stopped the engine soon enough to prevent the accident; whereas the other might have both seen and heard the engine in time. *Held*, that although the failure to ring the bell was negligence in law, yet, since the casualty was directly caused by the negligence of the deceased, and after he stepped from behind the train, could not have been prevented by the engineer, the company was not liable. *Harlan v. St. Louis, Kansas City and Northern R. R. Co.*; 64 Mo., 480, 1877. See, also, *Fletcher v. Atlantic and Pacific R. R. Co.*, ib., 484, 1877.

153. Degree of care required. An instruction that it is the duty of a railway company to give "due warning" of the approach of its trains to a highway crossing is erroneous, being too general. *Chicago and Alton R. R. Co. v. Robinson*, 106 Ill., 142, 1883.

154. — Whether the proper signals were given or the necessary precautions used by the company at the time the accident occurred to prevent injury is a question of fact for the jury. *Paducah and Memphis R. R. Co. v. Hoehl*, 12 Dush (Ky.), 41, 1876; 18 Amer. R'y Rep., 338.

155. — The court charged in substance that from a point the proper distance from the crossing until the engine reached the crossing, it was defendant's duty to ring a bell or blow a whistle, and do it continuously so as to give warning. To this portion of the charge defendant's counsel excepted generally. *Held*, untenable; that the charge was substantially correct, but even if the court erred in using the word "continuously," a portion of the charge being correct, a general exception could not be sustained; that if any qualification was proper and desired, it should have been suggested. *Smedis v. Brooklyn and Rockaway Beach R. R. Co.*, 88 N. Y., 13, 1382; 8 Amer. & Eng. R. R. Cases, 445.

156. — When the employees in charge of a railway train have given all the usual and proper signals to warn persons of their approach, they are not required to stop the train on discovering a person on the track, unless they have reason to believe that he is laboring under some disability, or that he does not hear or comprehend the signals. *Frech v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 39 Md., 574, 1873; 10 Amer. R'y Rep., 474.

157. — A railway company is entitled to precedence at highway crossings, on condition that it shall give reasonable and timely warning of the approach of its trains, and a failure to give such warning is negligence. *Indianapolis and Vincennes R. R. Co. v. McLin*, 82 Ind., 435, 1882; 8 Amer. & Eng. R. R. Cases, 237.

158. — The obligation of railway companies and travelers on highways at crossings are mutual, the same degree of care being required of each; and the right of precedence belonging to the railway company does not relieve it of the duty to give proper warning of its approaching trains, nor to use reasonable care to avoid collision. *Id.* See, also, *Rockford, Rock Island and St. Louis R. R. Co. v. Hillmer*, 72 Ill., 235, 1874.

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159. — The court charged the jury that it was the duty of the railroad company to blow the whistle at short intervals all the way from the depot to a crossing. *Held*, no error. *Louisville and Nashville R. R. Co. v. Gardner*, 1 Lea (Tenn.), 688, 1878.

160. — Where there is extensive travel upon a highway crossing it is the duty of the company to give timely and sufficient notice of the approach of trains to such crossing. *Philadelphia and Reading R. R. Co. v. Killips*, 88 Pa. St., 405, 1879.

161. Depots and depot grounds; failure to whistle. The plaintiff's deceased husband went, with some companions, to the defendant's railway station to see an intending passenger off by the train, and he crossed the rails (by a level pathway used by the public without objection by the defendant) to the rear of an ordinary train then standing at the station; his companions, from where they stood, could see an express train approaching from the opposite direction, but he, from his position behind the stationary train, could not see it, and, upon his attempting to recross the rails to his companions, he was killed by the express train; the engine-driver of the express train admitted that it was his duty to whistle on approaching that station, and he and other servants of the defendants deposed that he had done so upon that occasion, but the deceased's companions deposed that they did not hear it. *Held*, that there was evidence of negligence by the defendant proper to be submitted to the jury. *Slattery v. Dublin, Wicklow and Wexford R'y Co.*, 8 Irish Reports (Common Law), 531, 1874; 10 Irish Reports (Common Law), 256, 1875.

162. Evidence. The evidence being conflicting as to the giving of a signal, the question is one of fact for the jury. *Roach v. Flushing and North Side R. R. Co.*, 58 N. Y., 626, 1874; *McKeever v. N. Y. Central and Hudson River R. R. Co.*, 83 ib., 667, 1882; *Bayley v. Eastern R. R. Co.*, 125 Mass., 62, 1878.

163. — Where, in an action against a railroad company for negligence in not ringing a bell or blowing a whistle upon a train approaching a crossing, plaintiff's witnesses, whose attention was called to the subject at the time, swear that they did not hear the

bell, while defendant's witnesses swear positively that it was rung, the question is one of fact for a jury. *Salter v. Utica and Black River R. R. Co.*, 59 N. Y., 631, 1874; reversing 3 Thompson & Cook (N. Y. Supreme Ct.), 800, 1874.

164. — Upon the question whether the defendant rung its bell or blew its whistle there were several witnesses upon the part of the plaintiffs who testified that they were in a position where they could have heard the signals had they been given, and that the signals were not given. *Held*, that this negative testimony raised a conflict of evidence against the affirmative testimony of defendant's witnesses, that the bell was rung and the whistle blown. *Bunting v. Central Pacific R. R. Co.*, 16 Nev., 277, 1881; 6 Amer. & Eng. R. R. Cases, 282.

165. — Where the plaintiff testified that as he approached a crossing with his wagon and team, on a public street in the city of Topeka, adjoining the passenger depot, he looked to the west (the direction from which the train came), and all he saw was a large pile of lumber, and he didn't hear any bell or whistle; and a witness stated that he was ten or fifteen feet from the depot, but heard no signals until the collision, and would have heard them if any had been given; and four other witnesses, who were present, testified that they did not hear the whistle sounded or the bell rung until the instant of the collision; and a passenger on the train, and in a car next to the rear one, stated that he didn't hear any alarm; and on the part of the defense, the fireman and engineer testified that they whistled above the tank, three or four hundred yards west of the crossing, and rang the bell continuously from the tank until the train stopped; and five other witnesses stated that they heard the whistle sounded three or four hundred yards west of the crossing, and the ringing of the bell as the train came in,—*held*, that there was evidence sufficient to sustain the finding of the jury that proper signals of the approach of the train to the crossing were not given. *Kansas Pacific R'y Co. v. Richardson*, 25 Kans., 391, 1881; 6 Amer. & Eng. R. R. Cases, 96.

166. Leased lines. A railroad company operating trains upon a road owned by au-

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other company is liable for negligence in running its trains thereon, and for the negligence of the flagmen stationed at the crossings, and for other servants or employes engaged in the signal service of that road. The duty of avoiding danger rests in the company operating the roads, no difference to whom the property may belong. *Leonard v. N. Y. Central and Hudson River R. R. Co.*, 42 N. Y. Superior Ct., 225. 1877.

167. Obstructions to view. Where the view of the crossing is obstructed, a traveler has the right to presume that the usual and proper signals of the approach of the train will be given. *Bunting v. Central Pacific R. R. Co.*, 14 Nev., 351. 1879. See, also, *Indianapolis and St. Louis R. R. Co. v. Stables*, 63 Ill., 313, 1872; 7 Amer. R'y Rep., 365.

168. Omission of signals. In the absence of any statutory provision upon the subject, no legal obligation rests upon a railroad corporation to blow its whistle in approaching a public crossing with one of its trains. *Brown v. Milwaukee and St. Paul R'y Co.*, 22 Minn., 165, 1875; 19 Amer. R'y Rep., 298.

169. — It is the duty of the engine-driver to give sufficient signals of the approach of a train to a road-crossing by ringing the bell, sounding the whistle, or otherwise, as may be practicable, where the circumstances seem to require it. *Pennsylvania Co. v. Krick*, 47 Ind., 368, 1874; *Dyer v. Erie R'y Co.*, 71 N. Y., 228, 1877.

170. — Ordinary care may require the giving of signals from an approaching train, and the omission to do so when so required will subject the corporation to liability; but unless it is at a highway crossing in respect to which the statutory duty exists, the omission to give the designated signals is not negligence as matter of law, but the question of negligence is one of fact for the jury. *Cordell v. New York Central and Hudson River R. R. Co.*, 64 N. Y., 535. 1876.

171. — The omission to ring a bell or sound a whistle at a road crossing does not render a railroad company liable for personal injuries, unless it is made to appear the warning might have prevented the injury. *Toledo, Wabash and Western R'y Co. v. Jones*, 76 Ill., 311, 1875; *Chicago, Burlington and Quincy R. R. Co. v. Harwood*, 90 ib.,

425, 1878. See, also, *Chicago, Burlington and Quincy R. R. Co. v. Dvorak*, 7 Bradwell (Ill.), 555, 1880; *Parker v. Wilmington and Weldon R. R. Co.*, 86 N. C., 221, 1882; 8 Amer. & Eng. R. R. Cases, 420.

172. — The failure to ring a bell or sound a whistle, or to clear the track of obstructions upon it, does not exempt the traveler on the highway from the exercise of proper care on his part. *Chicago and Alton R. R. Co. v. Robinson*, 9 Bradwell (Ill.), 89. 1881.

173. — While failing to ring the bell or sound the whistle as the train approaches a street crossing constitutes negligence *per se* on the part of the railroad company, it does not necessarily entitle the plaintiff to a verdict against the company in a case where he was himself guilty of negligence. *Zimmerman v. Hannibal and St. Joseph R. R. Co.*, 71 Mo., 476, 1880; 2 Amer. & Eng. R. R. Cases, 191.

174. — In an action to recover for a personal injury, the court instructed the jury for the plaintiff, that, if he was injured by one of the defendant's engines at a street-crossing in the city of Peoria, and at the time there was no bell ringing or whistle sounding upon such engine, they should find for the plaintiff, unless he, by his own negligence, materially contributed to the injury; *held*, that the instruction was erroneous. It should have left it to the jury to find whether the plaintiff was injured by reason of such omission of duty, and without this it was fatally defective. *Chicago, Burlington and Quincy R. R. Co. v. Notzki*, 66 Ill., 455. 1872.

175. — It is error to authorize a finding of negligence because the company's employes failed to ring the bell or blow the whistle continuously until the train passed the crossing at which the plaintiff was injured by a passing train. *Paducah and Memphis R. R. Co. v. Hoehl*, 12 Bush (Ky.), 41, 1876; 18 Amer. R'y Rep., 338.

176. — The train which caused the death of plaintiff's intestate was backing up without a bell being rung or other signal, in charge of a brakeman, who was on a platform between two cars, where he could not see persons on the track or have notice to apply the brakes in case of danger. Persons were at all times crossing the tracks, several

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hundreds crossing daily. *Held*, that the evidence justified the submission of the question of defendant's negligence to the jury. *Barry v. New York Central and Hudson River R. R. Co.*, 92 N. Y., 289. 1883.

177. — One B. was driving, plaintiff's in-estate and himself being in a one-horse wagon, on a highway crossing defendant's railroad. At a safe distance they became aware of the approach of an engine, and B. at once endeavored to stop the horse, and succeeded in checking him; he started again and was again brought under control, but started a third time and ran into the engine. The bell of the engine was not rung as required by law. *Held*, that although negligence on the part of B. could not be imputed to the deceased, yet as defendant's neglect to ring the bell did not contribute to or cause the accident, the plaintiff could not recover. *Cosgrove v. New York Central and Hudson River R. R. Co.*, 13 Hun (N. Y.), 329, 1878; *Barrington v. Same*, 18 ib., 398, 1879.

178. — Where the plaintiff, when about to cross a railroad track in a city, on the usual route from the place where he labored, to his residence, looked up and down the track, and saw that it was clear, there being no engine in sight, and then started, and had proceeded only a few steps when a switch engine of the defendant came around the curve, behind him, at a rapid rate of speed, without giving the usual signals, and struck him, the whistle of a work shop near by being blown at the time, it was held, in an action by him against the railroad company, to recover for the injury, that negligence could not, under the circumstances, be attributed to the plaintiff. *Chicago and Northwestern R'y Co. v. Ryan*, 70 Ill., 211. 1873.

179. Pleading. In a suit against a railway company the plaintiff filed a complaint alleging that he was driving along a highway towards a railway crossing, and that the defendant negligently and carelessly caused one of its locomotives and a train to approach said crossing and then and there to pass the same at a great and unusual rate of speed, without proper care, and negligently omitted, while so approaching said crossing, to give any reasonable, proper or timely signal by ringing the bell or sounding the whistle at a

proper distance from the crossing, by reason of which plaintiff, being unaware of the approach of said train, and by reason of said negligence and without any fault of his own, was struck by said train and injured. *Held*, that the complaint was sufficiently specific. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Martin*, 8 Amer. & Eng. R. R. Cases (Ind.), 253. 1832.

180. Signalman. It is not negligence for a railroad company to omit to keep a flagman at a crossing, but, if one is employed, his neglect to perform the usual and ordinary functions of the place may be sufficient to charge the company. If one approaching a crossing where there is a flagman does not hear the bell of an approaching engine, and the flagman neglects to give any warning and an injury happens, solely produced by such neglect, it is sufficient to make the company liable. *Kissinger v. New York and Harlem R. R. Co.*, 55 N. Y., 538, 1874; 6 Amer. R'y Rep., 154.

181. — absence of signalman. In an action to recover damages for injuries sustained by a traveler at a crossing, the receipt of evidence of the custom to have a flagman there, and that the flagman was absent at the time of the accident, as a circumstance bearing on the question of plaintiff's negligence, was held erroneous. *McGrath v. New York Central and Hudson River R. R. Co.*, 59 N. Y., 468, 1875; 7 Amer. R'y Rep., 106; reversing *Same v. Same*, 1 Hun (N. Y.), 437, 1874. *Contra*, *Casey v. New York Central and Hudson River R. R. Co.*, 8 Daly (N. Y.), 220; 6 Abbott's New Cases, 104, 1879; affirmed, 73 N. Y., 518, 1879.

182. — It was averred in the petition that the injuries were caused by the neglect of the company in crossing the public street with a train of cars at a very reckless rate of speed, and without giving any warning of the approach of the locomotive by sounding a whistle or ringing a bell, and that the view of the approach of the train was obstructed by cars standing on the track and by lumber piled in close proximity to the road. *Held*, not error, under the allegations, for the trial court to permit the plaintiff to prove that the company had no flagman at the crossing of the street, as one of the circumstances existing at the time and place of

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the accident. *Kansas Pacific Ry Co. v. Richardson*, 25 Kans., 391, 1881; 6 Amer. & Eng. R. R. Cases, 96. The absence of the flagman is immaterial, unless it contributes to the injury. *Pakalinsky v. New York Central and Hudson River R. R. Co.*, 82 N. Y., 424, 1880; 2 Amer. & Eng. R. R. Cases, 251.

183. — In an action against a railway company under a declaration alleging that the plaintiff, while traveling on the high way, was injured at a crossing "by reason of the carelessness and negligence of the agents and servants of the defendant," the jury may consider whether the defendant was guilty of negligence in not having a gate or a flagman at the crossing, although never requested by the selectmen of the town, nor ordered by the county commissioners, to do so. *Eaton v. Fitchburg R. R. Co.*, 129 Mass., 364, 1880; 2 Amer. & Eng. R. R. Cases, 183.

184. — The absence of the watchman, usually on duty at a place in a city where four railway tracks cross a public street, is gross negligence. *St. Louis, Vandalia and Terre Haute R. R. Co. v. Dunn*, 78 Ill., 197, 1875.

185. — The posting of flagmen, placing of gates or other obstructions, or the giving of special and personal notice to travelers at crossings, is not required, and the omission thereof does not charge a railway company with negligence. *Weber v. New York Central and Hudson River R. R. Co.*, 53 N. Y., 451, 1874; 7 Amer. Ry Rep., 188.

186. — Evidence of what a flagman of a railroad company said and did at the time and just before a person about to take passage on a train was struck by another train passing on another track at a rapid speed is pertinent in an action to recover for the injury, under an allegation that the company failed to keep a flagman at the spot to signal and warn of the approach of impending danger. Such allegation means more than that there was no flagman employed there. *Pennsylvania Co. v. Rudel*, 100 Ill., 603, 1881; 6 Amer. & Eng. R. R. Cases, 30.

187. — Where a railway company has been in the habit of keeping a watchman to open and close a gate at a crossing at the approach of trains, it is a question for the jury whether the company is not charge-

able with negligence in leaving the gate open and fastened back and without a watchman. *Philadelphia and Reading R. R. Co. v. Kilips*, 88 Pa. St., 405. 1879.

188. — Where a person sees a locomotive upon a railroad, and knows, in time to avoid an injury, that it is approaching a crossing, the railroad company is not chargeable with negligence in not ringing the bell, or because of the absence of a flagman usually stationed at the crossing, or the absence of a light upon the engine in the night time; as the sole object of such precautions, so far as travelers upon a highway are concerned, is to notify them of the approach of trains. *Pakalinsky v. New York Central and Hudson River R. R. Co.*, 82 N. Y., 424, 1880; 2 Amer. & Eng. R. R. Cases, 251.

189. Snow storm. S. was walking on his regular route from his work at the Ophir mine, upon the track of the V. and T. R. R. Co., on a public street, much frequented by foot passengers, in Virginia City; there was no sidewalk or passage-way provided along the street; there was a heavy snow storm with such high winds as to prevent his seeing more than ten feet ahead of him; there was snow on the rails, which deadened the sound of the engine or train on the track; he was at a place where it was the usual custom of the railway company when moving its trains to give signals either by the whistle or bell; he was looking ahead whenever he could, and was listening for the sound of the whistle or bell, which he could have heard if such signals had been given; none was given; he was, without any warning, knocked down by a locomotive or tender backing along the track near a regular crossing. Held, that upon this statement of plaintiff's case, the court did not err in refusing to grant a non-suit. *Solen v. Virginia and Truckee R. R. Co.*, 13 Nev., 106, 1878.

190. Streets. A person walking along a track on a public street, in a city, has a right to presume, and act on the belief, that the railway company will not move its locomotives or cars along such track without giving the usual signals. *Solen v. Virginia and Truckee R. R. Co.*, 13 Nev., 106. 1878.

191. — A railway company, when moving its locomotives or trains upon the public

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streets of a city, is bound to use due care and give some signal of their approach. *Ib.*

192. Statute — Illinois. The police regulations of the act of 1849, requiring railroad companies to ring a bell or sound a whistle before reaching a public road crossing with their trains, apply to all railroads not specially exempted by their charters,—as well to those chartered since the passage of the act as to those receiving their charters before that time. *Western Union R. R. Co. v. Fulton*, 64 Ill., 271. 1872.

193. — An instruction that if the jury find that the defendant neglected to sound the whistle or neglected to ring the bell, etc., then this evidence is of gross negligence, is erroneous, as the jury may have inferred that both requirements were necessary, whereas the statute requires only one. *St. Louis, Alton and Terre Haute R. R. Co. v. Pflugmacher*, 9 Bradwell (Ill.), 300. 1881.

194. — The precaution which the statute requires of a railroad company, upon its cars approaching a public crossing, is to ring a bell or sound a whistle, and the company does its duty in this regard by ringing a bell without blowing the whistle. *Chicago, Burlington and Quincy R. R. Co. v. Damerrell*, 81 Ill., 450. 1876.

195. — The court instructed the jury "that railroad companies are bound, in crossing public highways, to have a bell of at least thirty pounds' weight, or a steam whistle, placed on each locomotive engine, which shall be rung or whistled at the distance of at least eighty rods from the place where the road crosses any public street or highway, and which shall be kept ringing or whistling until such street or highway is reached, so as to apprise persons of their approach;" held, that the instruction did not state the law correctly, the words italicized requiring a higher duty than the statute imposes. *Peoria, Pekin and Jacksonville R. R. Co. v. Siltman*, 67 Ill., 72. 1873.

196. — It is not the duty of a railroad company to check up its trains on discovering a person approaching a crossing from the highway with a team. The law requires the giving of the statutory signals of warning, and it is the duty of persons traveling on the highway to wait until the train

has passed; and the engine-driver, seeing a person so approaching, has a right to expect he will stop, according to the known custom, until the train passes. *Chicago, Burlington and Quincy R. R. Co. v. Lee*, 68 Ill., 576. 1873.

197. — Michigan. The neglect of a railway company to ring a bell as required by statute when approaching a crossing will make it liable for any injury resulting from such neglect. *Chicago and Northwestern R'y Co. v. Miller*, 46 Mich., 532, 1881; 6 Amer. & Eng. R. R. Cases, 89.

198. — Missouri. The requirement of § 806, Revised Statutes, that the bell shall be rung or the whistle sounded at the approach of a railroad train to the crossing of a public highway, is for the benefit of persons on the highway at or approaching the crossing; failure to comply with the statute will furnish no ground of complaint to a person injured on the track at a distance from the highway. *Bell v. Hannibal and St. Joseph R. R. Co.*, 72 Mo., 50, 1880; 4 Amer. & Eng. R. R. Cases, 530.

199. — A switch-crossing provided by a railway company across its own ground for ingress to and egress from its depot is not a "traveled public road" within the meaning of § 33 of the Railway Act (Wagn. Stat., 310). Failure of a train approaching such crossing to ring a bell or sound a whistle does not, therefore, constitute a violation of that section; but whether it may not constitute negligence on the part of the company depends upon the circumstances of the case, and is a question of fact for the jury. *Hodges v. St. Louis, Kansas City and Northern R'y Co.*, 2 Amer. & Eng. R. R. Cases, 190, 1879; 71 Mo., 50.

200. — New York. Although a highway has been regularly laid out, yet, until it has been regularly opened, or notice "of such laying out" has been served upon an officer of the railroad company named in, and as required by, the statute (ch. 62, Laws of 1853), the duty imposed by the General Railroad Act, as amended in 1854 (§ 7, ch. 282, Laws of 1854), of ringing a bell or sounding a whistle upon a train approaching the crossing, does not attach; the highway is not "a traveled public road or street" within the meaning of said last mentioned act. *Cordell*

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v. New York Central and Hudson River R. R. Co., 64 N. Y., 535. 1876.

201. Wild train. Where a railway company, in running a wild train, on approaching a highway crossing, fails to give the statutory signal by sounding a whistle or ringing a bell, at a place where the view of the approaching train from the crossing is obstructed by timber and heavy foliage, this will establish a right of recovery against the company for a personal injury received in attempting to cross the railroad. *Peoria, Pekin and Jacksonville R. R. Co. v. Siltman*, 88 Ill., 529, 1878; 21 Amer. R'y Rep., 353.

IV. NEGLIGENCE.

[See subdivision I, Street and Highway Crossings, ante.]

1. Contributory negligence.

202. City ordinances. Where a person, engaged in making repairs on a railway track, knew that a train was approaching but a short distance away, but nevertheless turned his back to it, stooped down and continued his work, and while in this position was struck by the train and injured, it was held that he was guilty of such contributory negligence as would prevent a recovery, though the defendant was handling the car which caused the injury in a negligent manner and in violation of a city ordinance. *Kelly v. Union R'y and Transit Co.*, 11 Mo. App., 1. 1881.

203. Crossing; license. Although a railway company has, by permitting people repeatedly to cross its tracks at a point where there is no public right of passage, given an implied license so to do, it owes no duty of active vigilance to those crossing to guard them from accident. The company is not restricted by the license in the use of its track, nor will a departure in some degree or particular by its employes from the ordinary course of procedure make it liable for an injury resulting therefrom, unless it involved the doing of an act which might reasonably be anticipated would result in injury to a person lawfully on the track under the license; the licensees acting under it take the risks incident to the business. *Sutton v.*

New York Central and Hudson River R. R. Co., 66 N. Y., 243, 1876; reversing *Same v. Same*, 4 Hun (N. Y.), 760, 1875.

204. Deaf persons. It is gross negligence for a deaf person to walk upon or very near a railway track. Employes have the right to presume that a person walking on the railway will hear the whistle. *Cogswell v. Oregon and California R. R. Co.*, 6 Oreg., 417, 1877; *Laicher v. New Orleans, Jackson, etc., R. R. Co.*, 28 La. An., 320, 1876; *Louisville and Nashville R. R. Co. v. Cooper*, 6 Amer. & Eng. R. R. Cases (Ky.), 5, 1832.

205. — The plaintiff, a deaf man, being about to cross a railroad in a buggy, saw the smoke of what he took to be a moving train east of him. He crossed, drove eastward a distance of two hundred and fifty feet along a road which was parallel with the railway and within a few feet of it, turned and drove back the same way he had come, attempting to recross the track at the same place. He never looked to the east to ascertain the direction in which the train was moving, and assumed that it was moving away from him. The view to the east was unobstructed for more than half a mile. When in the act of recrossing the track, he was looking back over his shoulder to the southward. In this position he was struck and injured by the train coming from the east. *Held*, that the accident was the result of his own negligence, and the company was, therefore, not liable. His deafness should have added to his vigilance. Although plaintiff was in full view of those operating the train for a long distance, yet they were not chargeable with negligence, owing to the fact that the road forked just at the crossing, and they could not anticipate that plaintiff intended to take that branch which crossed the track. *Held*, also, that under the circumstances it was immaterial whether the proper signals for the crossing were given or not. *Purl v. St. Louis, Kansas City and Northern R'y Co.*, 72 Mo., 168, 1880; 6 Amer. & Eng. R. R. Cases, 27.

206. — The plaintiff's intestate, a deaf-mute, on approaching the defendant's tracks at a crossing in a public street, in the city of Rochester, at about midnight, found a freight train passing; he waited until it had passed, stepped upon the track to cross, and

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was struck and killed by an engine following the freight train at a distance of about fifty feet. The night was very dark, and the engine was running backwards, with no light upon its tender, at the rate of about twenty miles an hour, though it was prohibited by a city ordinance from running at a greater rate than eight miles an hour. The evidence tended to establish the fact that a flagman was kept at the crossing, but failed to show he was there at the time of the accident. *Held*, that the question of the defendant's negligence and of plaintiff's contributory negligence should have been submitted to the jury, and that it was error to direct a non-suit. *Waldele v. New York Central and Hudson River R. R. Co.*, 19 Hun (N. Y.), 69, 1870.

207. — Plaintiff, a man of mature years, in his right mind, with his eye-sight unimpaired, but deaf, without looking to see if a train was coming, went upon a railroad track and started down the track, when he was almost instantly struck and injured by a train approaching from behind. A short distance before reaching the track he passed a point where the train was in full view; and a sidewalk for the use of pedestrians ran alongside the track. *Held*, a case of negligence precluding recovery. *Zimmerman v. Hannibal and St. Joseph R. R. Co.*, 71 Mo., 476, 1880; 2 Amer. & Eng. R. R. Cases, 191.

208. — Where an engine was running backwards at night, with no light upon the tender, and passing a street crossing at the rate of about twenty miles an hour, and the engine struck a deaf-mute who was passing the crossing, *held*, that the question of contributory negligence was for the jury. *Waldele v. New York Central and Hudson River R. R. Co.*, 19 Hun (N. Y.), 69, 1870.

209. *Duty of traveler.* A traveler approaching a railway crossing must look and listen for approaching trains. *Cleveland, Columbus, Cincinnati and Indianapolis R'y Co. v. Elliott*, 28 Ohio St., 340, 1875; 14 Amer. R'y Rep., 128; *New Orleans, Jackson and Great Northern R. R. Co. v. Mitchell*, 52 Miss., 808, 1875; *Railroad Co. v. Houston*, 95 U. S., 697, 1877; *Pennsylvania Co. v. Rathgeb*, 32 Ohio St., 66, 1877; *Holland v. Chicago, Milwaukee and St. Paul R'y Co.*, 18

Federal Reporter, 248, 1883; *Lynam v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 4 Houston (Del.), 583, 1874; *Haines v. Illinois Central R. R. Co.*, 41 Ia., 227, 1875; *Lang v. Holiday Creek R. R. Co.*, 49 Ia., 469, 1878; *Lenix v. Missouri Pacific R'y Co.*, 76 Mo., 86, 1882; *Kelley v. Hannibal and St. Joseph R. R. Co.*, 75 Mo., 138, 1881; *Zimmerman v. Hannibal and St. Joseph R. R. Co.*, 71 Mo., 476, 1880; 2 Amer. & Eng. R. R. Cases, 191; *Henze v. St. Louis, Kansas City and Northern R'y Co.*, 71 Mo., 636, 1880; 2 Amer. & Eng. R. R. Cases, 212; *Blaker's Executrix v. Receivers of N. J. Midland R'y Co.*, 30 N. J. Eq., 240, 1873; 18 Amer. R'y Rep., 81; *Palys v. Receiver of Erie R'y Co.*, 30 N. J. Eq., 604, 1879; *Pennsylvania R. R. Co. v. Richter*, 42 N. J. Law, 180, 1880; 2 Amer. & Eng. R. R. Cases, 220; *Dixey v. London and Southwestern R'y Co.*, Law Reports, 12 Queen's Bench Division, 70, 1883; *Chicago and Northwestern R'y Co. v. Dimick*, 96 Ill., 42, 1880; 2 Amer. & Eng. R. R. Cases, 201; *Illinois Central R. R. Co. v. Goddard*, 72 Ill., 567, 1874; *Chicago and Alton R. R. Co. v. Robinson*, 8 Bradwell (Ill.), 140, 1870; *Chicago and Northwestern R'y Co. v. Hutch*, 79 Ill., 187, 1875; *Chicago, Burlington and Quincy R. R. Co. v. Harwood*, 80 ib., 98, 1875; *Rockford, Rock Island and St. Louis R. R. Co. v. Byam*, 80 ib., 523, 1875; *Chicago, Burlington and Quincy R. R. Co. v. Van Patten*, 74 Ill., 91, 1874; *Chicago, Burlington and Quincy R. R. Co. v. Van Patten*, 64 Ill., 510, 1872; *Chicago and Alton R. R. Co. v. Jacobs*, 63 Ill., 178, 1872; 7 Amer. R'y Rep., 125; *Illinois Central R. R. Co. v. Hetherington*, 83 Ill., 510, 1876; *Lake Shore and Michigan Southern R'y Co. v. Clemens*, 5 Bradwell (Ill.), 77, 1879; *Wright v. Boston and Maine R. R. Co.*, 129 Mass., 440, 1880; 2 Amer. & Eng. R. R. Cases, 121; *Toledo, Wabash and Western R'y Co. v. Shuckman*, 50 Ind., 42, 1875; *St. Louis and South Eastern R'y Co. v. Mathias*, 50 Ind., 65, 1875; *Terre Haute and Indianapolis R. R. Co. v. Clark*, 73 Ind., 168, 1880; 6 Amer. & Eng. R. R. Cases, 84; *Gerety v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 81 Pa. St., 274, 1876; 16 Amer. R'y Rep., 164; *Pennsylvania R. R. Co. v. Weber*, 76 Pa. St., 157, 1874; *Weber v. New York Central and Hudson River R. R. Co.*, 58 N. Y., 451, 1874; 7

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Amer. R'y Rep., 188; *Bunn v. Delaware, Lackawanna and Western R. R. Co.*, 6 Hun (N. Y.), 303, 1875; *Bronk v. New York and New Haven R. R. Co.*, 5 Daly (N. Y.), 454, 1874; *Becht v. Corbin*, 93 N. Y., 658, 1883; *Abbott v. Chicago, Milwaukee and St. Paul R'y Co.*, 30 Minn., 482, 1883; *Brown v. Milwaukee and St. Paul R'y Co.*, 19 Amer. R'y Rep., 298; 22 Minn., 165, 1875; *Donaldson v. Same*, 21 Minn., 293, 1875; *Smith v. Minneapolis and St. Louis R'y Co.*, 26 ib., 419, 1890.

210. — Where a person familiar with a dangerous railway crossing, in passing over the same, neglects the exercise of any care to ascertain if a passing train is near, and in consequence of such neglect is injured by a collision with the train, he is guilty of negligence, and the mere fact that he had forgotten that he was in the vicinity of the crossing will not excuse such neglect. *Baltimore and Ohio R. R. Co. v. Whitacre*, 35 Ohio St., 627. 1880.

211. — The general rule is, that a person approaching a railroad crossing is required to look up and down the track in either direction, and watch for the approach of trains, before attempting to cross, and if such precaution is neglected and injury to the party ensues, he cannot recover; but this rule cannot be applied to an infant of tender years. *Chicago and Alton R. R. Co. v. Becker*, 84 Ill., 483. 1877.

212. — It cannot be declared, as a matter of law, that a footman is bound, before crossing a railway track, to stop, in order to look and listen for trains. That rule is applicable only to persons traveling in wagons or other vehicles which make a noise that would necessarily interfere with their hearing. *Zimmerman v. Hannibal and St. Joseph R. R. Co.*, 71 Mo., 476, 1880; 2 Amer. & Eng. R. R. Cases, 191.

213. — The fact that one in attempting to cross a railway does not, at the instant of stopping on it, look to ascertain if a train is approaching, is not conclusive evidence of a due want of care on his part. *Plummer v. Eastern R. R. Co.*, 73 Me., 591, 1892; 6 Amer. & Eng. R. R. Cases, 165.

214. — The duty of the traveler to stop is more obligatory when an approaching train cannot be seen, etc., than when it can.

Pennsylvania R. R. Co. v. Beale, 73 Pa. St., 504. 1873.

215. — An instruction that it is not necessarily the duty of a traveler approaching a railroad crossing to stop and listen before stepping upon the track, and that whether it is necessary and proper for him to stop depends on the circumstances of the case, is not erroneous. *Shaber v. St. Paul, Minneapolis and Manitoba R'y Co.*, 28 Minn., 103, 1881; 2 Amer. & Eng. R. R. Cases, 185; *Garland v. Chicago and Northwestern R'y Co.*, 8 Bradwell (Ill.), 571, 1881.

216. — The plaintiff made out a *prima facie* case of negligence, without proving affirmatively that the deceased had "stopped and looked and listened." *Held*, that the presumption in law was that he had stopped, looked and listened, and the burden of proving contributory negligence was on the defendant. *Weiss v. Pennsylvania R. R. Co.*, 79 Pa. St., 387. 1875.

217. — While a traveler, on approaching a railway crossing, is bound to look and listen for an approaching train before undertaking to cross, it is only where it appears from the evidence that he might have seen had he looked, or might have heard had he listened, that a jury, in the absence of evidence upon the question, is authorized to find that he did not look and did not listen. *Smedis v. Brooklyn and Rockaway Beach R. R. Co.*, 88 N. Y., 13, 1882; 8 Amer. & Eng. R. R. Cases, 445.

218. — The rule requiring persons, before crossing a railroad track, to look to see whether trains are approaching is not applied inflexibly in all cases without regard to age or other circumstances. *McGovern v. New York Central and Hudson River R. E. Co.*, 67 N. Y., 417, 1876; 15 Amer. R'y Rep., 119.

219. — The failure to stop immediately before crossing a railroad track is negligence *per se*, and this is for the court. The rule is unbending. *Pennsylvania R. R. Co. v. Beale*, 73 Pa. St., 504, 1873; 6 Amer. R'y Rep., 158.

220. — Where a traveler, about to cross a four-track railway, looked and listened before starting across the track, *held*, that a failure to stop and look and listen before crossing the fourth track was not negligence

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as a matter of law. *Weber v. N. Y. Central and Hudson River R. R. Co.*, 87 N. Y., 587. 1876.

221. — In an action for damages against a railway company for injuries received by a collision at a crossing, the following instruction was given: "If you believe from the evidence that the plaintiff neither stopped his team, nor made any effort to see or hear the train before he drove on the railroad track; and you further believe that if he had stopped and looked he could have seen the train, or if he had listened he could have heard it, then he cannot recover." *Held*, to embody the correct rule of law. *Benton v. Central R. R. Co. of Iowa*, 42 Ia., 192. 1875.

222. — A person, in crossing a railroad track, should look and see if a train is coming; if he does not he cannot recover for an injury received, although the train that injured him was behind time about thirty minutes, and he was crossing the track to get on another train. *Anderson v. Railroad Co.*, 12 Philadelphia, 369. 1877.

223. — Plaintiff's intestate was killed by a locomotive on defendant's track while crossing its track on a village sidewalk. It was shown that upwards of twenty-six feet before reaching the track the deceased could, by turning her head, have seen the approaching locomotive for a long distance, and that there were no other trains or engines passing at the time. *Held*, that the intestate was guilty of contributory negligence such as to avoid a recovery for her death. *Mitchell v. N. Y. Central and Hudson River R. R. Co.*, 5 Thompson & Cook (N. Y. Supreme Ct.), 122, 1874; 2 Hun (N. Y.), 535, 1874; affirmed, 64 N. Y., 655, 1876.

224. — The crossing, where the injury complained of in this action occurred, was one with which the plaintiff was familiar, and one which he had often passed. Above it was the usual sign "Look out for the cars," printed in large letters, and at that place the highway and railroad were nearly on a level. Away from it, at a distance of twenty rods in the direction from which the train in question came, was the depot nearest it in that direction. This stretch of track was in full view of the plaintiff while still six hundred feet from the crossing, and at

thirty-three feet from such crossing one could see a distance of some twenty rods beyond the depot. If, at any time after the train passed the depot, the plaintiff had looked in that direction, he would have seen it; and, if not then too near the train for escape by stopping his horse, he could have avoided the accident. On a motion to nonsuit, *held*, that these facts show contributory negligence on the part of the plaintiff, though the train was not a regular one, and no train was due at the time; though it was moving at an unusual and dangerous rate of speed; though it did not stop at the depot as trains usually but not always do; and though no warning was given of its approach, by blowing the whistle or ringing the bell, after such depot was passed. *Schofield v. Chicago, Milwaukee and St. Paul R. R. Co.*, 8 Federal Reporter, 488; 2 McCrary (U. S. C. C.), 283. 1881.

225. — M., a young and vigorous man, being at a point about two hundred and fifty-three feet west of a railway, in a village, and having his horses hitched on the same street about two hundred and twenty-five feet east of the track, heard the long whistle of an approaching engine, and immediately commenced running down the street towards his horses. At that time the train was about half a mile distant from the crossing, and it whistled again when about a quarter of a mile distant; it was hidden from M.'s sight until he was within about twenty feet of the track, when he might have seen it by looking in that direction, and, being a light special train, it was running about forty miles per hour, and without ringing the bell on its approach. The passenger trains of the company usually run at the rate of twenty miles, and its freight trains at the rate of twelve miles per hour, and a freight train was due near that time. M. did not cease running, or diminish his speed, until he was in the act of stepping on the first rail of the main track, when he was struck by the train and killed,— the whistle for the brakes being sounded at the same moment. The jury, by special verdict, found that M., after hearing the whistle and train, and seeing it, attempted to cross the track in front of the engine; that if he had stopped just before going upon the defendant's right

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of way, and looked in the proper direction, he could have seen the train, and that he was not guilty of any want of ordinary care in running upon the track as he did. *Held*, that in view of the evidence, these findings are inconsistent, and it was error to refuse a new trial. *Kearney v. Chicago, Milwaukee and St. Paul R'y Co.*, 47 Wis., 144, 1879; 21 Amer. R'y Rep., 43.

226. Elevated railway. The question of contributory negligence held properly submitted to the jury upon the facts of a particular case. *Corcoran v. New York Elevated R. R. Co.*, 19 Hun (N. Y.), 368. 1879.

227. Employe of adjoining railway. The D. Co., by contract, had a right of trackage on the tracks—two running parallel at a distance of seven feet from each other—of the B. Co. The plaintiff was a brakeman of the B. Co.; his train passed from one track to the other, and in the performance of his duty he left the train and closed the switch, the train passing on some distance into the yard without him. He stopped a few minutes and walked along the track to go to his train, which he might have reached in some other way; whilst so on the track he was struck by an engine of the D. Co., going in the same direction, and injured. *Held*, that he had no right to be on the track; that being there was contributory negligence *per se*, and he could not recover from the D. Co. for the injury. *Mulherrin v. Delaware, Lackawanna and Western R. R. Co.*, 81 Pa. St., 366, 1876; 15 Amer. R'y Rep., 456.

228. Evidence. It does not necessarily follow from the fact that a skilled engineer can show that, from a given point in a highway, the railway track is visible for any distance, that an individual in charge of a team approaching the track is negligent because from the point specified he fails to see a train approaching at great speed in time to avoid a collision. *Massoth v. Delaware and Hudson Canal Co.*, 64 N. Y., 524. 1876.

229. — Where, on the trial of an action for a personal injury, there is conflicting testimony as to whether or not the plaintiff's own negligence contributed to the accident, and the jury find in his favor, the court will not grant a new trial. *Murray v. Washington and Georgetown R. R. Co.*, 2 MacArthur (Dist. of Columbia), 195. 1875.

230. — In a suit against a railway company for injuring one on the track by a running train, where there is no conflict of evidence, and it appears that the injury was not wilful, and that the negligence of the deceased contributed to it, the court may direct a verdict for the defendant. *McClaren v. Indianapolis and Vincennes R. R. Co.*, 83 Ind., 319, 1882; 8 Amer. & Eng. R. R. Cases, 217.

231. Failure to stop; question for jury. It is not negligence, as matter of law, for a person approaching a railroad in a carriage, upon a highway, not to stop; his omission to do so is a fact to be submitted to the jury. *Kellogg v. New York Central and Hudson River R. R. Co.*, 79 N. Y., 72. 1879.

232. Flying switch. In an action against a railway company by the administrator of a person injured at a crossing, there was evidence that the railway, running north and south, crossed a highway at grade near the station; that, a short distance north of the highway, a side-track branched off and crossed the highway a little easterly of the main track, and led into but not through the station; that the station was south of the highway; that the pathway used by persons going to the station from the highway, on the east side, crossed the side-track obliquely, the distance to the platform being one hundred and fifty-seven feet; that at the point where the path left the highway one could see up the track to the north for about one hundred and fifty feet, and from the track itself for half a mile; that the person injured was going to the station to see his daughter off by a train then due; that the ground was frozen and slippery; that as he approached the track from the east, a freight train was coming from the north, which kept upon the main track, except a single car, which was switched upon the side-track; that, as he was crossing the side-track by the usual path, he was struck by the detached car, which was moving rapidly, and without any signal or warning. *Held*, that, on this evidence, the jury would not be warranted in finding that the plaintiff's intestate was in the exercise of due care. *Hinckley v. Cape Cod R. R. Co.*, 120 Mass., 257. 1876.

233. Frightened team. Where a physician in attempting, with his team, to pass

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through a train on a highway, where there was but a narrow space left for passage, was injured by the fright of his team, and the jury specially found that the attempt to pass was apparently dangerous, it was held that such finding precluded his right to recover, although the general verdict was in his favor. *Thompson v. Cincinnati, Lafayette and Chicago R. R. Co.*, 54 Ind., 197, 1876.

234. Gate. A railway, consisting of several lines, crossed a public footpath on a level at a point near a station, but the footpath was not in other respects dangerous. On each side of the railway was a good and sufficient swing gate, as required by the 8 and 9 Vict., c. 20, s. 61. The railway company, by way of extra precaution, usually, but not invariably, fastened the gates when a train was approaching. S., wishing to cross the railway, found the gate unfastened, and a coal train standing immediately in front of it. He waited until the coal train had moved off, and then, without looking up or down the line, commenced crossing the railway, and was killed by a passing train. If he had looked up the line he would have seen the train coming in time to stop and avoid the accident. In an action against the company by S.'s administratrix under Lord Campbell's Act, *held*, that S. contributed to the accident by his negligence, and that the company therefore was not liable. *Held* (by Willis, J.), that the mere failure to perform a self-imposed duty is not actionable negligence; that the omission to fasten the gate did not amount to an invitation to S. to come on the line; and that therefore, even if S. was not guilty of contributory negligence, the company was not liable. *Skelton v. London and Northwestern R'y Co.*, Law Reports, 2 Common Pleas Cases, 631, 1867.

235. Intoxicated persons. The sobriety or intoxication of decedent was a proper subject for the consideration of the jury in determining whether he exercised due care or not. *Houston and Texas Central R'y Co. v. Waller*, 56 Tex., 331, 1882; 8 Amer. & Eng. R. R. Cases, 431.

236. — A person lying drunk upon the track, who is injured by a passing train, cannot recover where the engineer has complied with the requirements of the statute in

making all efforts to stop the train. *Travis v. Louisville and Nashville R. R. Co.*, 9 Lea (Tenn.), 231, 1882; *Houston and Texas Central R'y Co. v. Symphkins* 54 Tex., 615, 1881; 6 Amer. & Eng. R. R. Cases, 11.

237. — One standing in a state of intoxication on a railway track at the usual time of running of the train, and in a position of exposure, is guilty of negligence. *Whalen v. St. Louis, Kansas City and Northern R'y Co.*, 60 Mo., 323, 1875; 9 Amer. R'y Rep., 224; *Marquette, Houghton and Ontonagon R. R. Co. v. Handford*, 39 Mich., 537, 1878.

238. — When the law presumes negligence from some of the facts proved, and where there is scope for legitimate reasoning by the jury, as to whether the presumption is, or is not, rebutted by other facts in the plaintiff's evidence, a non-suit should not be awarded. Code, § 708. *Hankerson v. Southwestern R. R. Co.*, 59 Ga., 598, 1877; 18 Amer. R'y Rep., 458. This rule applied to a case where a non-suit was ordered, the plaintiff having been injured on the track while lying there in a state of intoxication. *Held*, that the presumption as to his negligence was not conclusive. *Ib.*

239. — It is the positive and imperative duty of the engineer to sound the alarm whistle the instant he sees a person upon the track. We know not what might be the effect of the whistle, even upon the maudlin brain of a drunken man; nor are we allowed to conjecture as to whether its timely startle may have saved his life. Code, § 1106. *Hill v. Louisville and Nashville R. R. Co.*, 9 Heiskell (Tenn.), 823, 1872; 19 Amer. R'y Rep., 400.

240. — The engine was run during a dark night without a head-light, and ran over and killed the intestate, who was negligently lying across the track. *Held*, the company could not rely on the negligence in bar. Code, § 1106. *Nashville and Chattanooga R. R. Co. v. Smith*, 6 Heiskell (Tenn.), 174, 1871.

241. — The fact that a person was intoxicated cannot be shown by declarations of a third party. The declarations of a bar-tender, refusing to sell the party liquor on the ground that he already had enough, were not competent. *Lake Erie and Western R'y Co. v. Zoffinger*, 107 Ill., 199, 1888.

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242. Knowledge of neglect of injured party. Where the neglect of the injured party is known to the company's employees, they should take ordinary care to prevent the injury of the negligent person, and a failure to do so will render the company liable. *Houston and Texas Central R. R. Co. v. Smith*, 52 Tex., 178, 1879; *Cleveland, Columbus and Cincinnati R. R. Co. v. Crawford*, 24 Ohio St., 631, 1874; 7 Amer. R'y Rep., 172.

243. Mistake of judgment. If a person has placed himself, without negligence, into a position of danger, he is not responsible if he makes an error of judgment in getting out. A man placed under such circumstances, if he uses his judgment honestly, is not responsible, although he might have done better if he had acted differently. *Pennsylvania R. R. Co. v. Werner*, 89 Pa. St., 59, 1879; *Mark v. St. Paul, Minneapolis and Manitoba R'y Co.*, 30 Minn., 493, 1883.

244. — In an action against a railroad company for personal injuries causing death, upon a declaration containing two counts, one for failure to observe statutory precautions, and the other for common law negligence, the proof showed that plaintiff's intestate was standing upon a platform about thirty-eight inches high and about two feet from the track at a station which was not a regular stopping point; when the train was about one hundred yards distant, she got down from the platform and began to walk on the ends of the cross-ties, between the platform and the rails; being warned by a bystander of her danger she said, "I think I can make it," but turned and beckoned to her child not to follow her; she was caught by the train before reaching the end of the platform and killed. The engineer testified he did not see her. The circuit judge, at the request of plaintiff's counsel, charged, "If plaintiff's intestate got herself without negligence into a position of danger, she is not to be held responsible for contributory negligence for an honest though erroneous exercise of judgment in getting out." *Held*, this was misleading and erroneous; if the appearances were such as to put a reasonable person in apprehension of danger, and she disregarded them, and her death resulted in consequence, this was such contributory negligence as

bars a recovery at common law, and mitigates damages under a count for failure to observe statutory precautions. *Nashville and Chattanooga R. R. Co. v. Smith*, 9 Lea (Tenn.), 470. 1882.

245. — Contributory negligence is not presumed against one who suddenly acts wildly when peril comes upon him unwarned, and in the absence of any evidence throwing light on the matter, he will be presumed to have used that care and precaution which the law requires, and to which instinct would prompt him in saving his life. *Cook v. Central R. R. and Banking Co. of Georgia*, 67 Ala., 533. 1880.

246. Mistake in time. Contributory negligence of the injured party will defeat a recovery. So held, where, by reason of an error in his own clock, the deceased was led to attempt a crossing at the time when a train was due at the crossing. *Murray v. Pontchartrain R. R. Co.*, 31 La. An., 490. 1879.

247. Passing between cars. Where the plaintiff's declaration showed that he received a personal injury in attempting to pass between the cars of a freight train, to which was attached an engine, with steam up, and which was liable to start at any moment, and without permission or notice to any one in charge of the freight train, or having authority over it, to reach a passenger train standing on the other side, it was held that it showed such negligence on the part of the plaintiff as would preclude a recovery. *Chicago and Northwestern R'y Co. v. Coss*, 73 Ill., 394. 1874.

248. — Where a passage-way is open between the cars of a standing freight train, and a traveler passing between them is injured by the sudden "kicking" of a car, the question of contributory negligence is for the jury. *Mahar v. Grand Trunk R'y Co.*, 19 Hun (N. Y.), 32. 1879.

249. — It is proper to submit to the jury the question as to whether or not persons in the street were in the habit of crossing between the cars, in the presence of the railway company's employees. It was the duty of the railway company, before moving a train in a street, to give some warning. So held, where the plaintiff got caught between the cars in passing through a train.

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Grant v. Baltimore and Potomac R. R. Co., 2 MacArthur (Dist. of Columbia), 277, 1875.

250. — The plaintiff attempted to cross defendant's tracks at what was claimed to be a public crossing, and found the crossing blocked by a long freight train which had been standing there for some time. Owing to a curve in the road the front of the train could not be seen; the end of the train was some two hundred feet from the crossing. Plaintiff climbed upon the bumper of one of the cars and attempted to cross the tracks. While so doing the train was moved, without any signal being given, his foot was caught, and the injury occasioned to recover damages for which an action was brought. *Held*, that the plaintiff was properly non-suited, as he was guilty of contributory negligence. *O'Mara v. Delaware and Hudson Canal Co.*, 18 Hun (N. Y.), 192, 1879.

251. *Passing under the train.* Where a person going to a station to take passage on a passenger train finds a freight train across the sidewalk, and is told by the freight conductor to pass under the end of a freight car—that he has plenty of time,—and while passing under is injured, § 54 of the Railroad and Warehouse Law will have no application to the case. That section applies only to climbing, stepping, standing upon, clinging to, or in any way attaching one's self to a locomotive engine or car, either stationary or in motion on the track. *Chicago, Burlington and Quincy R. R. Co. v. Sykes*, 96 Ill., 162, 1880; 2 Amer. & Eng. R. R. Cases, 254.

252. — Where a conductor has control over his train as to its starting or stopping, a person will have the right to act on his invitation to pass under a freight car when the train is obstructing a passway, unless he has reason to suppose it hazardous. The person in such case has the right to suppose the train will not be started until he can pass through, and that the conductor has the power to control the train, and will do so, knowing the dangerous position in which the person is placed by his direction. *Ib.*

253. — An instruction as to the right of a party to act upon the direction of the conductor in such case, which refers to many of the circumstances bearing upon the ques-

tion of negligence, but not to all of them, and which is argumentative, and not explicit in announcing the rule of law sought to be presented, should not be given. *Ib.*

254. — Under ordinary circumstances and without any encouragement from the servants of the company that it might be safely done, a person attempting to pass a train of cars, to which an engine was attached and liable to be set in motion at any moment, by crawling under the cars, would be guilty of such gross negligence as would prevent a recovery. *Chicago, Burlington and Quincy R. R. Co. v. Sykes*, 1 Bradwell (Ill.), 520, 1877; *Smith v. Chicago, Rock Island and Pacific R. R. Co.*, 55 Ia., 33, 1880.

255. *Person lying near the track.* In an action by an administrator against a railroad company, for negligence causing the death of the plaintiff's intestate, the proof was that the deceased jumped or fell from a train upon one of the tracks of the defendant's road, and lay near another track in such a position that a train then approaching on that track could pass him without injury to him if he made no incautious movement to bring himself nearer the track; and a part of the train did in fact pass his prostrate body without touching, when, by a sudden movement, he threw his legs under the wheels of the last car, and thereby sustained the injuries from which he died. *Held*, that there was no negligence on the part of the defendant's servants in charge of the train in not stopping it to prevent accident from such a cause. *McKenna v. New York Central and Hudson River R. R. Co.*, 9 Daly (N. Y.), 262, 1880; 8 ib., 804, 1879.

256. *Postmaster; contributory negligence.* Moody, the postmaster at Webster station on defendant's road, was in the habit of carrying the mail to one of its mail trains which stopped at the station about 8:40 P. M. His office was near the station but across the track. Hearing a train approach at about the time the mail train usually passed, he picked up his mail bags and started to cross the track to the platform. The train was then one thousand two hundred feet distant, but running at great speed. Relying upon its stopping, he continued on his way, and was struck by the locomotive and killed. The testimony was conflicting

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as to whether the bell was rung or the whistle sounded. The train was a freight train, which, on account of the mail train being behind time, had been ordered to go on without stopping, and passed Webster station at the very time the mail train would have passed had it been on time. *Held*, that Moody was guilty of contributory negligence, and his representative could not recover. *Moody v. Pacific R. R. Co.*, 68 Mo., 470. 1878.

257. Remote negligence. Although one may be improperly or unlawfully on the track of a railroad, that fact will not discharge the company or its employes from the observance of due care; and where he is run over by the train and killed, the company will be responsible if its officers could have avoided the accident by the exercise of ordinary caution and watchfulness. *Isabel v. Hannibal and St. Joseph R. R. Co.*, 60 Mo., 475, 1875; 9 Amer. R'y Rep., 261.

258. — Although one injured by a collision may have failed to exercise ordinary care and prudence, and thereby contributed remotely to the injury complained of, yet if the accident was directly caused by negligence of the company, the latter will be liable. *Burham v. St. Louis and Iron Mountain R. R. Co.*, 56 Mo., 338, 1874; *Whalen v. St. Louis, Kansas City and Northern R'y Co.*, 60 Mo., 823, 1875; 9 Amer. R'y Rep., 224.

259. Side-track. It appeared from plaintiff's evidence that upon a dark night, and without any necessity therefor, he was standing upon a side-track leading to the round-house, where, as he well knew, trains were passing in both directions almost constantly; that he did not look along the line of the track upon which he was standing, but suffered his attention to be wholly diverted to the lights of a train passing upon another track; and that, in that position, he was struck by an engine moving upon the track on which his foot rested, and was injured. *Held*, that he was guilty of contributory negligence, and should be non-suited. *Delaney v. Milwaukee and St. Paul R'y Co.*, 33 Wis., 67. 1873.

260. Signal. Where one, at the very moment when he knows a train is expected to arrive, goes upon a railroad track in front of an approaching train, which, by the

proper exercise of his faculties, he must have seen and heard, the mere fact that the locomotive bell was not sounded as required by law will not make the railroad company liable for any damage which may result. *Leduke v. St. Louis and Iron Mountain R. R. Co.*, 4 Mo. App., 485, 1877; *Pennsylvania R. R. Co. v. Righter*, 42 N. J. Law, 180, 1880; 2 Amer. & Eng. R. R. Cases, 220.

261. Torpedo. A railway company is not liable in damages for the death of a person caused by the explosion of a torpedo with which he intermeddled while walking on the track, and which had been placed there by the company as a danger signal to approaching trains. *Carter v. Columbia and Greenville R. R. Co.*, 19 So. Car., 20. 1882.

262. — In refusing to charge that, if the jury believed that the accident was caused by the effort of the deceased to open the torpedo which he found upon the track, the verdict must be for the defendant, the circuit judge committed no error, as such a charge would have taken from the jury a matter which was for their determination, to wit, whether the alleged act amounted to contributory negligence. *Ib.*

263. Trespassers. Except at crossings, where the public have a right of way, one who steps on a track does so at his peril. *Mulherrin v. Delaware, Lackawanna and Western R. R. Co.*, 81 Pa. St., 366, 1876; 15 Amer. R'y Rep., 456; *Pittsburgh, Fort Wayne and Chicago R'y Co. v. Collins*, 87 Pa. St., 405, 1878; *Terre Haute and Indianapolis R. R. Co. v. Graham*, 12 Amer. & Eng. R. R. Cases (Ind.), 77, 1883; *Wright v. Boston and Maine R. R. Co.*, 129 Mass., 440, 1880; 2 Amer. & Eng. R. R. Cases, 121.

264. — Where a person is trespassing upon the track the railway company will be liable for injuring him if the injury could have been prevented by the use of ordinary care on the part of its employes, or if the injury was caused by the wilful and wanton act of such employes. *Patterson v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 4 Houston (Del.), 103, 1870; 7 Amer. R'y Rep., 207; *Mason v. Missouri Pacific R'y Co.*, 27 Kans., 83, 1882; 6 Amer. & Eng. R. R. Cases, 1; *Jeffersonville, etc., R. R. Co. v. Goldsmith*, 47 Ind., 43, 1874; 8 Amer. R'y Rep., 315.

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265. — hand-car. A complaint against a railway company to recover for an injury causing death, which showed that the deceased, in company with others, was voluntarily riding on a hand-car, in the night time, and thus collided with an engine of the defendant, was bad, because it showed contributory negligence on the part of the deceased. *Ream v. Pittsburgh, Fort Wayne and Chicago R. R. Co.*, 49 Ind., 93. 1874.

266. Trestle work. Where a railway company had constructed a trestle work over a street and creek, laid out on the plat of Wyandotte City, and at a place where the street had not been graded or improved, and the trestle work, with a span of one hundred feet, extended over a stream sixty feet wide, with perpendicular banks from fifteen to twenty feet high, and was thirty feet above the water in the creek, and the water under the trestle work was from three to six feet deep, and there were no railings to the trestle work or bridge and no foot-planks upon it, and the only way of crossing such was by stepping from tie to tie, and the railway was constantly using the track on such trestle work or bridge for the operation of its trains, and a party climbed and attempted to cross such trestle work and was injured by being run over with a hand-car operated on the track, *held*, that it was not error to rule out the evidence concerning the custom of foot passengers crossing such trestle work after two persons had testified to it without objection. *Mason v. Missouri Pacific R'y Co.*, 27 Kans., 83, 1882; 6 Amer. & Eng. R. R. Cases, 1.

267. — In an action for damages for personal injuries alleged to have been caused by the negligence of the officers of the defendant in the management of its engine and train, it appeared from the evidence of the plaintiff that he was injured upon the roadway of the defendant while going afoot over a trestle spanning a ravine, over which the road passed. *Held*, the plaintiff was guilty of contributory negligence, which contributed proximately to the injuries he received, and a non-suit was rightly granted. *Tennbrook v. South Pacific Coast R. R. Co.*, 59 Cal., 269, 1881; 6 Amer. & Eng. R. R. Cases, 8.

268. — When a person, walking over a

long trestle on a railway, let himself down under the ties to avoid being run over by an approaching train, but being unable to get upon the track again, fell and was killed, a charge which submitted to the jury the question of his negligence in attempting to cross the trestle, but which ignored the question of due caution in regaining his position, on which there was evidence, was misleading and properly refused. *Cook v. Central R. R. and Banking Co. of Georgia*, 67 Ala., 533. 1880.

269. Walking near the track. Where a person got near a side-track and was walking along the same when he was struck by a yard-engine and killed, and it appeared that he was well acquainted with the locality, and placed himself in this dangerous position when the engine was near him, without looking back to see if any engine was on the track, and that the engine was too close to him when he got near the track to be stopped, it was held that his negligence precluded any recovery against the company. *Austin v. Chicago, Rock Island and Pacific R. R. Co.*, 91 Ill., 35. 1878.

270. — Where an engineer in charge of a locomotive, or train of cars, looks ahead and sees a man walking at the side of the track, it is not his duty to infer that the man will walk into danger in front of his engine when it is approaching near, and giving the usual signal of approach. *Scudder v. Indianapolis, Peru and Chicago R'y Co.*, 1 Indianapolis Superior Court Reporter, 481. 1873.

271. Walking on the track. In refusing to charge that one who walks upon a railroad track, except at a road crossing, does so at his peril, the circuit judge committed no error. *Carter v. Columbia and Greenville R. R. Co.*, 19 So. Car., 20. 1882.

272. — There is no error in refusing to charge "that if the deceased was upon the track without lawful authority, and using it for his own convenience, he was a trespasser, and that the company was under no obligation to take precautions against possible injuries to trespassers." *Ib.*

273. — It is negligence for a person to walk upon the track of a railroad, whether laid in a street or upon an open field, and he who deliberately does so will be presumed to assume the risk of the peril he may en-

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counter. *Illinois Central R. R. Co. v. Hall*, 72 Ill., 222, 1874; *Illinois Central R. R. Co. v. Godfrey*, 71 Ill., 500, 1874; *Chicago, Burlington and Quincy R. R. Co. v. Olson*, 12 Bradwell (Ill.), 245, 1882.

274. — When a plaintiff is unlawfully upon the track and is injured by a passing train, the company can only be held liable for wanton or wilful injury, or such gross negligence as evinces wilfulness. *Id.*

275. — A person going upon the track of a railroad for the purpose of walking thereon is bound to exercise ordinary precaution in looking out for the approach of the cars, and to use his ordinary senses to that end. His failure to do so constitutes negligence on his part as matter of law. *Carlin v. Chicago, Rock Island and Pacific R. R. Co.*, 37 Ia., 316, 1873; 8 Amer. R'y Rep., 141; *Lang v. Holiday Creek R. R. Co.*, 42 Ia., 677, 1876; *Seudder v. Indianapolis, Peru and Chicago R'y Co.*, 1 Indianapolis Superior Court Reporter, 481, 1873; *Baltimore and Ohio R. R. Co. v. Depev*, 12 Amer. & Eng. R. R. Cases (Ohio), 64, 1883.

276. — A person walking upon the track, but not in a condition to be aware of his danger, was warned by a friend who was in his company that a train was approaching. He failed, however, to get off the track, whereupon the friend waved his hat to the engine-driver to stop. As soon as the engine-driver saw the waving he blew the whistle and applied the brakes. The train, nevertheless, ran over the person on the track, killing him. *Held*, that the company was not in fault, and that decedent had been guilty of such contributory negligence as precluded all right to recover damages for his death. *Louisville and Nashville R. R. Co. v. Watkins*, 12 Amer. & Eng. R. R. Cases (Ky.), 89, 1883.

277. — Where the plaintiff had been a section-hand on the railway and was perfectly familiar with all the modes of its operation, and yet upon a dark, rainy night, with a strong wind blowing in his face, he travels upon the track between the stations, knowing the express train was coming behind him, that it was due and might overtake him at any time, and the only specific allegation of negligence on the part of defendant was, that there was no head-light

burning on the engine, *held*, the court erred in treating the absence of the head-light as gross negligence on the part of the defendant. And as the injury did not occur at a station or crossing, but at a place where plaintiff had no right to be, and where there was no reason to expect he would be, and where the record fails to show that defendant's employes were aware of plaintiff's presence on the track, and where, under the circumstances, it is by no means certain that ordinary care on their part would have protected him against the consequences of his act, *held*, the court erred in allowing judgment. *Houston and Texas Central R'y Co. v. Richards*, 12 Amer. & Eng. R. R. Cases (Tex.), 70, 1883.

278. — Evidence considered, and held to sustain a finding that a person who was killed while walking on the track of a railroad was not guilty of contributory negligence precluding a recovery by his administrator. *Laverenz v. Chicago, Rock Island and Pacific R. R. Co.*, 56 Ia., 689, 1881; 6 Amer. & Eng. R. R. Cases, 274; *Michigan Central R. R. Co. v. Campau*, 35 Mich., 468, 1877; 15 Amer. R'y Rep., 314.

279. — In an action by the administrator of a person killed upon a railroad track against the company, the deceased not being an employe of the company or passenger, but walking on it for his convenience, but not of necessity, it was held in this case, upon the evidence, that there was little ground to charge negligence upon the company; but if there was negligence on the part of the company, there was contributory negligence on the part of the deceased, and the negligence of the company, if any, was not so gross as to render it responsible for the damage sustained by the plaintiff from the killing of the deceased, in view of his own contributory neglect. *Baltimore and Ohio R. R. Co. v. Sherman*, 30 Grattan (Va.), 602, 1878.

280. — Plaintiff's intestate undertook to walk along the defendant's road, on a switch track, from one street to another, in Saratoga Springs, a distance of about three hundred and fifty feet. While so doing some cars were switched thereon, came up behind him, struck and killed him. *Held*, that he was guilty of contributory negligence

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in walking upon the track, and that the plaintiff could not recover. *McCarty v. Delaware and Hudson Canal Co.*, 17 Hun (N. Y.), 74. 1879.

281. — Railroad tracks are not highways for general travel, and persons cannot, as matter of right, convert them into common thoroughfares, except at public crossings, and then only for the purpose of crossing with no undue tardiness. *Mobile and Montgomery R. R. Co. v. Blakely*, 59 Ala., 471. 1877.

282. — Where a person walked upon a railway track, knowing that it was time for a train going in the same direction, and looked back several times, but did not see the train, or hear any signal, though he thought he heard it come to the point from which he started, and he could have seen the train for nearly a quarter of a mile, but did not observe it until it struck him, and those in charge of the train, on observing that he was heedless of the approaching danger, made the usual efforts to stop the train and avoid running upon him, *held*, that he could not recover for the injury. *Terre Haute and Indianapolis R. R. Co. v. Graham*, 46 Ind., 239, 1874; 6 Amer. R'y Rep., 358.

283. — Where a person walking by the side of a railroad track heedlessly or negligently steps upon the track in front of an approaching locomotive, he cannot recover, unless those in charge of the locomotive saw his peril, or could, by the use of ordinary diligence have seen it in time to prevent the injury, after it became apparent that he was in danger. *Scudder v. Indianapolis, Peru and Chicago R'y Co.*, 1 Indianapolis Superior Court Rep., 481. 1873.

284. — It is the duty of every person about to cross a railway to approach it cautiously, and ascertain if there is danger in crossing; otherwise he cannot recover for an injury thereby received; and a still higher degree of care and vigilance is required where the party is, without right, traveling on foot along the track. *Lake Shore and Michigan Southern R. R. Co. v. Hart*, 87 Ill., 529, 1877; 19 Amer. R'y Rep., 249.

285. — The servants of a railroad company in charge of a moving train are not

bound to stop the same because a person ahead is walking near the track, and in a line nearly parallel with it. *Chicago, Rock Island and Pacific R. R. Co. v. Austin*, 69 Ill., 426. 1873.

286. — Persons in charge of a train, seeing an adult upon the track, are entitled to presume that he will leave the same before he is run over. *Terre Haute and Indianapolis R. R. Co. v. Graham*, 12 Amer. & Eng. R. R. Cases (Ind.), 77. 1883.

287. — Deceased, after finishing his day's work, started to leave appellant's railroad yard, in which he was employed. On account of the snow elsewhere it was more convenient for him to walk on the track. While on the track he was struck and fatally injured by an engine running at a high rate of speed, which was being backed down from the turn-table. *Held*, that the negligence of deceased, in going upon the track, and, while there, not looking for the known danger, materially and directly contributed to the injury. *Chicago, Burlington and Quincy R. R. Co. v. Olson*, 12 Bradwell (Ill.), 245. 1882.

288. — Although the statute (§ 1811, R. S.) makes it unlawful for a person not connected with, or employed upon, a railway, to walk along the track, "except when the same shall be laid along public roads or streets," yet where the question is, whether a person injured, while walking upon a track, was guilty of a want of ordinary care, it is error to reject evidence showing that many persons, men, women and children, had, for years before the accident in question, been in the habit of passing, daily and hourly, up and down in the same pathway on which the injured person was passing — since such evidence would tend to show a license, or to repel the inference of a want of ordinary care on plaintiff's part, and also to show a lack of such care on defendant's part as the facts required. *Townley v. Chicago, Milwaukee and St. Paul R'y Co.*, 53 Wis., 626, 1881; 4 Amer. & Eng. R. R. Cases, 592.

289. — It is no excuse for a party entering upon a railway to travel along the ties, in not first looking behind him to see if any train is approaching, that the company had, before, been in the habit of moving its trains going in such direction over another and different track. *Lake Shore and Michigan*

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Southern R. R. Co. v. Hart, 87 Ill., 529, 1877; 19 Amer. R'y Rep., 249.

290. — A rule of a railway company prohibiting freight trains from passing between a station-house and a standing passenger train while receiving or discharging passengers, has for its object the protection of passengers between the standing train and the passenger-house, and not that of persons, at a distance away, carelessly walking on the track; and a failure to observe the rule, of itself, will not render the company liable for an injury to a person carelessly walking upon the track, some distance from the station. *Ib.*

291. What neglect will defeat recovery. A party injured cannot recover if he has been guilty of negligence contributing to the injury. *Johnson v. Canal and Claiborne R. R. Co.*, 27 La. An., 53, 1875; *Schwartz v. Crescent City R. R. Co.*, 30 La. An., 15, 1878; *Conroy v. Pa. R. R. Co.*, 1 Pittsburgh, 440, 1858; *Pittsburgh, Fort Wayne and Chicago R. R. Co. v. Krichbaum's Adm'r*, 24 Ohio St., 119, 1873; 7 Amer. R'y Rep., 200; *O'Donnell v. Mo. Pacific R'y Co.*, 7 Mo. App., 190, 1879; *Hearne v. Southern Pacific R. R. Co.*, 50 Cal., 482, 1875.

292. — The negligence of the deceased, in this case, *held* to be, as a matter of law, a bar to recovery. *Fitzpatrick v. N. Y., New Haven and Hartford R. R. Co.*, 48 N. Y. Superior Ct., 539, 1883; *Elwood v. N. Y. Central and Hudson River R. R. Co.*, 4 Hun (N. Y.), 808, 1875; *Denman v. St. Paul and Duluth R. R. Co.*, 26 Minn., 357, 1880.

293. — Instructions to the effect that the plaintiff would be entitled to recover if defendant were negligent and plaintiff's own carelessness did not *materially* contribute to the injury, *held*, to be erroneous. The plaintiff cannot recover when he was in whole or in part the proximate cause of the injury. *Artz v. Chicago, Rock Island and Pacific R. R. Co.*, 38 Ia., 293, 1874.

294. — The finding of the jury *held* to be conclusive as to the contributory negligence of the plaintiff. *Morrison v. N. Y. Central and Hudson River R. R. Co.*, 4 Hun (N. Y.), 424, 1875; affirmed, 63 N. Y., 643, 1875.

295. — Where the uncontroverted evidence proved that the deceased (to recover damages for whose death the defendant was

sued) was improperly on the track of the defendant; that he voluntarily exposed himself to the peril, with full knowledge of the risk, and might, if he had used his eyes and ears, have seen and heard the approaching train, long before it struck him; and the only material conflict of evidence was as to the giving of the signals upon the approach of the cars, it was held that the deceased, having directly contributed to his own death, the plaintiff had no cause of action, and it was error to reject a prayer of the defendant to that effect. *Baltimore and Potomac R. R. Co. v. State*, 54 Md., 648, 1880; 4 Amer. & Eng. R. R. Cases, 574.

296. — The plaintiff, when one hundred feet from a railway crossing, attempted to pass over it in front of a passenger train, which he saw coming thirty rods distant; *held*, that he was guilty of contributory negligence, and could not recover for injuries caused by collision with the train. *Grows v. Maine Central R. R. Co.*, 69 Me., 412, 1879.

297. — Although the servants of the company may have been guilty of negligence contributing to the injury complained of, still, if the plaintiff could, by the exercise of ordinary care and prudence, have avoided the injury, he cannot recover. *Chicago and Alton R. R. Co. v. Jacobs*, 63 Ill., 178, 1872; 7 Amer. R'y Rep., 125; *Colorado Central R. R. Co. v. Holmes*, 5 Colo., 197, 516, 1881; 8 Amer. & Eng. R. R. Cases, 410.

2. Comparative negligence.

[See *ante*, 763, in this subdivision, under head of Contributory Negligence.]

298. Degrees of negligence. Where a person, while attempting to cross a railroad track with his team at a regular highway crossing, was struck by an approaching engine and killed, and it appeared that the company allowed the sight along its track to be obstructed by a house, brush and weeds upon its right of way, and failed to give the statutory signals on the train approaching the crossing until it was too late to avail, and the train was running at unusual speed to make up time, it being behind time, it was *held* that the negligence of the company was gross, and even if deceased was

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guilty of negligence in failing to listen or look for a train out of its time, such negligence was slight, and the company was liable to an action by the representative of the deceased. *Chicago, Burlington and Quincy R. R. Co. v. Lee*, 87 Ill., 454. 1877.

299. — A person struck and injured by a train of cars within the limits of a city, at a street crossing, may recover for the injury, of the company, if at the time of the collision the train was running at an improper rate of speed, in reference to the plaintiff's safety, even if he was guilty of slight negligence, provided the negligence of the company was gross when compared with that of the plaintiff. *Wabash R. R. Co. v. Henks*, 91 Ill., 406. 1879.

300. — Where a plaintiff has been guilty of negligence contributing to his injury, he cannot recover unless the negligence of the defendant is gross, and not then unless the negligence of the plaintiff is slight in comparison to that of the defendant. *Illinois Central R. R. Co. v. Hammer*, 85 Ill., 526. 1877.

301. — When the negligence of the defendant is the proximate cause of the injury, but that of the plaintiff only remote, consisting of some act or omission not occurring at the time of the injury, in such cases an action for damages may be maintained. *Manly v. Wilmington and Weldon R. R. Co.*, 74 N. C., 655, 1876; 13 Amer. R'y Rep., 105.

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302. Contributory negligence. Instructions in relation to the effect of neglect on the part of the defendant should likewise call attention to the effect of want of due care upon the part of the plaintiff. *Chicago City R'y Co. v. Freeman*, 6 Bradwell (Ill.), 608. 1880.

303. Degree of care required. A public footway crossed a railway on a level. The plaintiff while crossing on the footway in the evening, after dark, was knocked down and injured by a train of the defendant on the crossing. He stated, in evidence on the trial, that he did not see the train until it was close upon him; that he saw no lights on the train and heard no whistling. He

stated, also, that he did not hear any caution or warning given to him by any servant of the company. The driver and fireman of the engine were called on behalf of the company, and stated that there were lamps on the engine and train, which were lighted in due course on the night in question, at the commencement of the journey, and which, if lighted, could be seen for a considerable distance by any one standing at the crossing. A porter in the defendant's employ also stated that he had seen the plaintiff at the crossing on the night in question, and had called to him not to cross. The judge at the trial ruled that there was evidence to go to the jury of negligence on the part of the defendant which caused the injury to the plaintiff. *Held*, on a bill of exceptions, by Bramwell, B., Mellor, J., Pollock and Amphlett, BB. (Cockburn, C. J., and Cleasby, B., dissenting), that there was no evidence of negligence to go to the jury. *Ellis v. Great Western R'y Co.*, Law Reports, 9 Common Pleas Cases, 551, 1874; 10 Eng. (Moak), 293.

304. — Persons having control of steamboats and locomotive engines must employ more than ordinary skill and diligence to prevent disasters. They are required to be skilled in their particular departments; but infallibility is not required of them. *Mobile and Montgomery R. R. Co. v. Blakely*, 59 Ala., 471. 1877.

305. — An officer having control of a train of cars who fails to perform a duty enjoined by statute may be indicted; and any person who suffers an injury, which would not have resulted had the statutory duty been performed, has a right of action. *Ib.*

306. — When a person of adult years is seen on a railroad track, in advance of an approaching train, and shows by his actions that he is aware of its approach, and is using the proper efforts to get out of its way, the person in charge of the train is not required to stop it, nor, ordinarily, even to check its speed; but if the person be on horseback, on a high embankment, or in a deep cut, from which he probably cannot escape in time, or be suddenly thrown from his horse, and cannot escape, it is the duty of the engineer promptly to use all means in his power to avoid the injury, and the company is liable

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if he fails to do so. *Tanner v. Louisville and Nashville R. R. Co.*, 60 Ala., 621. 1877.

307. — A railway company is under no obligations to exercise a high degree of care toward the public upon the company's own grounds, even within the corporate limits of a city. *Lake Erie and Western R'y Co. v. Zoffinger*, 10 Bradwell (Ill.), 252. 1881.

308. — The presence of persons on the railroad track does not require them to stop their trains, or even check them, unless the circumstances show their approach is not observed, or the person is unable to leave the track. *Mobile and Montgomery R. R. Co. v. Blakely*, 59 Ala., 471. 1877.

309. — In the employment of steam as a motive power, railroad companies are held to the exercise of extraordinary diligence — that degree of diligence which very careful and prudent men exercise in the conduct of their own affairs; and this requires that they shall employ very careful and prudent men, and that the persons employed by them shall exercise such care and diligence as very careful and prudent men exercise in the conduct of their own private interests and important enterprises. *Tanner v. Louisville and Nashville R. R. Co.*, 60 Ala., 621. 1877.

310. — It is error to instruct the jury that certain acts, and the omission of "anything else that you may think it was their duty to do," would constitute actionable negligence. Such an instruction leaves it to the jury's discretion to determine what precautions should have been taken. *Semel v. N. Y., New Haven and Hartford R. R. Co.*, 9 Daly (N. Y.), 321. 1880.

311. Engine-driver's neglect; persons in the cab. Held proper to permit the engine-driver to testify that the presence of strangers in the cab did not interfere with the performance of his duties. *Marcott v. Marquette, Houghton and Ontonagon R. R. Co.*, 49 Mich., 99, 1882; 8 Amer. & Eng. R. R. Cases, 306.

312. Failure to fence. Where the road-bed of a railroad is laid near to a dwelling-house, and the child of the owner gets upon the track and is killed by the train, plaintiff may show, as an element of negligence on the part of the company, a failure to fence

its track as required by the statute, even though the primary object of the requirement was merely protection of cattle and other stock. *Isabel v. Hannibal and St. Joseph R. R. Co.*, 60 Mo., 475, 1875; 9 Amer. R'y Rep., 261.

313. Flying switch. The making of a "flying switch" necessarily implies negligence. *Illinois Central R. R. Co. v. Hammer*, 72 Ill., 347. 1874.

314. Gates; failure to keep closed. The defendant's railway crossed on a level a public carriage and footway near to the P. station. There were gates across the carriage-way and a turnstile for the use of foot passengers. S., a foot passenger, whilst traversing the railway at the level crossing, was knocked down and killed by one of the defendant's trains. At the time of the accident, contrary to the provisions, by statute and by the defendant's rules, for the safety of carriage-traffic, the gates on one side of the line were partially open, and there was no gate-keeper present to take charge of them, although no traffic was passing across, and although a train was overdue. In an action against the defendant by the executors of S., held, that there was, under the circumstances, evidence of negligence on the part of the defendant to go to the jury, inasmuch as by neglecting the required precautions for the safety of carriage-traffic the defendant might be considered to have intimated that its line might safely be traversed by foot passengers. *Stapley v. London, Brighton and South Coast R'y Co.*, Law Reports, 1 Exchequer Cases, 21. 1865.

315. Head-light. An injury to a person on the track, caused by a train running without a head-light, resulted in the death of the injured party. Held, that the question of contributory negligence was for the jury. *Smedis v. Brooklyn and Rockaway Beach R. R. Co.*, 23 Hun (N. Y.), 279. 1880.

316. — An instruction telling the jury, as a matter of law, that an ordinary switchman's lantern, giving forth a white light, is a sufficient compliance with a city ordinance requiring "a brilliant and conspicuous light on the forward end of each locomotive," etc., is properly refused, as taking from the jury an important fact which it is their province to find from the evidence. *Penn-*

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sylvania Co. v. Conlan, 101 Ill., 98, 1881; 6 Amer. & Eng. R. R. Cases, 243.

317. — A workman while on his way home in the evening stood talking with a companion by a railway track where three roads ran side by side, and where, by daylight, the track could be seen for two miles. He had drunk two glasses of beer. He was familiar with the locality, and he also knew that a train was due. A well-lighted passenger train which had broken its head-light, and had substituted an ordinary lantern therefor, approached, and was seen by several persons in the neighborhood. The workman, however, did not see it, but heard a rumbling which he supposed came from some vanishing train on one of the other tracks. He stepped on the track nearest him, with his companion, and both were struck, the latter being killed. *Held*, that he did not exercise due care. *Mahlen v. Lake Shore and Michigan Southern R'y Co.*, 49 Mich., 585, 1883.

318. — The plaintiff's intestate, while crossing defendant's tracks at their intersection with a street in the city of Rochester, on a dark night, was struck and killed by an engine moving backwards. Upon the trial the court charged that it was for the jury to say whether it was the duty of the company, under the circumstances, to have a light upon the engine, and, as it was moving backwards, upon the rear of it, and if so, what kind of a light was required; and then said, "the company was bound to have so much light, and so located, that a person reasonably diligent, and of natural powers of observation, might have been able to discover it." *Held*, that the charge was correct. *Cheney v. New York Central and Hudson River R. R. Co.*, 16 Hun (N. Y.), 415, 1879.

319. — While, in the night time, the plaintiff was walking on the track in a village, at a place where the same was so used, without objection, by all classes of persons, he was overtaken and struck by an engine without any head-light, running at a high rate of speed, there being no bell rung or whistle sounded, and the plaintiff hearing or seeing nothing of it until he was struck. *Held*, that the negligence of plaintiff in walking on the track, if it was negligence, was but

slight when compared with the gross and criminal negligence of the defendant. *Indianapolis and St. Louis R. R. Co. v. Galbreath*, 63 Ill., 436, 1872; 7 Amer. R'y Rep., 128.

320. Lookout. Upon the evidence (stated in the opinion), the question of the negligence of a railway company in not keeping a proper lookout in the direction in which the train was moving should have been submitted to the jury. *Johnson v. Chicago and Northwestern R'y Co.*, 56 Wis., 274; 8 Amer. & Eng. R. R. Cases, 471, 1882.

321. — The statute requires the engineer to keep a lookout ahead, but not behind. *Moran v. Nashville and Chattanooga R. R. Co.*, 2 Baxter (Tenn.), 379, 1872; 21 Amer. R'y Rep., 192.

322. — A railway company is bound to provide for a careful lookout in the direction in which a train is moving, in places where people, and especially where children, are likely to be upon the track. *Townley v. Chicago, Milwaukee and St. Paul R'y Co.*, 53 Wis., 626, 1881; 4 Amer. & Eng. R. R. Cases, 563.

323. Rate of speed. Aside from statutory or municipal regulation, no rate of speed at which a railroad train may be run is negligence *per se*. *Powell v. Missouri Pacific R'y Co.*, 76 Mo., 80, 1882; 8 Amer. & Eng. R. R. Cases, 467.

324. — The mere fact that a train was moving at a dangerous rate of speed will not make the company liable for injuries to a person run over by the engine, if he was himself guilty of contributory negligence. *Bell v. Hannibal and St. Joseph R. R. Co.*, 72 Mo., 50, 1880; 4 Amer. & Eng. R. R. Cases, 580.

325. — Trains may be run at a high rate of speed to reach their greatest utility; but in populous towns and cities the speed must be moderated. *Philadelphia and Reading R. R. Co. v. Long*, 75 Pa. St., 257, 1874; *Pennsylvania R. R. Co. v. Lewis*, 79 Pa. St., 83, 1875.

326. — It is gross negligence on the part of a railroad company to run its trains through a town at a rate of speed prohibited by law, and if the company does so run its trains, and thereby causes the death of a person who is himself in the exercise of due

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care and caution, it is liable in an action by the representatives of the person so killed. *Chicago and Alton R. R. Co. v. Becker*, 84 Ill., 483. 1877.

327. Remote and proximate cause. To make a railroad company liable where the party injured has also been negligent, it should appear that the proximate cause of the injury was defendant's omission, after becoming aware of plaintiff's danger, to use a proper degree of care to avoid injuring him. If, on discovering him upon the track, it was impossible, with safety to the train, and those on board, to stop the train in time to prevent the casualty, the company cannot be held, unless guilty of negligence beforehand which creates the impossibility. *Maher v. Atlantic and Pacific R. R. Co.*, 64 Mo., 267. 1876.

328. Unusual loading; projecting timbers. A person who declares that he was upon a railroad track by its consent, and was injured by the running of the cars, caused by the unusual loading of the same—the timbers projecting seven feet beyond the track and he standing that distance from it at night, supposing himself safe at such a distance from the rail—several other trains properly loaded having passed without injury to him,—has the right to go to the jury—the question of negligence being one peculiarly for the jury, the presumption in all cases being against the company; and a declaration alleging facts to the effect above stated should not have been dismissed on demurrer. *Boston v. Ga. R. R. Co.*, 60 Ga., 339. 1878.

329. — On failure of proof that the plaintiff was on the track with the consent of the defendant, a verdict for defendant will be upheld. *Boston v. Ga. R. R. Co.*, 63 Ga., 164. 1879.

4. Gross negligence.

330. Effect of gross neglect. Where injury is caused by a failure of the railroad company to use ordinary care in moving its trains or cars, it is liable, unless there be contributory negligence by the person injured. Hence it is error to charge the jury that the company is liable only for gross negligence, where it may have been under-

stood by the jury that this term was used as the equivalent of fraud or intentional wrong, and not as meaning the want of the ordinary care required under all the circumstances of the case. *Meek v. Pennsylvania Co.*, 38 Ohio St., 632. 1883.

5. By whom the question of negligence is to be determined.

[Decisions upon this question will also be found under the various other heads of this Digest.]

331. When question is for the jury. Where there is conflicting evidence on a question of fact, whatever may be the opinion of the judge who tries the cause as to the value of that evidence, he must leave the consideration of it for the decision of the jury. S. went to the D. and K. railway station to accompany a relative who was going by the up train to Dublin. It was necessary to cross the line in order to get the ticket. S. went through a gate, down a pathway, and across the line in front of the train going to Dublin, which was then slowly approaching the station from Kingstown. The time was night. There were notice boards warning persons not to cross the line at that point, but there was evidence that the railway employes never interrupted any persons who did cross the line there. S. crossed in safety; he obtained a ticket for his relative, who, with two friends, was standing on the bank by the side of the up line. The train to Dublin had in the meantime arrived, and was standing still. S. having got the ticket began to recross the line, being then not in front of the Dublin train, but behind it, in consequence of which that train prevented him seeing anything on the down line from Dublin, and he moved on. As he was going on the down line (which ran from Dublin to Kingstown) the down express train caught him and he was killed. It was a rule of the company that the express train should always sound a whistle on approaching the station, and the driver of that train swore that he had whistled twice, and some other servants of the railway company swore that they had heard the whistling. The friends of S. had, in their evidence for the

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plaintiff, sworn that they were in a situation to hear the whistle if it had been sounded, and that they had not heard it, and one of them, who could see the down train approaching, swore that he heard the "rumbling" of the approaching train, but heard no whistle. *Held*, that this was a case which was properly left to the jury, for that where there was contradictory evidence on facts, the jury, and not the judge, must decide upon them. *Dublin, Wicklow and Wexford R'y Co. v. Slattery*, Law Reports, 8 Appeal Cases, 1155, 1878; 24 Eng. (Moak), 713.

332. — The evidence to rebut the presumption that the deceased stopped and listened before attempting to cross may be very strong, but yet the question is for the jury. *Pennsylvania R. R. Co. v. Weiss*, 87 Pa. St., 447. 1878.

333. — Where the circumstances of the killing of a person, not an employe or passenger, are merely conjectural, the court will be justified in taking the case from the jury. *State v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 60 Md., 555. 1888.

334. — It is a question for the jury whether a special train can be run without negligence at such speed as to make it difficult to check the speed within a reasonable time and distance. *Marcott v. Marquette, Houghton and Ontonagon R. R. Co.*, 47 Mich., 1, 1881; 4 Amer. & Eng. R. R. Cases, 548.

335. — The questions whether or not there were obstructions obscuring the sight of an approaching train to one about to drive upon the track, and whether or not plaintiff, under the admitted facts, was using his senses to avoid danger, are questions of fact for the jury. *Artz v. Chicago, Rock Island and Pacific R. R. Co.*, 44 Ia., 284. 1876.

336. — The rule is that, as a matter of law, a person voluntarily going upon a railway track at a point where there is an unobstructed view of the track, and failing to look or listen for danger, cannot recover for an injury which might have been avoided by looking or listening; but when the view is obstructed, or other facts exist which tend to complicate the question of contributory negligence, it becomes one for the jury. *Laverenz v. Chicago, Rock Island and Pacific R. R. Co.*, 56 Ia., 689, 1881; 6 Amer. & Eng. R. R. Cases, 274.

337. When a question of law. Where it affirmatively appears from the plaintiff's evidence that the want of due prudence upon his part was the proximate cause of the injury complained of, it becomes the duty of the court, upon motion made for non-suit, to decide as a question of law that the action cannot be maintained. *Behrens v. Kansas Pacific R'y Co.*, 5 Colo., 400, 1880; 8 Amer. & Eng. R. R. Cases, 184.

V. INJURIES TO CHILDREN.

338. Contributory negligence. Where, in an action for damages for injuries sustained by a little child, in consequence of being run over by an engine, it appears that the engine-driver might, with the exercise of ordinary care, have stopped the engine, and so have avoided the injury, the contributory negligence of the plaintiff does not constitute a bar to a recovery. *Kenyon v. New York Central and Hudson River R. R. Co.*, 5 Hun (N. Y.), 479. 1875.

339. — Railway employes are not bound, as a matter of law, to stop a train upon seeing a child upon the track. *Pennsylvania R. R. Co. v. Morgan*, 82 Pa. St., 134, 1876; 16 Amer. R'y Rep., 89; *Walters v. Chicago, Rock Island and Pacific R. R. Co.*, 41 Ia., 71, 1875.

340. — A child three and a half years old strayed on a railway and had its leg cut off by a train. *Held*, that in the absence of evidence that the child got there through the fault of the company the defendant was not liable. *Singleton v. Eastern Counties R'y Co.*, 7 Common Bench (N. S.), 287; 97 E. C. L., 287. 1859.

341. — A railway company is not liable for running over a child who is using the track as a play-ground, if the act is not done maliciously or with gross and reckless carelessness. *Morrissey v. Eastern R. R. Co.*, 126 Mass., 877. 1879.

342. — The degree of care required of an infant of tender years, the omission of which will constitute negligence on his part, is entirely different from that required of an adult. *Thurber v. Harlem Bridge, Morrisania and Fordham R. R. Co.*, 60 N. Y., 326, 1875; 10 Amer. R'y Rep., 126; *Dowling v.*

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New York Central and Hudson River R. R. Co., 90 N. Y., 670, 1882.

343. — In a suit for damages for the negligent killing of plaintiff's intestate, the evidence showed that he was an intelligent boy thirteen years of age, living near defendant's road, which he crossed daily. He was familiar with the road and the manner of running the trains; the tracks (of which there were two) crossed the highway nearly at right angles. Upon the day of his death the boy was last seen going from school at noon, toward the tracks, and about one hundred feet therefrom; a moment thereafter two trains, going in opposite directions, passed each other at the crossing; after the passage of the trains he was found dead in the cattle-guard, between the tracks. At a point in the highway, ten feet from the crossing, the engineer of the train by which, as the circumstances indicated, the deceased was killed, could have been seen seventy-five feet distant. It was a fair day, with but little wind. As the evidence tended to show, no signal was given of the approach of the train by which he was killed. *Held*, that the proof was insufficient to sustain a verdict for plaintiff, as it did not warrant a finding that there was no negligence on the part of the deceased. *Reynolds v. New York Central and Hudson River R. R. Co.*, 58 N. Y., 248, 1874; 7 Amer. R'y Rep., 6. See *Day v. Flushing, North Shore and Central R. R. Co.*, 75 N. Y., 610. 1878.

344. — A girl twelve years of age must exercise what is to be regarded as a reasonable precaution, for one of her years, for her own safety. It is her duty to take notice of the usual and customary signals given by trains on their approach at crossings. *Paducah and Memphis R. R. Co. v. Hoebl*, 12 Bush (Ky.), 41, 1876; 18 Amer. R'y Rep., 238.

345. — A child of the age of fourteen years is presumed to have sufficient capacity to be sensible of danger and to have the power to avoid it; and this presumption will stand until overthrown by clear proof of the absence of such discretion as is usual with children of that age. *Nagle v. Allegheny Valley R. R. Co.*, 88 Pa. St., 35. 1878.

346. — In a suit for damages for alleged negligence causing the death of W., plaintiff's intestate, who was killed at a crossing on the

defendant's road, in the city of S., it appeared that the deceased was a bright, active boy, seven years old, considered competent by his parents to go to school and on errands alone. He was in the habit of crossing the railway at the place where the accident happened; he had been stopped, while attempting to cross, by the flagmen stationed at that point, and been before cautioned by them against attempting to cross in front of an approaching train. Shortly before the accident, the deceased was standing near the flagman's shanty with a companion, on the street, fifty-one feet from where he was struck; the approaching train was in plain sight from the place where he stood for a distance of about five hundred feet from the crossing. The flagmen (two in number) had left the shanty and approached the track, in the performance of their duty. The boys both started on a run to cross in front of the train; the flagmen shouted to them to stop and waved their flags; one of the flagmen, who stood on the sidewalk ten or fifteen feet distant from the track on which the train was approaching, endeavored to intercept the deceased, but he eluded him and reached the track, where he slipped and fell and was killed. *Held*, that a motion for non-suit, on the ground of contributory negligence, was improperly denied. *Wendell v. New York Central and Hudson River R. R. Co.*, 91 N. Y., 420. 1883.

347. — The plaintiff's intestate, a bright boy of nine years of age, waited on the westerly side of the defendant's road, at a public crossing, until a long freight train, which was going in a southerly direction, had passed, and then immediately attempted to run across the track, without looking along it to see whether another train was approaching; after having run about thirty or forty feet he was struck by the locomotive of a passenger train, going north, at a speed of about thirty or thirty-five miles an hour; there was a curve just south of the crossing, which hid the tracks beyond it, and only about thirty-five seconds elapsed from the time the locomotive passed it until it struck the boy. *Held*, that the court properly refused to non-suit the plaintiff on the ground that the deceased had been guilty of contributory negligence. *Powell v. New York*

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Central and Hudson River R. R. Co., 22 Hun (N. Y.), 56. 1880.

848. — The court charged: "If the boy (being on the track) had sufficient judgment and discretion to know his danger, and did not exercise the ordinary care that one of his age and maturity should, he was guilty of such negligence as would prevent him from recovering," etc. *Held*, proper. *Pennsylvania R. R. Co. v. Lewis*, 79 Pa. St., 83, 1875.

849. — Where a boy, in attempting to pass under a car moving along the street, is run over and seriously injured, he is not entitled to recover damages from the railway company for the injury sustained; the attempt to pass under the car while in motion, being such an act of carelessness as amounts in law to contributory negligence. The child in this case was five years and nine months old. *McMahon v. Northern Central R'y Co.*, 89 Md., 488. 1873.

850. — An engine-driver was backing his engine northerly across a street in Schenectady, at the rate of two miles an hour, to take in water. The plaintiff, a boy under four years of age, ran easterly on the south side of the street towards the engine, approached near to it, turned northerly, ran alongside and beyond it, then turned across the track in front of it, was struck by it and injured. *Held*, that the railway company was not liable. *Schwier v. New York Central and Hudson River R. R. Co.*, 15 Hun (N. Y.), 572. 1878.

851. — In a suit for damages against a railroad company for running over a child which had strayed upon the track, it appeared that the child was seen by the officers in time to avoid the collision, but mistaken for something else; and that by the exercise of a proper degree of care and caution, they might, after first observing the object, have discovered that it was a child in time to stop the train before the accident occurred. *Held*, that in such case, although some negligence might have been attributable to those having charge of the infant, it was not the proximate cause of the casualty, and the company would be liable. *Isabel v. Hannibal and St. Joseph R. R. Co.*, 60 Mo., 475, 1875; 9 Amer. R'y Rep., 261.

852. — Plaintiff, a girl in her seventeenth

year, while crossing defendant's tracks, five in number, at a street crossing, had passed over two tracks and was standing near the third track awaiting the passage of an express train. She looked once up and down the track as she stopped. While she waited, an engine which approached without signal, ran upon and injured her. *Held*, that the same degree of caution was not required of her as of an older person, and the question whether she was negligent was one for the jury. *Hayercroft v. Lake Shore and Mich. Southern R'y Co.*, 5 Thompson & Cook (N. Y. Supreme Ct.), 49, 1874; *Same v. Same*, 2 Hun, 489; affirmed, 64 N. Y., 636, 1876.

853. — A boy of ten years old, bright, intelligent, strong, healthy and of rather exceptional capacity, was sent by his parents upon an errand along a street in a populous suburb of a city on which a railroad track was constructed. He was killed by a passing train, moving at a very high rate of speed, without whistle or other signal. The only witness of the accident declared that he saw the boy walking upon the outer ends of the sleepers a single instant before he was struck. The street was of ample breadth and had sufficient sidewalks, and the errand upon which the boy was sent did not require him to cross the track at the point where he was killed. In an action by the boy's parents against the railway company to recover damages for his death, the plaintiffs adduced evidence which showed the facts to be as above. The court thereupon awarded a non-suit, on the ground of the boy's contributory negligence. *Held*, that this was not error. *Moore v. Pennsylvania R. R. Co.*, 99 Pa. St., 801, 1882; 4 Amer. & Eng. R. R. Cases, 569.

854. — Action was brought by the father to recover damages for loss of five children, ranging from five to sixteen years old, killed in a collision with a train belonging to defendant. The children killed were returning home from a May-day picnic, in a light wagon drawn by one gentle horse. The oldest, a girl of sixteen, was driving. She was acquainted with the highway over which she was passing and with the point at which it was crossed by the track. Several persons in vehicles preceded her on the highway, and had crossed over, the nearest

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one being some four hundred feet in advance; and she was followed by a boy thirteen years old, at a considerable distance in the rear. On the track, about three hundred and thirty-five feet from the point of crossing, was a covered bridge. On either side of the track, between the bridge and its intersection with the highway, were a number of trees planted by the defendant, and which had attained such size, as, according to some of the testimony, prevented—in connection with some of the neighboring orchards—an approaching train from being seen by those traveling the highway, until the traveler should reach a point very close to the track. There was also evidence going to show that at the time of the accident the train was slightly behind time, and was running at the rate of from thirty-three to thirty-five miles an hour, whereas the rate at which the trains usually ran at that point was from twenty-five to thirty miles an hour. Further, there was some evidence tending to show that the bell was not rung nor the whistle blown. *Held*, that this evidence, especially that relating to the increased speed, under the circumstances appearing, tended to show negligence on the part of the defendant, and it was for the jury to pass upon the effect of this testimony. The evidence was sufficient to justify the verdict of the jury against the defendant on the question of its negligence. *Nehrbas v. Central Pacific R. R. Co.*, 62 Cal., 320. 1892.

355. — The plaintiff's intestate was a boy ten years of age. The train which ran over him went over the crossing followed by a freight train. The bell on the freight train was ringing and the flagman on the crossing was flagging it, paying no attention to the other. The first train was switched on to another track and backed up on the track the boy attempted to cross. There was no direct proof as to what precautions he took before crossing the track. *Held*, that the question of contributory negligence was properly submitted to the jury; that it was competent for them to infer that the boy, seeing the first train pass, supposed it was going on, and, his attention being attracted by the freight train, he did not observe that the first train had changed its direction and

was backing up. *Barry v. New York Central and Hudson River R. R. Co.*, 92 N. Y., 289. 1883.

356. — A child two years old, while walking upon a railway track, was injured by the train backing over it; there was evidence tending to show that no one on the train saw the child, and that if some one on the train had been on the lookout the accident could have been avoided. *Held*, that it was not error to refuse to instruct that defendant was not liable for the damages occasioned by the child being run over. *Frick v. St. Louis, Kansas City and Northern R. R. Co.*, 5 Mo. App., 435. 1878.

357. — The Atchison, Topeka and Santa Fe R. R. Co. owned a side-track about four hundred and fifty feet long, situated upon its own right of way, and partially within the limits of Osage City, and near several dwelling-houses. It was not inclosed and children occasionally played upon it. A coal shaft was situated by the side of it, about three hundred feet from where it connected with the main track; and from the coal shaft toward the main track it descended to a point within about seventy-five feet from the main track, and then ascended to the main track, so that cars loaded at the coal shaft would descend of their own weight to the lowest point, or beyond it, but would finally settle at that point. One car was loaded at the coal shaft and was allowed to run down the side-track to the lowest point, where it settled and remained. Afterward another car was loaded and allowed to run down against the standing car, and in so doing the plaintiff, who was a child two years old, was run over and injured. Whether the employes at the coal shaft looked to see whether the track was clear, is a disputed question of fact; also, whether they could have seen the plaintiff, is likewise a disputed question of fact; and whether the plaintiff was under or behind the first car, is also a disputed question of fact. But supposing that the employes at the coal shaft did not look before permitting the second car to move, and supposing that they could not have seen the plaintiff if they had so looked, then *held*, that their acts did not constitute negligence *per se*, for which the court could, as a matter of law, declare the

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railroad company to be responsible. *Atchison, Topeka and Santa Fe R. R. Co. v. Smith*, 28 Kans., 541, 1882; 8 Amer. & Eng. R. R. Cases, 327.

358. — In an action against a railway company for personal injuries received by the plaintiff, a boy nine years old, by being struck by a train run by the defendant along a highway, evidence that, prior to the accident, the plaintiff had been seen on the tracks, and had been warned not to go there, is admissible upon the question whether he was using due care. *Fitzpatrick v. Fitchburg R. R. Co.*, 128 Mass., 13, 1879; 1 Amer. & Eng. R. R. Cases, 154.

359. — The deceased was a boy of the age of six or seven years, and it appeared that the defendant's train, which ran over and killed him, was not running at an unusual rate of speed, or at a rate prohibited by the ordinance of the town; that the whistle was sounded at the proper place, and a bell kept continuously ringing until the crossing was passed where the accident occurred; that the deceased heard the whistle, and, in company with two other boys, started for the crossing; that the other two crossed over the track, and the deceased, in attempting to follow, when the engine was but about sixty feet from him, stumbled and fell upon the track, and that those in charge of the train used every exertion to check the train, which was a heavy freight train, but could not in time to avoid the accident. *Held*, in an action by the administrator of the deceased against the company to recover damages for the killing, that a recovery by the plaintiff could not be sustained. *Chicago and Alton R. R. Co. v. Becker*, 76 Ill., 25, 1875.

360. Contributory negligence of parents. The fact that a child under the age of discretion is upon a railroad track, where trains are frequently passing, without a proper attendant, is only *prima facie* evidence of negligence in a parent, and is subject to explanation; and it is for the jury to determine, from the evidence, whether the explanation is sufficient to repel the presumption of negligence. *St. Louis, Iron Mountain and Southern R'y Co. v. Freeman*, 38 Ark., 41, 1880; 4 Amer. & Eng. R. R. Cases, 608.

361. — Parents who permit their children to trespass upon a railway track are guilty of contributory negligence. *Cauley v. Pittsburgh, Cincinnati and St. Louis R'y Co.*, 95 Pa. St., 398, 1880; 2 Amer. & Eng. R. R. Cases, 4; *Philadelphia and Reading R. R. Co. v. Long*, 75 Pa. St., 257, 1874; *Evansville and Crawfordville R. R. Co. v. Wolf*, 59 Ind., 89, 1877; *St. Louis, Iron Mountain and Southern R'y Co. v. Freeman*, 38 Ark., 41, 1880; 4 Amer. & Eng. R. R. Cases, 608.

362. — It is negligence *per se* for parents to allow an infant of six years to make use of a railroad track for a play-ground, and to lie down upon it unattended, and this, whether the child was asleep or awake. *Meeks v. Southern Pacific R. R. Co.*, 52 Cal., 602, 1878; 20 Amer. R'y Rep., 115. But see, also, *Meeks v. Same*, 56 Cal., 513. 1880.

363. — If the negligence of a parent, or person standing *in loco parentis*, materially and proximately contributes to the injury, the defendant is not liable. *Id.*

364. — Where a child two years old strays away from his home, without the knowledge of his parents, and goes upon a railroad track, which is about one hundred feet from his home, and within three minutes after leaving his home is injured by a car running over him, *held*, that it cannot be said, as a matter of law, that the failure of the parents to keep the child away from the track was *per se* negligence contributing to the injury. *Smith v. Atchison, Topeka and Santa Fe R. R. Co.*, 25 Kans., 738, 1881; 4 Amer. & Eng. R. R. Cases, 554.

365. — The negligence of the parent is in the law to be imputed to the infant. *Fitzgerald v. St. Paul, Minneapolis and Manitoba R'y Co.*, 29 Minn., 336, 1882; 8 Amer. & Eng. R. R. Cases, 310; *Stillson v. Hannibal and St. Joseph R. R. Co.*, 67 Mo., 674, 1878.

366. — The court, laying down the above proposition to the jury as a rule of law to be applied by them (because such proposition had been agreed to by both parties to the action), accompanied its instructions with statements to the effect that, in the opinion of the court, the law was really otherwise, and that the proposition charged was perhaps opposed to the weight of reason and of authority. *Held*, to be error. *Fitzgerald v.*

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St. Paul, Minneapolis and Manitoba R'y Co., 29 Minn., 336. 1882.

367. — The mere fact that a boy, between six and seven years old, was upon a railway track at or near a street crossing, even though his father had, a short time previous, seen him going toward the track, is not enough to establish contributory negligence as a matter of law. *Johnson v. Chicago and Northwestern R'y Co.*, 56 Wis., 274; 8 Amer. & Eng. R. R. Cases, 471. 1882.

368. — It is negligence in a parent to permit a child between three and four years of age to be upon a railway where trains are frequently passing; and if the child be killed by a train the parent cannot recover damages therefor, unless such killing be done purposely or wilfully. *Jeffersonville, etc., R. R. Co. v. Bowen*, 49 Ind., 154, 1874; *Albertson v. Keokuk and Des Moines R. R. Co.*, 48 Ia., 292, 1878.

369. — Where deceased, a boy, was killed by an engine in crossing defendant's track, if it was clear from the undisputed facts that the boy himself, considering his age and intelligence, did not exercise proper care in crossing the track, or that, in view of his tender years, his mother was guilty of contributory negligence in permitting him to go alone on the errand upon which he was sent, the trial court might determine, as a proposition of law, that there could be no recovery. *Ewen v. Chicago and Northwestern R'y Co.*, 38 Wis., 613. 1875.

370. — The court instructed the jury that "looking at the case as the person injured in fact was, as to age and intelligence," if he was not "in the exercise of ordinary care and caution in going on the track, but was guilty of negligence in doing so, and by reason thereof was killed," no recovery could be had, although the defendant was running the engine at an unlawful speed; but if he was of such tender years as to be unfit to be allowed to go alone in such a place, and not capable of exercising ordinary care, it was negligence on the part of those having him in charge to allow him to do so; and "if the injury was occasioned or contributed to by reason of his inability to exercise ordinary care," plaintiff could not recover. *Held*, that there was no error, as against defendant, in these instructions, nor in a refusal to

further charge that if the mother sent the boy across the tracks, and failed to caution him to use care in crossing them, she was guilty of negligence which would prevent a recovery. *Ib.*

371. — When the parents of an infant are unable to give him their personal care, and intrust him to the supervision of a suitable person, the negligence of the latter cannot be imputed to the parents, and will not defeat a recovery for negligence resulting in the death of the infant. *Walters v. Chicago, Rock Island and Pacific R. R. Co.*, 41 Ia., 71. 1875.

372. — A child two years of age, without the knowledge of its parents, escaped from its home and strayed upon a railroad track, where it was injured. It did not appear how it got upon the track, or that it was ever known to have been there before, or that its absence had been discovered when the accident occurred. Its father was a butcher, and at the time was at his shop in another part of the city. Its mother, besides the care of her household duties, in which she had no help, had charge of an infant about one month old. *Held*, that under these circumstances the father could not, as a matter of law, be held chargeable with negligence in permitting the escape of the child. *Frick v. St. Louis, Kansas City and Northern R'y Co.*, 75 Mo., 542, 1882; 10 Amer. & Eng. R. R. Cases, 776.

373. — The operation of a railway over and along public highways in a village or city being necessarily attended with great peril to human life railway companies are held to the utmost care on the part of their servants to avoid inflicting injury under such circumstances. And in this action against a company for the killing of a child of six years by a train while crossing a city street, a judgment of non-suit is reversed on the ground that the questions of negligence on defendant's part, and contributory negligence of the child or its parents, should have been submitted to the jury on the evidence. *Johnson v. Chicago and Northwestern R'y Co.*, 49 Wis., 529, 1880; 1 Amer. & Eng. R. R. Cases, 155.

374. *Depot grounds.* The fact that a boy had been admonished to keep away from the depot as a place of danger would not con-

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stitute him a trespasser in going there. He was injured by a projecting timber from a freight car. *Held*, that the liability of the railway company embraced a want of ordinary care, and was not confined to the result of wanton acts. *Hicks v. Pacific R. R. Co.*, 64 Mo., 480, 1877.

375. Fence. Section 1289 of the Iowa Code of 1873, providing that "any corporation operating a railway, that fails to fence the same against live-stock running at large, at all points where such right to fence exists, shall be liable to the owner of any stock injured or killed by reason of the want of such fence, or for the value of the property or damage caused, unless the same was occasioned by the wilful act of the owner or agent," does not impose on such corporation the absolute duty of fencing, and it will not be liable for an injury caused to a child by reason of the absence of a fence alone, no other fault or negligence being charged. *Walkenhauer v. Chicago, Burlington and Quincy R. R. Co.*, 17 Federal Reporter, 136, 1882; *Walkenhauer v. Chicago, Burlington and Quincy R. R. Co.*, 3 McCrary (U. S. C. C.), 553, 1882. See, also, *Fitzgerald v. St. Paul, Minneapolis and Manitoba R'y Co.*, 29 Minn., 336, 1882; 8 Amer. & Eng. R. R. Cases, 310.

376. — The defendant's line crossed a public foot path on the level; but the defendant had not erected any gate or stile as provided by 8 and 9 Vict., c. 20, s. 61. The plaintiff, a child of four years and a half old, having been sent on an errand, was shortly afterwards found lying on the level crossing, a foot having been cut off by a passing train; *held*, that there was evidence to go to the jury that the accident was caused by the neglect of the defendant to fence. *Williams v. Great Western R'y Co.*, Law Reports, 9 Exchequer Cases, 157, 1874; 9 Eng. (Moak), 469.

377. Negligence of employes. Where a railroad track is constructed in a populous neighborhood near a city, and children often go upon the track, and a portion of the track has a steep grade down which cars will run with great force when the brakes are loosened, and the persons operating the road loosen the brakes of a car loaded with coal, and let it run down this steep grade, without

any person being on the car, or without any means of stopping it, and without first looking to see whether the track was clear, or whether any person was on the track or not, and a child who was on the track was run over and injured, and there is a conflict in the evidence as to whether the child could have been seen by the persons operating the road before they loosened the brakes,—*held*, that the court cannot say, as a matter of law, that the persons operating the road were not guilty of negligence; but it is a question of fact, which should be submitted to the jury. *Smith v. Atchison, Topeka and Santa Fe R. R. Co.*, 25 Kans., 738, 1881; 4 Amer. & Eng. R. R. Cases, 554.

378. Sitting under train. Where a boy sitting on trestle work under one of a train of freight cars was run over and killed by the starting of the train, an instruction was *held* proper which declared, as a matter of law, that his position was an unsafe one, without leaving the question to the jury to determine, under all the circumstances, *Ostertag v. Pacific R. R. Co.*, 64 Mo., 421, 1877.

379. Speed. A child about nine years old was sent by his mother, who resided in Harrisburg, near defendant's railway, on an errand across the road; whilst on the track he was killed by an engine going westward; there were iron-works and houses for the hands on the opposite side of the track at that point, which was in the outskirts of the city; and the hands of the works and other persons were frequently crossing about the place. East of where the boy was struck was a curve which prevented the engine-driver from seeing him till within too short a distance to stop the train after he was seen. There was no ordinance of the city limiting the rate of running trains at that point. There was evidence that the train was running at a high rate of speed. *Held*, that whether the train was running at a rate of speed which was safe and prudent under the circumstances was for the jury. *Pennsylvania R. R. Co. v. Lewis*, 79 Pa. St., 33, 1875.

380. Streets. In a suit brought on behalf of a child two years of age to recover damages for injuries sustained by being run over by a train within the limits of a city and be-

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tween two streets, the testimony was conflicting as to the length of time the child was on the track before she was run over, but the track was level, the view between the streets was unobstructed, the road was unfenced, there were dwellings on either side, there was a path leading across the track near the spot where the injury occurred, and the train was approaching a crossing. *Held*, that in view of all these circumstances, if the employes of the company in charge of the train saw, or by the exercise of ordinary care could have seen, the child in time to avoid injuring her, and failed to do so, the company was liable; and whether they were using such care was a question of fact for the jury. *Frick v. St. Louis, Kansas City and Northern R'y Co.*, 75 Mo., 595, 1882; 8 Amer. & Eng. R. R. Cases, 280.

381. Switch track. Where a railroad company constructed a switch track, six hundred and sixty-seven feet in length, on its own land, near a small village, making part of the grade at the rate of eighty feet to the mile, and afterward, for several years, operated its road and switch track, and placed a flat-car on the switch track and grade, and properly fastened the same with an ordinary hand-brake, and on the next day a small boy, nearly five years old, went to said car, without any right or authority so to do, and without the knowledge of the company, and not accompanied by any person, and climbed upon said car and unfastened the brake, and the car then, by its own weight, moved down the grade, and the boy either jumped off or fell off, in front of the car, and was run over by the car and killed, *held*, that the company was not guilty of any negligence, nor liable for damages on account of the boy's death. *Central Branch Union Pacific R. R. Co. v. Henigh*, 23 Kans., 347. 1880.

382. Trespassers. Except at public crossings, where the public has a right of way, a railway company has the exclusive right to its track, and it owes no duty to the father of a child of tender years trespassing thereon, nor to the child itself. *Cauley v. Pittsburgh, Cincinnati and St. Louis R'y Co.*, 95 Pa. St., 398, 1880; 2 Amer. & Eng. R. R. Cases, 4.

383. — An eight-year-old boy trespassing

upon the premises of a railway company got on the step of the engine, and was ordered off by the fireman, and as he jumped off he fell. The engine was started at that moment, and the tender passed over his leg. He was a boy of more than average intelligence, and had been warned against going on the premises or riding on the engine. *Held*, that the company could not be held liable for the injury without showing that the engine-driver, or other employes of the company in charge of the engine, knew that the child was in the way, or that they had been reckless or negligent in the management of the engine, or could have anticipated the injury. *Chicago and Northwestern R'y Co. v. Smith*, 46 Mich., 504; 1881; 4 Amer. & Eng. R. R. Cases, 535.

384. — A railway company is responsible for an injury to a child trespassing on its track, where the injury might have been prevented had the employes of the company used ordinary care in keeping an outlook. *Texas and Pacific R'y Co. v. O'Donnell*, 58 Tex., 27. 1882.

385. Verdict. Where the repugnancy between answers to interrogatories and the general verdict is not such that it could not have been removed by evidence properly admissible under the issues in the cause, it is not available to defeat the general verdict, even though all the facts necessary to justify the rendition of a judgment on such general verdict do not appear in the special findings. The special findings, in case of the killing of a child, examined. *Indianapolis and Vincennes R. R. Co. v. McCaffrey*, 63 Ind., 552. 1878.

386. — *Inconsistent findings.* While defendant's train was running at an unlawful speed within the limits of a city, a boy nearly ten years of age attempted to cross the track in front of it, and, in attempting to do so, was killed. The jury found that he was in a position to see the train before he ran upon the track, and that he had sufficient intelligence to know the danger he was incurring, but also found that, in the circumstances of the case, he could not have avoided the injury by the exercise of ordinary care. There was no evidence tending to show any necessity for his crossing before the train should pass. *Held*, that the findings are incon-

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sistent, and a judgment against the defendant must be reversed for a new trial. *Haas v. Chicago and Northwestern R'y Co.*, 41 Wis., 44. 1876.

387. Walking on bridge. When a child, who was walking upon a railroad bridge, fell therefrom as a train was passing over, it was held, in an action against the company by his administratrix, that it was not necessary for plaintiff to prove that the child was struck by the train to enable her to recover, but that the defendant was liable if the fall was occasioned by the negligent acts of its employes, in the absence of negligence on the part of child. *McMillan v. Burlington and Mo. River R. R. Co.*, 46 Ia., 231, 1877; 16 Amer. R'y Rep., 239.

VI. INJURIES CAUSING DEATH.

[See title INJURIES CAUSING DEATH.]

VII. DAMAGES.

[For further decisions in relation to damages, see the other subdivisions of this title. Also title DAMAGES.]

388. Medical expenses. The plaintiff sued as the administratrix of her late husband, who, while crossing the defendant's railway at a level crossing, was, through the negligence of the defendant, run over by an engine and sustained personal injuries, which prevented him from following his occupation and earning wages, and caused him to incur expenses for medical attendance and nursing, whereby his personal estate was diminished in value; *held*, that the plaintiff could not sue in respect to damage to the intestate's estate arising, as above mentioned, from the tortious injury to the intestate's person, and that the action was therefore not maintainable. *Pulling v. Great Eastern R'y Co.*, Law Reports, 9 Queen's Bench Division, 110, 1882; 6 Amer. & Eng. R. R. Cases, 438.

389. Punitive damages. In an action against a railway company to recover damages for personal injuries caused by the failure and neglect to keep in proper repair a bridge over a public highway, the plaintiff may recover exemplary or punitive damages, if the negligence was gross; and the

degree of negligence is a question for the jury, under proper instructions from the court. *South and North Ala. R. R. Co. v. McLendon*, 63 Ala., 266. 1878.

VIII. DEFECTS IN ROADWAY, MACHINERY, ETC.

390. Pitfalls. The plaintiff, while crossing the private grounds of a railway company, fell into an unprotected pit between the tracks and was injured. At most there was only a license by the company to cross and no invitation. *Held*, that the company was not liable. *Morgan v. Pennsylvania R. R. Co.*, 19 Blatchford (U. S. C. C.), 239. 1881.

IX. DEPOT GROUNDS.

391. Contributory negligence. Where a railroad right of way passes over ground not used by any person, save employes of the company, and an engineer, driving an engine along the tracks of the company, had no reason, under the circumstances, to apprehend the presence of the plaintiff or any other person upon such track, a failure on his part to take precautions to discover such presence is not negligence on the part of the company. *Illinois Central R. R. Co. v. Frelka*, 9 Bradwell (Ill.), 605. 1881.

392. License to pass. Where a street, running north and south, extended southward only to the northern line of the grounds of a railway company, and there was no access to it from the south except across those grounds, and both the employes of the company and the public generally had been in the habit of crossing such grounds to and from such street, with the knowledge of the company, and without objection made, *held*, in an action against the company for injuries sustained by one while so passing over the defendant's track, that the facts showed an implied license on the part of the company to all persons to pass over that portion of its grounds, and that it was not necessary, in order to a recovery, that the plaintiff should show defendant guilty of gross negligence. *Delaney v. Milwaukee and St. Paul R'y Co.*, 33 Wis., 67. 1873.

393. Public use. Depot grounds and passenger houses are *quasi* public, and a person

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going to such houses and passing over such depot grounds in a proper manner is not a trespasser; but where persons go upon or pass over the grounds connected with railroad depots, they are presumed to know that the place is dangerous, and hence are required to use care and prudence commensurate with the known danger of the place. *Illinois Central R. R. Co. v. Hammer*, 72 Ill., 347. 1874.

394. Unloading cars. Where a person was engaged in unloading coal from a car upon a side-track of a railroad, by direction of an agent of the company, and while thus engaged was thrown from the car by reason of other cars being violently pushed against it by a locomotive in charge of the servants of the company, whereby he was injured, it was held not to have been the duty of such person to be on the constant watch for approaching trains on the side-track, but the law would impose upon the company the duty to use all necessary precaution, and to give proper signals to warn of danger. *Illinois Central R. R. Co. v. Shultz*, 64 Ill., 172. 1872.

395. — At the defendant's station at C. it was the habit to unload coal wagons by shunting them and tipping the coal into cells; it was also the practice of the consignees of the coal, or their servants, to assist in the unloading, and for that purpose to go along a flagged path by the side of the wagons. The plaintiff was consignee of a coal wagon, which could not be unloaded in the usual way on account of all the cells being occupied. With the permission of the station-master, he went to his wagon, which was shunted in the usual place, took some coal from the top of the wagon, and descended on the flagged path. The flag he stepped on gave way, and he fell into one of the cells and was injured. Held, that, although not getting his coal in the usual mode, the plaintiff was not a mere licensee, but was engaged, with the consent and invitation of the defendant, in a transaction of common interest to both parties, and was, therefore, entitled to require that the defendant's premises should be in a reasonably secure condition. *Holmes v. North Eastern R'y Co.*, Law Reports, 4 Exchequer Cases, 254. 1869.

396. — liability of persons negligently moving cars. It is negligence for persons engaged in loading cars on a railroad track to put a car in motion without making any provision for stopping it, or examining to see whether the brakes are in order, or examining to see whether any person is on or about other cars on the same track with which the one put in motion will necessarily collide, and if injury results to one repairing cars who is guilty of no negligence himself, the parties putting the car in motion will be liable. *Noble v. Cunningham*, 74 Ill., 51. 1874.

X. EVIDENCE.

[See *ante*, p. 763 of this title, subdivision IV, Negligence.]

397. Age of plaintiff; child. Evidence of the age of the plaintiff is admissible to show that he exercised such care as was reasonably to be expected of him. *Elkins v. Boston and Albany R. R. Co.* 115 Mass., 190, 1874; 7 Amer. R'y Rep., 456.

398. Burden of proof. Where a person has been killed at a railway crossing and there are no witnesses of the accident, to authorize a recovery against the company the circumstances must be such as to show that the deceased exercised proper care for his own safety. Where the circumstances point just as much to negligence on his part as to its absence, or point in neither direction, a recovery cannot be had against the railroad company. *Cordell v. New York Central and Hudson River R. R. Co.*, 75 N. Y., 330. 1878. See, also, *Willoughby v. Chicago and Northwestern R. R. Co.*, 37 Ia., 432. 1873.

399. — The burden of showing itself free from fault is not thrown upon a railway company by the statute, in case of a trespasser being injured. Rule applied to a small boy killed in jumping on the platform of a passing train. *Sommers v. Miss. and Tenn. R. R. Co.*, 7 Lea (Tenn.), 201. 1881.

400. City ordinances. A city ordinance limiting the speed of trains in one part of a city is not admissible to show negligence in the operation of trains in another part of the city. *Calligan v. N. Y. Central and Hudson River R. R. Co.*, 59 N. Y., 651. 1874.

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401. Competency. In an action against a railway company to recover damages for killing plaintiff's testator while riding on the track, on horseback, the defendant cannot be allowed to prove "that there was danger to employes on the train in running over stock," nor that other persons had been notified not to travel on the track. *Tanner v. Louisville and Nashville R. R. Co.*, 60 Ala., 621. 1877.

402. Crossings. It is competent for a witness to testify that very near the crossing a train was going at a high rate of speed without giving signals; and it is then a question for the jury to determine whether the facts constituted negligence. *Black v. Burlington, Cedar Rapids and Minnesota R'y Co.*, 38 Ia., 515. 1874.

403. — In actions of this character, it is incumbent on the plaintiff to make out a *prima facie* case in his favor, showing that the damages claimed by him resulted from the negligence of the defendant. *Behrens v. Kansas Pacific R'y Co.*, 5 Colo., 400, 1880; 8 Amer. & Eng. R. R. Cases, 184.

404. — The declaration alleged that the company neglected to keep the crossing in repair, there being no averment that the condition of the crossing contributed to the injury, but the gravamen of the action was the neglect to give the statutory signal or warning before reaching the crossing, and neglect in not slackening the speed of the train; *held*, that evidence of the condition of the crossing was not admissible. *Toledo, Wabash and Western R'y Co. v. Jones*, 76 Ill., 311. 1875.

405. — There is no general duty on railway companies to place watchmen at public footways crossing the railway on a level; but it depends upon the circumstances of each case whether the omission of such a precaution amounts to negligence on the part of the company. A railway was crossed by a public footway on a level, and was protected by gates on each side of the line, and caution boards were placed near the gates. The view of the line from one of the gates was obstructed by the pier of a railway bridge crossing the line; but on the level of the line it could be seen for three hundred yards each way. A woman approaching the line by that gate was detained by a luggage

train on her side, and, immediately on its having passed, crossed the line, and was run down and killed by a train coming along the other line of rails. There was no evidence of negligence in the mode of running the trains. *Held*, that there was no evidence of negligence on the part of the company, but that there was evidence of negligence on the part of the deceased. *Stubley v. London and North Western R'y Co.*, Law Reports, 1 Exchequer Cases, 13. 1865.

406. Darkness. The action being for negligence in causing the death of plaintiff's intestate, by running an engine over him at a street crossing, the accident having happened in the dark, immediately after another train, with a bright head-light, had passed the crossing, *held*, it was proper, under the circumstances, to admit evidence how long the eye requires, after looking at a brilliant light, to recover its natural power of sight. *Shaber v. St. Paul, Minneapolis and Manitoba R'y Co.*, 28 Minn., 103, 1881; 2 Amer. & Eng. R. R. Cases, 185.

407. Failure of proof. A railway company held not to be liable for the injury to the deceased, where there was no evidence to show how she came to her death, excepting that she must in some way have been struck by a passing train. *Northern Central R'y Co. v. State*, 54 Md., 113, 1880; 6 Amer. & Eng. R. R. Cases, 66.

408. — The evidence held insufficient to sustain a verdict against a railway company for a personal injury. *Chicago, Burlington and Quincy R. R. Co. v. Rosenfeld*, 70 Ill., 272, 1873; *Donaldson v. Milwaukee and St. Paul R'y Co.*, 21 Minn., 293, 1875; 20 Amer. R'y Rep., 15.

409. — An action in the name of the state was brought against a railroad company to recover damages for a death alleged to have been caused by the negligence of the defendant. The deceased was found under the cars of the defendant mortally wounded. There was no testimony showing in what manner he got under the cars. Whether he was attempting to get on them while in motion, or fell while attempting to cross the track, was not explained by the evidence. The cars were on a siding, and going at the rate of one mile an hour. *Held*, that the jury were properly instructed that, "under

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the pleadings and evidence in the cause, the plaintiff was not entitled to recover." *State v. Baltimore and Ohio R. R. Co.*, 58 Md., 221, 1881; 10 Amer. & Eng. R. R. Cases, 723.

410. Failure to use employes as witnesses. At the trial of an action against a railway company for personal injuries occasioned to the plaintiff's intestate, he being struck by an engine, if the plaintiff fails to sustain the burden of proving negligence on the part of the defendant, no inference can be drawn, adverse to the defendant, from the fact that the engine-driver and fireman who were in charge of the engine at the time of the accident were in court, and were not called as witnesses by the defendant. *Tully v. Fitchburg R. R. Co.*, 134 Mass., 499, 1883.

411. Habit of deceased. Evidence that, on former occasions, the deceased attempted to get upon moving trains is incompetent. *Peoria and Pekin Union R'y Co. v. Clayberg*, 107 Ill., 644, 1883.

412. Non-suit. The plaintiff's evidence tending to show negligence on defendant's part, and not conclusively showing any contributory negligence on his own part, the court erred in directing a non-suit. *Gower v. Chicago, Milwaukee and St. Paul R'y Co.*, 45 Wis., 182, 1878.

413. Opinions. In an action against a railway company for the negligent killing of a child upon the track, it was held proper for the engine-driver, when asked why he did not see the child, to testify that the child could not possibly be on the track without his seeing it, unless it got on from the ditch on the left-hand side of the engine. This was a matter of knowledge and not of opinion. *Marcott v. Marquette, Houghton and Ontonagon R. R. Co.*, 49 Mich., 99, 1882; 8 Amer. & Eng. R. R. Cases, 306.

414. — The engineer, in charge of the train at the time the accident happened, cannot be allowed to testify that he used "all the means he had to stop the train," but should state what means he did use. So, he cannot be asked "whether the ground and bearing of the road-bed were such as would have permitted the deceased to escape injury by the locomotive and cars, but for his own conduct," etc. *Tanner v. Louisville and Nashville R. R. Co.*, 60 Ala., 621, 1877.

415. Presumption of negligence. Where a train of cars and a wagon collide at a railroad crossing at which, owing to a high bank and a curve in the road, the locomotive could not be seen or heard by the driver of the wagon until within ten seconds in time and three hundred feet in distance, the jury are not bound to infer from the presence of the wagon on the track at the time of the collision that the driver did not, in the absence of the usual signal by the bell, use proper care. *Richey v. Mo. Pacific R'y Co.*, 7 Mo. App., 150, 1879.

416. — In such a case negligence will not be presumed on either side; and where the driver is killed by the collision, the plaintiff is not bound to establish affirmatively, by the evidence of eye-witnesses, that the deceased did not by his negligence contribute to the injury. *Ib.*

417. Presumption that track is clear. The servants of a railway company operating its trains in the country at night have a right to assume that the track is clear, and are under no obligations to provide for the safety of persons who may be thereon. Even if they know the track is used as a foot-path, this will not exonerate any one using it from the duty of taking proper care to avoid injury. *Yarnall v. St. Louis, Kansas City and Northern R'y Co.*, 75 Mo., 575, 1882; 10 Amer. & Eng. R. R. Cases, 726.

418. Rate of speed. Where the question of the speed of the train is involved, opinions of witnesses may be received as to that fact. *Chicago, Burlington and Quincy R. R. Co. v. Johnson*, 103 Ill., 512, 1882; 8 Amer. & Eng. R. R. Cases, 225.

419. — On the question at what speed an engineer drove a railway train at a certain time and place, evidence of the speed at which he drove the same train at the same place on other days may be admitted. Whether such evidence should be excluded for remoteness of time or place is a question of fact. *State v. Boston and Maine R. R. Co.*, 58 N. H., 410, 1878.

420. — Testimony showing how far a train of cars ran after striking a person is competent evidence in a suit against the railroad company to recover damages for causing the death of the person struck, as tending to show the train was running at a greater

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speed than allowed by ordinance of the city in which the accident occurred, and also that the train was not under proper control. *Pennsylvania Co. v. Conlan*, 101 Ill., 93, 1881; 6 Amer. & Eng. R. R. Cases, 243.

421. Signals. While, in actions for injuries from trains at crossings, testimony that the witnesses did not hear a signal given by blowing the whistle is not, as a rule, so conclusive as testimony of the same number of witnesses that they did hear it, yet this rule may be greatly modified by the character and interest of the witnesses, their means of knowledge and manner of testifying, and other circumstances; and in a particular case, held that there was no such preponderance of evidence against the special finding of the jury on that question as will warrant a reversal of the judgment. *Urbanek v. Chicago, Milwaukee and St. Paul R'y Co.*, 47 Wis., 59, 1879; 21 Amer. R'y Rep., 58; *Eilert v. Green Bay and Minnesota R. R. Co.*, 48 Wis., 606, 1879.

422. — It is not the law that the jury should give more weight to testimony as to signals not being given than to affirmative testimony that the signals were given. It seems that the rule would be to the contrary. *Chicago and Alton R. R. Co. v. Robinson*, 106 Ill., 142, 1883.

423. — The only evidence of the failure to ring the bell was the testimony of the plaintiff that he did not hear it, and proof of the fact that the engineer appealed to another employe to say if the bell was not rung, when he learned that it had been claimed that it had not been rung. *Held* sufficient to be submitted to the jury. *Sutherland v. N. Y. Central and Hudson River R. R. Co.*, 41 N. Y. Superior Ct., 17, 1876.

424. Trespasser. Where a person walking upon a railway track was killed by a train, in an action for damages, evidence tending to show whether or not the deceased was a trespasser upon the track was properly admitted, to aid the jury in determining the measure of care required by defendant, and the ultimate fact of negligence. *Murphy v. Chicago, Rock Island and Pacific R. R. Co.*, 38 Ia., 539, 1874.

425. Verdict of coroner's jury. The fact that the jury of inquest had found a verdict

in the case is also inadmissible. *Central R. Co. v. Moore*, 61 Ga., 151, 1878.

426. Wealth of parties. The fact that the widow who sues for the killing of her husband worked in the field for a livelihood after his death is immaterial and irrelevant to the issue on trial, and should not, therefore, go to the jury as evidence. *Central R. Co. v. Moore*, 61 Ga., 151, 1878.

- XI. FRIGHTENED TEAMS.

[See title FRIGHTENED TEAMS.]

427. Contributory negligence. The plaintiff's intestate was riding upon a load of hay, near to and on a line diagonal with the railroad track, upon a down grade. The team, which was driven by another person, became frightened by a train coming from behind, and at the foot of the grade sprang across the track; the wagon was struck by the train and the plaintiff's intestate killed. *Held*, that the question of his contributory negligence was properly left to the jury, and that a verdict in favor of the plaintiff would not be set aside. *Massoth v. Delaware and Hudson Canal Co.*, 6 Hun (N. Y.), 314, 1876; *Same v. Same*, 64 N. Y., 524, 1876.

428. — The act of leaving a span of horses unhitched in close proximity to a railroad, at a time when the train usually comes along, is negligence, and if the owner afterwards, when the train arrives, and when the horses have moved to the track, attempts to rescue them and is injured, he is guilty of additional negligence, which proximately contributes to his injury, and he cannot recover damages. *Dewille v. Southern Pacific R. R. Co.*, 50 Cal., 383, 1875; 12 Amer. R'y Rep., 180.

429. Hand-car. Where it appeared in evidence that the public highway was rendered unsafe for travel by reason of a ditch dug across it by the company, and plaintiff drove up to a crossing on the depot grounds of defendant, near which lay a hand-car bottom upwards, and another car, loaded with wood, extended partly over the crossing, but leaving sufficient room to pass, and plaintiff's horse shied at these cars, whereby plaintiff was thrown from his buggy and injured, it was held that the company was not guilty of negligence in such an arrange-

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ment of its cars, and that a motion for a non-suit should have been sustained, or the jury directed to find a verdict for the company. *Atchison and Nebraska R. R. Co. v. Loree*, 4 Neb., 446. 1876.

430. Pleading. A petition charged that in attempting to cross a railroad track, on depot grounds of defendant, the horse which plaintiff was driving became frightened at "an arrangement and scarecrow, caused by the placing of cars and other implements" near the crossing in such a manner as to present "a horrid and frightful appearance," whereby plaintiff was thrown from his buggy and injured. *Held*, that the facts stated were insufficient to constitute a cause of action against the company. *Id.*

431. Signals. Plaintiff was driving in a buggy upon a highway crossed by defendant's track. She was accustomed to drive and had a steady horse. She approached the track with great caution, looking and listening for a train; a train approached without giving the statutory warnings; in consequence of obstructions plaintiff did not see its approach until she was within three rods of the crossing; she could not turn around, her horse became frightened, she backed it about three rods, and at a loud blast of the whistle given at the crossing it turned around and she was thrown from the buggy and injured. *Held*, that the jury were authorized to find that, if the warning had been given, she could and would have stopped in time to escape danger, and that because it was not given she was lured on, without any fault on her part, to a place of danger, and that these facts authorized a verdict in her favor. *Voak v. Northern Central R'y Co.*, 75 N. Y., 320. 1878.

432. — If a traveler upon a highway crossing is free from fault, and does not hear an approaching train, and the railway company is guilty of negligence in not giving the proper signals, it cannot escape responsibility because the horse of the traveler, frightened by the rapid approach of the engine, suddenly starts forward, and, getting beyond control, draws the wagon on to the track and so exposes the traveler to injury. *Cosgrove v. New York Central and Hudson River R. R. Co.*, 87 N. Y., 88, 1881; 6 Amer. & Eng. R. R. Cases, 35.

XII. GENERAL MATTERS.

433. Change of statute. The rights of the party injured in this case were determined by the statute in force at the time he received his injuries, and he can derive no advantage from a subsequent statute enacted before the commencement of his action, enlarging the liability of the railway company. *Payne v. Chicago, Rock Island and Pacific R. R. Co.*, 44 Ia., 236. 1876.

434. Indictment of employe; acquittal. The indictment and acquittal of the engineer-driver, for the neglect causing the death of the injured party, is no defense to a civil action for damages. *Ham v. Grand Trunk R'y Co.*, 11 Upper Canada (Common Pleas), 86. 1861.

435. Injury received in saving life of an infant. The facts and evidence considered in which a railway company was held liable for an injury received by a person in endeavoring to save the life of a little child upon the track. *Schwier v. N. Y. Central and Hudson River R. R. Co.*, 90 N. Y., 558. 1882.

436. Lookout. A railroad company will not be liable for a failure to comply with the requirements of the statute when a person appears upon the road, if, after such person could have been seen by the lookout, a compliance was impossible. *East Tenn. and Va. R. R. Co. v. Swaney*, 5 Lea (Tenn.), 119. 1880.

437. Owner of live stock assisting to unload his property. The plaintiff sent a heifer (which was put into a horse-box) by defendant's railway to P. station. On the arrival of the train at the station, there being only one porter available to shunt the horse-box to the siding, from which alone the heifer could be delivered to the plaintiff, he was allowed, in order to save delay, to assist in shunting the horse-box, and while he was so assisting he was run against and injured by a train which was negligently allowed to come out of the siding. There was evidence from which the jury might find that the plaintiff was assisting in the shunting with the assent of the station-master. *Held*, that the plaintiff was not a mere volunteer assisting the defendant's servants, but was on the defendant's premises with its consent

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for the purpose of expediting the delivery of his heifer; and the defendant was therefore liable to him for the negligence of its employes, according to the principle of *Holmes v. North Eastern R'y Co.* (Law Rep., 4 Ex., 254; Law Rep., 6 Ex., 123). *Wright v. London and North Western R'y Co.*, Law Reports, 10 Queen's Bench Cases, 298, 1875; *Same v. Same*, Law Reports, 1 Queen's Bench Division, 252, 1876; 16 Eng. (Moak), 314.

438. Passenger alighting from steamboat. The rule which makes a traveler on a highway guilty of contributory negligence if he does not exercise a certain degree of care, caution and judgment before crossing a railway, was held inapplicable in a case where a woman who had just been landed from a steamboat upon a long pier on which there were about two hundred persons, was run over by a train of freight cars, loaded with iron and running down a heavy grade upon the wharf, without any engine. *Held*, moreover, that the facts were sufficient to show gross negligence in the railway company, and that the negligence of the steamboat company, if any, did not relieve it from responsibility. *Malmsten v. Marquette, Houghton and Ontonagon R. R. Co.*, 49 Mich., 94, 1882; 8 Amer. & Eng. R. R. Cases, 291.

439. — A passenger who has just landed from a steamboat is not so identified with the steamboat company as to make the company solely liable for an injury suffered by him from another quarter immediately afterwards. *Ib.*

440. Person prostrated by a flt. If one who enters upon the track of a railway when no train is in sight should, from providential cause, become insensible while there, and in that condition be run over and injured by a train while lying in open view, the company would be liable in damages on account of that negligence on the part of its agents in not discovering the helpless man, which was the proximate cause of the injury. *Houston and Texas Central R'y Co. v. Sympkins*, 54 Tex., 615, 1881; 6 Amer. & Eng. R. R. Cases, 11.

441. Pleading. A general averment of negligence is sufficient without stating the particular acts constituting such negligence,

St. Louis and South Eastern R'y Co. v. Mathias, 50 Ind., 65, 1875; 8 Amer. R'y Rep., 381.

442. — A complaint, alleging that the plaintiff was on the track of the defendant's road, and without any warning to him, and without any fault on his part, the engine was negligently run against him, etc., is substantially good. Such complaint is also good, if it is alleged that the defendant wilfully and purposely, and with great force, ran the locomotive against the plaintiff. *Terre Haute and Indianapolis R. R. Co. v. Graham*, 46 Ind., 239, 1874; 6 Amer. R'y Rep., 353.

443. — In a suit against a railway company for personal injuries, the declaration alleged that the defendant's line crossed a certain highway in a city at grade; that, on a day named, while the plaintiff was crossing the track on said highway, and in the exercise of due care, he was struck by one of the defendant's engines, and received the injuries complained of, "through the negligence and carelessness of the defendant, who carelessly omitted to give any signal while approaching said highway with said engine, or warning the plaintiff by ringing a bell or blowing a whistle, or by a flagman or otherwise, that it was dangerous or unsafe then to cross by reason of the approach of said locomotive." *Held*, that the declaration set out a good cause of action against the defendant at common law, but did not sufficiently state a cause of action under the statutes of 1874, ch. 372, § 164; and that, under the declaration, the plaintiff could not recover, unless he was using due care when hurt. *Fuller v. Boston and Albany R. R. Co.*, 133 Mass., 491. 1892.

444. — An allegation that the plaintiff could not secure his safety in any other way than urging his horse to pass over the crossing before an approaching train is not materially different, in a legal sense, from the allegation that he believed it impossible to control his horse. *Grows v. Maine Central R. R. Co.*, 69 Me., 412. 1879.

445. — In an action against a railway company to recover damages for the killing of the plaintiff's intestate, through negligence and carelessness in the managing and running of a train of cars, the declaration should show in what such negligence and

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carelessness consisted, and not charge the same in general terms, without disclosing any specific acts or omissions. *Chicago, Burlington and Quincy R. R. Co. v. Harwood*, 90 Ill., 425. 1878.

446. — Amendments may be made that change neither the form nor the cause of action. *McIntire v. Eastern R. R. Co.*, 58 N. H., 137, 1877; *Augusta and Summerville R. R. Co. v. Dorsey*, 68 Ga., 228. 1881.

447. — A declaration alleged that the defendant was bound to keep in repair a certain highway at a point where it crossed its railroad, and that the plaintiff in traveling upon the highway was injured by its defective condition at that point. The defendant pleaded specially that the highway was not a legally laid-out one; that if it was a highway, it was yet laid out many years after the railway was constructed. The court below, on motion of the plaintiff, ordered the defendant to plead the general issue instead of the special pleas, on the ground that they amounted to the general issue. The defendant, instead of thus pleading, afterwards filed a demurrer to the declaration, which the court heard and overruled. *Held*, that the first special plea amounted to the general issue, and was properly rejected. *Allen v. New Haven and Northampton Co.*, 49 Conn., 243, 1881; 10 Amer. & Eng. R. R. Cases, 298.

448. — A complaint which avers that the defendant negligently caused its trains to pass the crossing at unusual speed, and negligently omitted to give any timely signal of its approach by bell or whistle at a proper distance, by reason whereof, etc., is sufficiently specific as to the defendant's negligence. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Martin*, 82 Ind., 476, 1883; 8 Amer. & Eng. R. R. Cases, 253.

449. — In an action against a railway company for damages on account of a personal injury alleged to have been caused by the defendant carelessly running its train against a horse, it is not competent for the plaintiff to prove that the railroad track was not properly fenced or that the cars were not provided with steam brakes, or any other negligence than that averred. *Toledo, Wabash and Western R'y Co. v. Foss*, 88 Ill., 551, 1878; 21 Amer. R'y Rep., 368.

450. Private crossing. If a railway company so constructs a private crossing over its track, at grade, in a city, that it is held out as a suitable place for foot passengers to cross, it is liable in damages for an injury sustained by a person using due care who is thereby induced to enter upon the crossing and is injured by the negligence of the company or its employes. And if the plaintiff, at the time he was injured, was on that part of the crossing so constructed, it is no defense to an action by him for such injury that he entered upon the crossing at a place not so constructed. *Murphy v. Boston and Albany R. R. Co.*, 133 Mass., 121. 1882.

451. — A conveyance in fee, without reservation or exception, to a railroad company of a right of way for its road across a farm, is not a waiver or release of the obligation imposed upon the corporation by the General Railroad Act (§ 44, ch. 140, Laws of 1850), to erect and maintain farm crossings. The statute applies as well to cases where the lands are acquired by purchase as where they are acquired compulsorily by the power of eminent domain. And for a personal injury resulting from a defect in such a crossing the corporation is liable. *Smith v. New York and Oswego Midland R. R. Co.*, 63 N. Y., 58. 1875.

452. Sunday laws. One who travels on Sunday to ascertain whether a house which he has hired, and into which he intends to move the next day, has been cleaned, is not traveling from necessity or charity, and cannot maintain a suit for injuries sustained at a railway crossing, through the negligence of the servants of the railway company. *Smith v. Boston and Maine R. R. Co.*, 120 Mass., 490. 1876.

453. Tennessee; statute. The statutes evidently mean that some person shall be so situated on the lookout that he can see ahead. If the engine-driver cannot see, the fireman must; if the fireman cannot, the engine-driver must. *Nashville and Chattanooga R. R. Co. v. Nowlin*, 1 Lea (Tenn.), 523. 1878.

454. — The failure to observe the statutory requirements will render the company liable, although the injury would not have occurred if they had been observed. Code, § 1166. *Railroad Co. v. Walker*, 11 Heiskell

Constructing improvement — Contributory Negligence.

(Tenn.), 388. 1872. Contributory negligence goes in mitigation of damages. *Ib.*

455. — The statute requires, when obstructions appear upon the road, that the whistle should be sounded, but does not specify the number or character of whistles; and the question is reserved, whether, if an engineer sounded for brakes, that would be a compliance with the statute. *Dinwiddie v. Louisville and Nashville R. R. Co.*, 9 Lea (Tenn.), 309. 1882.

456. — The statute does not specify the number of brakemen there shall be upon the train. This is a regulation left to the railroad company, which must be reasonable and in conformity with general usage and the course of business of railroads. To require one brakeman to each car is unreasonable. *Ib.*

457. Wilful acts. Where an intent, either actual or constructive, to commit an injury, exists at the time of its commission, the injury ceases to be a merely negligent act and becomes one of violence or aggression. *Pennsylvania Co. v. Sinclair*, 62 Ind., 801. 1878.

458. — Contributory negligence is a complete defense to an action for damages for a merely negligent injury. *Ib.*

459. — It is only when the injury is alleged, in terms or substance, to have been wilfully committed, that contributory negligence ceases to be a defense. *Ib.*

460. — Train-men have the right to suppose that a person walking upon the track in front of a train will step off, at least at the last moment, and an injury resulting from a collision with such person under such circumstances will not be sufficient in itself to raise an inference of wilfulness. *Indianapolis and Vincennes R. R. Co. v. McClaren*, 62 Ind., 566. 1878.

INJURIES TO TEAMS AND OTHER PROPERTY.

1. Constructing improvement; obedience to orders; teamster. A railway company was engaged in "rip-rapping" the Missouri river at a point on its line; some ten feet from the bank there was a crack or fissure in the earth, which had been filled up by dirt and sand; that teamsters hauling rock for

the rip-raps were ordered, by the company's superintendent, to drive out between the fissure and the bank; that a teamster employed by a subcontractor to haul rock, having expressed some apprehension, was assured by the superintendent that there was no danger, that the company was responsible; and while the order was being obeyed, the earth caved in, and the team was precipitated into the river. In an action by the subcontractor against the railroad for damages, it was held that, as to the place where the rock was to be delivered, the teamster, although hired by plaintiff, was subject to the control of the superintendent; that as to whether the earth which caved in was apparently dangerous, and known to be so by the superintendent, or was equally open to the observation of the teamster and the superintendent, there being evidence tending to show these facts, these questions were for the jury; that the superintendent represented the company, and that the driver was not his fellow-servant. *Cook v. Hannibal and St. Joseph R. R. Co.*, 63 Mo., 807, 1876; 20 Amer. R'y Rep., 177.

2. Contributory negligence. It appeared by the testimony of plaintiff's witnesses that plaintiff drove his team at a brisk trot upon the crossing, without having stopped to listen for trains; that he had looked, but at a place where a thicket well known to him prevented a view of the track; that if he had looked at any other point he would have seen the locomotive which did the injury. *Held*, that he was guilty of contributory negligence, which debarred him of recovery. *Turner v. Hannibal and St. Joseph R. R. Co.*, 74 Mo., 602, 1891; 6 Amer. & Eng. R. R. Cases, 88.

3. — If a person is driving a four-horse team along a road running parallel with and near to a railroad, and is approaching a crossing, and the air is so filled with dust that he cannot see the railroad; and his wagon makes some noise, and he attempts to cross the track without stopping his team to listen for an approaching train, and his horses are killed by the engine, he is guilty of contributory negligence, and cannot recover damages. *Flemming v. Western Pacific R. R. Co.*, 49 Cal., 258, 1874; 7 Amer. R'y Rep., 265.

Crossings — Passing Between Cars.

4. — A traveler, before sunrise on a foggy and dark morning, approached a railway crossing in a city, stopped about ten steps from it, and looked and listened without getting out of his wagon and going on the track. The view of the track was somewhat obstructed by standing cars, the train came more rapidly than the city ordinance allowed, and there was snow on the track; there was evidence that the bell was not sounded; the wagon was struck, and a horse killed. *Held*, that under the circumstances the question of contributory negligence was for the jury. *Pennsylvania R. R. Co. v. Ackerman*, 74 Pa. St., 265, 1873; 7 Amer. R'y Rep., 165.

5. Crossings. A railway company is not responsible to a traveler, on a public highway, for a collision with the team of the latter at a highway crossing, where the injury was the result of accident alone, without negligence or fault on the part of the company or its employees. *Zeigler v. Railroad Co.*, 5 So. Car., 221. 1873.

6. — A train when crossing an ordinary public highway is not bound, unless special circumstances exist making it necessary, to slacken its ordinary speed, and is therefore not chargeable with negligence for failure to slacken the speed. *Zeigler v. Northeastern R. R. Co.*, 7 So. Car., 402, 1876; *Same v. Same*, 5 ib., 221, 1873.

7. Defective crossing. A railway company is responsible for an injury to a horse's foot occasioned by being caught between a plank and the rail at a crossing, where the space left was greater than necessary for the operation of the cars. *Cuddeback v. Jewett*, 20 Hun (N. Y.), 187. 1880.

8. — In a suit against a railroad company for damages to plaintiff's vehicle, where it appears that the track was out of repair, and in consequence the wagon broke down, and in that condition it was run into by the train, and the state of the road was known to plaintiff at the time, it is proper to submit to the jury the question whether, under the circumstances, plaintiff was guilty of negligence, and also what care and caution he was bound to exercise. *Meyers v. Chicago, Rock Island and Pacific R. R. Co.*, 59 Mo., 223, 1875; 8 Amer. R'y Rep., 473.

9. — In crossing a railroad at a crossing the horse which plaintiff was driving caught his foot in the space between the rail and the plank on the crossing and fell down on the track. Plaintiff alighted and endeavored for about two minutes to extricate the foot, when a train came along and broke the horse's leg. In an action for damages the court non-suited the plaintiff, invoking the rule that he should have "stopped, looked and listened" before approaching the crossing. *Held*, that the rule was not applicable to the case; that the true question was whether the company was guilty of negligence in allowing the track at the crossing to be in an insecure condition, and that this question should have been submitted to the jury. *Baughman v. Shenango and Allegheny R. R. Co.*, 92 Pa. St., 335, 1879; 6 Amer. & Eng. R. R. Cases, 51. See, also, *Payne v. Troy and Boston R. R. Co.*, 83 N. Y., 572, 1881; 6 Amer. & Eng. R. R. Cases, 54.

10. Depot grounds. Plaintiff, going to defendant's warehouse after goods, stopped his wagon on the track nearest the platform, and next to the main track, over which the mail train passed, so near thereto as to be in the way of the engine. *Held*, in a suit to recover damages for the destruction of his wagon by the engine, that his loss was the result of his own negligence, and that he had no right to recover. *Murphy v. Wilmington and Weldon R. R. Co.*, 70 N. C., 437. 1874.

11. Passing between cars. It is not contributory negligence to assume that it will be safe to pass through an open way left by a railway company to give access to its depot, even though the track ends near by and is not protected by snubbing posts. *Grand Rapids and Indiana R. R. Co. v. Martin*, 41 Mich., 667. 1879.

12. — It may be assumed that a railway company, in such case, will take the utmost care to protect persons from injury in going through a passage left by it to give access to the depot, when the passage does not actually cross the railway track. *Id.*

13. — It is for the jury to determine whether it is not negligence in a railway company to omit means to prevent its cars from moving or being driven beyond the

Signal—Bankruptcy Proceedings.

rails, where these, if extended, would cross a passageway left open by the company to give access to the depot. *Ib.*

14. **Signal.** The court instructed the jury "that if they believe, from the evidence, that a bell was not rung or a whistle sounded at a distance of eighty rods from the crossing, and kept ringing and whistling until the crossing was reached, and the plaintiff was lulled into security by reason of such neglect on the part of the defendant, then plaintiff would have the right to recover, even though he was guilty of slight negligence." *Held*, that the instruction was correct. *Chicago and Alton R. R. Co. v. Elmore*, 67 Ill., 176. 1878.

15. — In a suit for damages to a dray by a train, at a street crossing in a city, the negligence of defendant's agents being in question, there was no error in charging that proper diligence required the tolling of a locomotive bell in approaching a crossing. *Atlanta and West Point R. R. Co. v. Wyly*, 65 Ga., 120, 1880; 8 Amer. & Eng. R. R. Cases, 262.

16. — Whether the failure to ring a bell or sound a whistle on approaching a highway crossing by a railroad train, as required by the statute, was the cause of an injury sustained, is a question of fact for the determination of the jury. *Illinois Central R. R. Co. v. Benton*, 69 Ill., 174. 1878.

17. **Signalman.** As a general rule a railway company is not bound to keep a flagman at the intersections of its road with public highways; but where, by reason of the extraordinary danger arising from the location of the track, a flagman is required, or the company relies on the presence of a flagman to negative negligence on its part in the running of trains, whether the conduct of the flagman was proper or not is a question depending upon the circumstances of each case. *Delaware, Lackawanna and Western R. R. Co. v. Toffey*, 38 N. J. Law, 525, 1875; 13 Amer. R'y Rep., 75.

18. — Railway companies are not bound to station flagmen at the crossing of public highways, no matter how dangerous. If the bell is rung or the whistle sounded, as the train approaches the crossing, in compliance with § 806, Revised Statutes, a company fulfils its whole duty, except, perhaps, in a case

where the crossing is of such a character that the employment of a flagman is one of the common and usual means of warning adopted by prudent railroad companies. In such case the omission to employ one might be negligence. *Welsch v. Hannibal and St. Joseph R. R. Co.*, 72 Mo., 451, 1880; 6 Amer. & Eng. R. R. Cases, 75.

INJURY TO TRAINS.

1. **Cattle unlawfully at large.** In an action for damages to live stock the railroad company alleged in its answer, by way of counterclaim, that the plaintiff's stock was knowingly and intentionally permitted to run at large, and on the defendant's premises, in violation of the herd law of the state (Comp. Laws of 1879, p. 933 *et seq.*), whereby the defendant's train was wrecked, and great damage was thereby done to the defendant. The defendant did not admit that it was itself guilty of any fault or negligence, its pleadings did not show that it was, and it denied in its answer all allegations of the plaintiff charging it with fault or negligence. *Held*, that said defense was not defective merely because it failed to allege that the defendant was itself free from all fault and negligence. The defendant's fault or negligence is matter to be shown by the other party. *Central Branch Union Pacific R. R. Co. v. Walters*, 24 Kans., 504. 1880. See, also, *Richelieu v. Atlantic and St. Lawrence R'y Co.*, 2 Decisions des Tribunaux (Lower Canada), 337. 1852.

INSOLVENCY.

See BANKRUPTCY; STOCK AND STOCKHOLDERS.

1. **Bankruptcy proceedings; purchase of liabilities by stockholders.** Where the stockholders of a bankrupt railroad company purchase, in good faith, all the outstanding floating indebtedness of the company, except a few minor claims, and all the creditors, except those representing these few claims, desire such a result, they should be allowed to have the bankruptcy proceedings dismissed; on giving proper security for the payment of the objecting creditors. *Indl-*

Liability of Stockholders — Winding-up Acts.

anapolis, Cincinnati and Lafayette R. R. Co., In re, 5 Bissell (U. S. C. C.), 287. 1873.

2. **Liability of stockholders.** The liability of stockholders of corporations (pursuant to part 2, title 2, ch. 3 of the Revised Code) for debts of the corporation becomes primary and absolute on the dissolution of the corporation; and a bill in equity will lie to enforce such liability, without averring the insolvency of the corporation, and without previous suit against it. *Spence v. Shapard*, 57 Ala., 598. 1877.

3. — **Creditors and stockholders of an insolvent non-resident corporation** may unite in a suit in behalf of themselves and other creditors and stockholders, to enforce the liability of holders of unpaid shares of the capital stock of such corporation, without making the non-resident corporation a party. *Walser v. Seligman*, 13 Federal Reporter, 415. 1892.

4. **Preference; directors.** The directors of an insolvent corporation are trustees for the benefit of its creditors. They cannot make a preference in favor of a debt due to a partnership of which they are members. *Bradley v. Farwell*, 1 Holmes (U. S. C. C.), 433. 1874.

5. **Right to examine debtor.** An order requiring a debtor of the defendant to appear for examination, made on account of his refusal to give the certificate required by § 236 of the Code, for the benefit of an attaching creditor, will not be vacated on the affidavit of such debtor stating that the funds in his hands are held in trust and cannot be applied in payment of the plaintiff's debt. *Baxter v. Missouri, Kansas and Texas R'y Co.*, 4 Hun (N. Y.), 630. 1875.

6. **Services of solicitor; contract of indemnity with subscribers.** A solicitor who was promoting a railway company induced various persons to sign the subscription contract, by assurance that they should incur no liability if the line was not made. Some of these persons were provisional directors. The act was obtained, and contained the usual clause that the preliminary expenses should be paid by the company. The line was not made. The undertaking was abandoned, and the company ordered to be wound up. The solicitor carried in a claim as creditor for professional services in obtaining the

passage of the act. This claim was opposed by some of the contributories, on the ground of the above assurances. *Held* (affirming the decision of Bacon, V. C.), that the solicitor was entitled to prove, for that the assurances made by him could only operate as a contract to indemnify the individuals to whom they were made, and did not exonerate the company in its corporate capacity. *Brampton and Longtown R'y Co., In re*, Law Reports, 10 Chancery Appeal Cases, 177, 1875.

7. **Sheriff's sale of railway.** The assets of an insolvent corporation are a fund for the payment of its debts, and a court of equity will enforce this trust in favor of creditors against the holders of its assets; and the act of assembly of April 4, 1862, authorizing a contractor to issue a writ of *scire facias* on his judgment and proceed as in other cases, does not give a remedy, where a judicial sale has extinguished the corporation and rendered it impossible for him to obtain a judgment against it. *Shamokin Valley and Pottsville R. R. Co. v. Malone*, 85 Pa. St., 25. 1877.

8. **Unfinished line.** The provisions of the act of June 16, 1836, which empower a sequestrator to take possession and assume the control and management of the property of a corporation, are restricted by the act of April 22, 1838, so as not to apply to an unfinished railway. It was the design of the latter act to give to the sequestrator, as the representative of creditors, the earnings of the completed portion of the road, but to preserve the corporate property within the possession, management and control of the corporate officers. *Muncy Creek R'y Co. v. Hill*, 84 Pa. St., 459. 1877.

9. **Winding-up acts.** The proceeds of a call made under the winding-up acts to provide for the payment of a debt of the company may be attached in the hands of the official manager, under the Common Law Procedure Act, to answer a judgment against a creditor. *Warwick and Worcester R'y Co., In re*, 2 De Gex, Fisher & Jones, 354; 63 Eng. Ch., 354, 1860.

10. — Where a settlement scheme seriously affects the rights of outside creditors the court will not confirm it until the written assent of all such creditors is obtained.

Winding-up Acts.

Bristol and North Somerset Ry Co., Law Reports, 6 Equity Cases, 448. 1868.

11. — agreement with subscribers. By the subscribers' agreement of a provisionally registered railway company, prepared by the direction of some of the persons who were named in it to be managing directors, the persons made parties to the deed of the first part (the subscribers) covenanted to indemnify the persons therein named as managing directors (who were expressed to be parties of the third part, as distinct parties, and also to be among the parties of the first part) from all payments, losses and expenses incurred or to be incurred by them in the formation or management of the concern. No one of the persons nominated as managing directors executed the deed or paid any money. One of them died before any subscriber executed the deed, and two others never consented to act. On the company being wound up, *held*, that there had been material misrepresentations of facts on the part of those who caused the deed to be prepared and submitted to the subscribers for execution, and that such persons nominated as managing directors as could be shown to have acted were primarily liable to calls for the payment, whether of the debts of the company or of the costs of winding up, and that until their liability was exhausted, the subscribers who had signed the deed as parties of the first part could not be called upon to contribute. *Held*, also, that the subscribers were entitled to insist on this defense without taking a substantive proceeding to set aside the deed. *Carew's Case*, 7 De Gex, Macnaghten & Gordon, 43; 56 Eng. Ch., 42, 1855. See *Carew's Case*, 5 De Gex, Macnaghten & Gordon, 94; 54 Eng. Ch., 93, 1854.

12. — committee. A. was, in his absence, chosen by the provisional committee of a provisionally registered railway to be one of the managing committee, to whom, by resolutions of the provisional committee then passed, power was given to allot shares and to apply the funds of the company in payment of expenses. The scheme having proved abortive, the allottees recovered their deposits in actions against A. and other persons who had been appointed to be members of the managing committee. The members of the managing committee

thereupon appointed a sub-committee, of which A. was one, to take measures to protect the members of the committee. A. was a constant attendant at the meetings of the sub-committee, and took an active share in providing for some of the demands on the committee of management and resisting others. *Held*, that he thereby sanctioned and adopted the former proceedings of the managing committee, in which he had not taken part, and was liable to contribute in respect of them. *Spottiswoode's Case*, 6 De Gex, Macnaghten & Gordon, 345; 55 Eng. Ch., 344. 1855.

13. — directors' liability. By a private act of parliament, which incorporated the Companies Clauses Act, 1845, it was enacted that F., and certain other persons named, and all other persons who had already subscribed, or should thereafter subscribe, to the undertaking, should be united into a company for the purposes therein mentioned; that the number of directors should be six; that the qualification of a director should be the possession in his own right of fifty shares; that F. and certain other persons should be the first directors of the company, and should continue in office until the first ordinary meeting, and that at that meeting the shareholders might either continue in office the directors appointed by the act, or any of them, or might elect a new body of directors, or directors to supply the place of those not continued in office, the directors appointed by the act being, if qualified, eligible for re-election. F. acted as a director until the first ordinary meeting, which was held in April, 1867. At that meeting he retired from office, and never afterwards had anything to do with the company. He never applied for any shares, nor were any ever allotted to him, nor was he ever placed on the register of shareholders. In May, 1874, the company was ordered to be wound up. *Held*, that F. must be settled on the list of contributories for fifty shares. *Teme Valley Ry Co.*, *In re*, Law Reports, 19 Equity Cases, 353. 1875.

14. — discharge of employees. An order for the winding up of a company is notice of discharge to the servants of the company. *General Rolling Stock Co.*, *In re*, Law Reports, 1 Equity Cases, 846. 1866.

Not Applicable to the Evidence — Time to Prepare.

15. — misapplication of funds; notice.

Two directors of company A. were also directors of company B., and both companies employed the same solicitor. Company A. owed money to its contractor, which, however, was not payable immediately. The contractor had bought shares in the company and was pressed by the stockholders for the money. Company A. agreed to advance him £7,000, and borrowed the money from company B. on the security of a mortgage. The loan was negotiated by one of the persons who was a director of both companies, and the solicitor who acted for both companies prepared the mortgage. Company A. had power under the articles to borrow money, but was not authorized to buy up its own shares. Both companies afterwards were wound up. *Held* (reversing the decision of *Malins, V. C.*), that company B. was not affected by notice of any illegality in the purpose to which the money borrowed was to be applied, and that it was consequently entitled to prove against the estate of company A. under the winding up. *Marseilles Extension Ry Co. v. Credit Foncier and Mobilier of England*, Law Reports, 7 Chancery Appeal Cases, 161, 1871; 1 Eng. (Moak.), 490.

16. — shares as collateral security. A hotel was built at the London terminus of a railway, by a company, on land leased to it by the railway company. The hotel company borrowed money from the railway company to complete its hotel, upon the security of unissued shares, which were placed in the names of trustees, with power to sell the shares and reduce the amount of debt. The hotel was afterwards sold to the railway company, and the hotel company was thereupon wound up. *Held*, upon summons under the winding up, that the two companies being distinct and separate, the railway company was not to be treated as a shareholder in the hotel company, but as a creditor, and was entitled to deduct from its purchase money the advance made upon the security of the shares. *City Terminus Hotel Co., In re*, Law Reports, 14 Equity Cases, 10. 1872.

17. — transfer of shares. The deed of settlement of a joint-stock company provided for the transfer of shares, with the approbation of the directors. Some of the shareholders threatened to take proceedings to

set aside a purchase and lease for fraud, whereupon the directors agreed with them that they should be allowed to transfer their shares on payment to the company of a sum, out of which a claim of one of the directors against the company should be satisfied. The money was paid and the claim satisfied out of it, and the shares transferred to nominees of the directors for a nominal consideration. *Held*, that the transaction was inconsistent with the duty and beyond the power of the directors, and that the shareholders were, notwithstanding the transfer, properly placed on the list of contributories under the winding-up acts. *Bennett's Case*, 5 De Gex, Macnaghten & Gordon, 284; 54 Eng. Ch., 283. 1854.

INSTRUCTIONS.

[Instructions upon different branches of law will be found distributed through this work under the various different titles.]

1. Not applicable to the evidence. The giving of an instruction in a case presenting no evidence to which it is applicable, to the prejudice of the adverse party, is a sufficient ground for reversal. *Case v. Illinois Central R. R. Co.*, 38 Ia., 581. 1874.

2. Should be asked for. If a party wishes instructions to be separately considered, he should ask the court for an instruction to that effect. *Hartson v. St. Paul and Pacific R. R. Co.*, 21 Minn., 517. 1875.

3. Time to prepare. In an action to recover damages for personal injuries, where the only doubtful question was as to the amount that the plaintiff ought to recover, and there were no difficult questions of law involved, and the defendant, who was represented by two counsel, at the close of the testimony presented to the judge four instructions in writing, and requested time to prepare further instructions in writing, and where the amount of the verdict was not grossly excessive, *held*, that the judgment would not be reversed because the court refused to grant further time. *Atchison, Topeka and Santa Fe R. R. Co. v. Frazier*, 27 Kans., 463, 1882; 8 Amer. & Eng. R. R. Cases, 72.

Accident Policy — Policy on Railway Property.

INSURANCE.

See INJURIES CAUSING DEATH; FIRES.

1. Accident policy. An accident policy provided that the company should not be liable for injuries incurred in consequence of the negligence of the assured. *Held*, that riding on the platform or passing from car to car at night, while the train was in full motion, was such negligence as would defeat a recovery. *Sawtelle v. Railway Passenger Assurance Co.*, 15 Blatchford (U. S. C. C.), 216. 1878. See, also, *Bon v. Railway Passenger Assurance Co.*, 56 Ia., 664. 1881.

2. — The falling of a passenger in alighting from the cars is a "railway accident" within a contract of insurance. *Theobald v. Railway Passengers' Assurance Co.*, 10 Hurlstone & Gordon (Exchequer), 45. 1854.

3. — The policy prescribes the terms of a contract of insurance, and when it stipulates that the company will indemnify the assured for loss of time while totally disabled, he cannot recover except upon proof of total disability; nor would the rule be varied if he should be totally disabled in his own pursuit and able to engage in some other employment. *Lyon v. Railway Passenger Assurance Co.*, 46 Ia., 631. 1877.

4. Goods insured by carrier; liability of insurer in the policy. Plaintiff insured goods against fire, in an insurance company of which defendant was treasurer. By condition indorsed on the policy, "goods held in trust, or on commission," were "to be insured as such, otherwise the policy" would "not extend to cover such property." By the policy 15,000*l.* was declared to be insured "on goods their" (plaintiff's) "own, and in trust as carriers" in a certain warehouse; and it was stipulated that the funds of the insurance company were to be liable to pay, reinstate, or make good "to the" "assured" "all damage and loss which the" "assured" should "suffer by fire, on the property" "therein particularized." Another of the conditions indorsed ran thus: "In every case of loss duly proved, the company will either reinstate the property, or the assured shall receive satisfaction to the amount thereof, without discount or deduction." *Held*, in an action on the policy, that, to the

named amount the whole value of goods in the warehouse, in plaintiff's possession as a carrier, was insured by it, and not merely plaintiff's interest as a carrier in such goods. That plaintiff was entitled to recover the whole value of such goods destroyed by fire in the warehouse, although, as the value of such goods exceeded 10*l.*, and the owners had not declared such value to plaintiff, plaintiff was not liable to the owners for such loss, by reason of the Carriers' Act (Stat. 11 G. 4, and 1 W. 4, c. 68, s.1). *Held*, further, that plaintiff would be trustee for the owners of the goods of the amount thus recovered, less plaintiff's charges in respect of the goods. *London and North Western R'y Co. v. Glyn*, 1 Ellis & Ellis, 652; 102 E. C. L., 651. 1859.

5. Other insurance. An insurance policy upon railway property forbid other insurance without consent. *Held*, that this stipulation was violated by the taking out of a general "floating policy," which carried the property in connection with other property of the assured. *Phoenix Insurance Co. v. Mich. Southern and Northern Indiana R. R. Co.*, 28 Ohio St., 69. 1875.

6. Policy; construction; property endangered by railway. The contingent interest of a railway company in the property of others endangered by its engines will not be presumed to be covered by a policy of insurance in which that interest is not described in appropriate terms, when the company has property of its own to which the terms of the policy are applicable. *Monadnock R. R. Co. v. Manufacturers' Insurance Co.*, 113 Mass., 77. 1878.

7. Policy on railway property. The plaintiffs, the P. and W. R. R. Co., procured insurance in the defendant insurance company, the policy of insurance containing the following proviso: "Provided, all the property hereby insured is on premises owned or occupied by the Providence and Worcester R. R. Co. in Mass. and R. I. . . . It matters not whether the property is in motion on the road, at rest, or in buildings." *Held*, that by reason of this proviso the defendant insurance company was not liable for a loss occurring upon premises not used or occupied by the plaintiff at the time of the issuing of the policy, although so used and occupied by it at the time of the loss.

Contribution.

Providence and Worcester R. R. Co. v. Yonkers Fire Ins. Co., 10 R. I., 74, 1871; 6 Amer. R'y Rep., 134.

8. Property in transit; petroleum. A policy, issued to an express company, insuring goods and merchandise in its care for transportation while on board cars or other conveyances, contained the following provision: "It is a further condition of this insurance, that no loss is to be paid in case of collision, except fire ensue, and then only for the loss and damage by fire. And that no loss is to be paid arising from petroleum or other explosive oils." Certain goods in the possession of the company, and in the course of transportation by it, were in an express freight car, forming part of a railway train, which collided with another train composed mainly of oil-cars loaded with petroleum. Immediately upon the collision, the petroleum burst into flames, which enveloped and destroyed the freight car and the goods. *Held*, that the loss thereby sustained by the express company was not covered by the policy. *Insurance Co. v. Express Co.*, 95 U. S., 227. 1877.

9. Recovery of insurance company against carrier. An insurance company which has been compelled to pay the owner for property destroyed by fire has a right of action against the person who wrongfully caused the loss, without any assignment of such right by the assured, and may sue in its own name, under the Wisconsin statutes. *Swarthout v. Chicago and Northwestern R'y Co.*, 49 Wis., 625, 1880; 21 Amer. R'y Rep., 153.

10. — Where the owner of the property and several insurers have rights of action for different portions of the value, all arising out of the same wrongful act, they may join in a single action against the wrong-doer. *Id.*

11. — Where insured property has been destroyed by a wrong-doer and the insurer has paid to the owner on the policy less than the value of his loss, and taken a partial assignment of his right, he cannot sue the wrong-doer in his own name for the injury, either as at common law or under the statute of Missouri. The action must be in the name of the owner of the property destroyed. *Aetna Insurance Co. v. Hannibal*

and St. Joseph R. R. Co., 3 Dillon (U. S. C. C.), 1. 1874.

12. Subrogation. An insurance company having paid a loss upon some cotton brought suit against two railway companies by way of subrogation for the loss. *Held*, that as to one of the companies the plaintiff was entitled to recover. *Kentucky Ins. Co. v. Western and Atlantic R. R. Co.*, 8 Baxter (Tenn.), 268. 1874.

13. — Plaintiff issued a policy of insurance for \$1,500 to M. upon certain buildings, which were afterwards burned through defendant's negligence. The buildings were worth \$3,400. M. received from defendant \$1,800 for his damages, and released all claims for the loss; the release contained a statement that the settlement was not intended to discharge plaintiff from any claim of M. against it, but simply as a full settlement and discharge of defendant. Plaintiff thereafter paid the amount of the insurance. In an action to recover the amount paid, *held*, that the clause in the release as to the claim against plaintiff was in the nature of a proviso or exception from the general purview of the release, limiting its effect to a release of the balance, retaining the claim against plaintiff, and excepting its rights to a remedy over; and, therefore, as to the plaintiff, the release was of no effect, it could not have interposed it as a defense upon the policy, and its right to subrogation was not affected thereby. *Connecticut Fire Insurance Co. v. Erie R'y Co.*, 73 N. Y., 399, 1878; reversing *Same v. Same*, 10 Hun (N. Y.), 59, 1877.

INTEREST.

See BONDS OF RAILWAY COMPANIES; DAMAGES; EMINENT DOMAIN; JUDGMENT; STOCK AND STOCKHOLDERS.

INTERNAL REVENUE.

See MORTGAGE; TAXATION.

JOINT TORT-FEASORS.

1. Contribution. The law will not enforce contribution between joint tort-feasors. So, in a case where appellee having been

Alderman's Record — Default.

obliged to pay a judgment recovered against it for an injury to one of its passengers, and subsequently appellee brought suit against appellants to recover the amount of such judgment, alleging that the injury was caused by appellants' servants, it was error to instruct the jury that they must find whether the injury was wholly the result of the negligence of appellee or appellants, and upon this find a verdict for or against the plaintiff. The injury may have been the result of the joint negligence of both, and in that case the verdict should be for defendants. *Rend v. Chicago West Division R'y Co.*, 8 Bradwell (Ill.), 517. 1881.

JUDGMENT.

See CONTRACTOR; EMINENT DOMAIN; GARNISHMENT; INJUNCTION; JURISDICTION; MANDAMUS; MORTGAGE; PLEADING; WRIT OF ASSISTANCE.

1. **Alderman's record.** An alderman's record should show how the cause of action arose. *Moore v. Philadelphia and Reading R. R. Co.*, 11 Philadelphia, 348. 1876.

2. **Collateral attack.** A judgment cannot be impeached by parol. *Galena and Southern Wis. R. R. Co. v. Ennor*, 9 Bradwell (Ill.), 159. 1881.

3. — A judgment cannot be collaterally assailed because of a mere defect in the notice. *Oppenheim v. Pittsburgh, Cincinnati and St. Louis R'y Co.*, 85 Ind., 471. 1882.

4. **Contractors.** Complainants entered into a contract with the defendant railroad companies to build the stone piers for a bridge over the Cumberland river, and, in doing the work, stretched a rope across the river by which the chimneys of a steamboat were knocked down, and for damages occasioned by which the owners of the boat recovered a joint judgment against complainants and said defendants. The L. and N. R. R. Co. paid the judgment, causing the same to be assigned to its president in his individual name, and execution to be issued thereon, which was levied on complainants' property. Upon bill filed by the latter to enjoin the execution as extinguished, and by the company to recover the amount of the judgment, held, that equity would not, under

the circumstances, deprive the company of any legal advantage acquired by the assignment of the judgment. The company held entitled, on the cross-bill, to recover from the complainants any money paid by it in satisfaction of the judgment, and this though one of the complainants was, by clerical misprision, not named in the judgment. *Maxwell v. Louisville and Nashville R. R. Co.*, 1 Tenn. Ch., 8. 1872.

5. **Correction of name of defendant.** A suit was brought against a corporation by the name of "The West Side Railroad Company," and under that name a judgment recovered against it, and execution issued and returned unsatisfied. Held, that thereafter the court had power to allow the summons, complaint, judgment roll and execution to be amended by correcting the name and title of the defendant so as to make it "The West Side and Yonkers Railroad Company." *Tasker v. Wallace*, 6 Daly (N. Y.), 304. 1876.

6. **Constitutional law.** A statute authorizing a judgment in vacation, on default, is not unconstitutional. *Gamble v. Jacksonville, Pensacola and Mobile R. R. Co.*, 14 Fla., 226. 1872.

7. **Creditor's bill; lease of railway.** A railway and its franchises are liable for the payment of judgments against the company; and where a railway is leased the court will, upon a creditor's bill, appoint a commissioner to lease the road for the shortest period that will be sufficient to yield the amount of the judgments. *Winchester and Strasburg R. R. Co. v. Colfelt*, 27 Grattan (Va.), 777. 1876.

8. **Debt.** It is an irregularity to render a judgment in damages in an action of debt, but is not such an error as to justify a reversal. *Rockford, Rock Island and St. Louis R. R. Co. v. Steele*, 69 Ill., 253. 1873.

9. **Default.** Judgment by default for want of an appearance taken off, and the defendant let in to try the case upon its merits, upon it appearing to the court that there has been no negligence or laches upon his part in failing to have an appearance entered. *Brown v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 9 Federal Reporter, 183. 1881.

10. — In computing the ten days' time within which a motion to set aside a default

Extinct Corporation — Injunction.

may be made (Wagn. St., 847, § 2), the first day after the rendition of the judgment should be excluded and the last included. *Reynolds v. Missouri, Kansas and Texas R'y Co.*, 64 Mo., 70. 1876.

11. — An order of the district court vacating a judgment rendered on a default is not such an order as may be reviewed by the supreme court while the suit is still pending in the district court. *Kermeyer v. Kansas Pacific R'y Co.*, 18 Kans., 215, 1877; 15 Amer. R'y Rep., 218.

12. **Extinct corporation.** Under the Gen. Stats., ch. 68, §§ 36, 37, continuing every corporation whose charter has been annulled, for the term of three years thereafter, for the purpose of prosecuting and defending actions by or against it, and of enabling it gradually to settle and close its affairs, to dispose of and convey its property, and to divide its capital stock, and giving the court power to appoint a receiver, at any time within said three years, to do all acts which might have been done by the corporation if in being, necessary for the final settlement of its unfinished business, a judgment recovered against the company after the expiration of three years from the repeal of its charter, no receiver having been appointed, is void. *Thornton v. Marginal Freight R'y Co.*, 123 Mass., 32. 1877.

13. **Foreign judgment.** The authoritative character of a domestic judgment is founded, among other reasons, on the constitutional provision which guarantees full faith and credit to the records and judicial proceedings of every state, while the rule as to foreign judgments rests upon considerations of comity; and though they are treated by the courts, in respect to their conclusiveness, as entitled to the same weight as domestic judgments, they do not, to the same extent as a domestic judgment, extinguish the original contract debt. *New York, Lake Erie and Western R. R. Co. v. McHenry*, 17 Federal Reporter, 414. 1883.

14. **Former recovery.** In an action on a simple contract, a judgment recovered by the plaintiff against the defendant in a former action, which was founded on a separate and distinct contract, is not conclusive as a plea of former recovery, because the plaintiff might have embraced in that action

the demand on which his second suit is founded. *New Orleans, Mobile and Texas R. R. Co. v. Castello*, 50 Ala., 12. 1873.

15. **Fraud and contract.** Where a judgment has been obtained against a corporation for the price of goods sold, an action cannot be maintained against it for fraud in obtaining a credit for the goods; the judgment for the purchase price is a complete and full remedy. Two judgments cannot be obtained against a corporation as an indemnity for the same loss. *Caylus v. New York, Kingston and Syracuse R. R. Co.*, 76 N. Y., 609. 1879.

16. **General term.** A general term has power to vacate a judgment entered on an order at a former general term, where the judgment does not conform to the order. *Caro v. Metropolitan R. R. Co.*, 2 N. Y. Civil Procedure Reports, 371. 1882.

17. **Gold coin.** In an action to recover damages for an injury to the person, a verdict for the plaintiff, payable in gold coin, is not warranted, and, if such verdict is rendered, the court should disregard the gold coin part as surplus. *Patochi v. Central Pacific R. R. Co.*, 52 Cal., 90. 1877.

18. **Grounds of judgment.** Where a majority of this court agree in the judgment that ought to be rendered, but disagree as to the reason therefor, such judgment must be entered without giving the opinion of the several judges. *Atchison and Nebraska R. R. Co. v. Hubbard*, 16 Kans., 156. 1876.

19. **Indorsers; payment.** A payment of a judgment by indorsers discharges the judgment and releases the principal, although the payment is made in depreciated bank notes furnished by the principal. *Kirtland v. Miss. and Tenn. R. R. Co.*, 4 Lea (Tenn.), 414. 1880.

20. **Injunction.** In 1866, B. recovered judgment against a railroad company. In 1868, by virtue of other judgments against the company, its franchises, track, etc., were sold under execution; but certain town lots of the company remained unsold. In 1872, execution from B.'s judgment was levied on these town lots; and a suit was brought by the trustees of the company to enjoin the sale. The petition acknowledged the judgment debt to B., but failed to show that there was any other creditor of the

Interest — Res Adjudicata.

company, and failed to account for the delay of petitioners in applying the property to B.'s demand. *Held*, that the injunction was erroneously granted. Under such a state of facts, B. should not have been restrained from enforcing his judgment by sale of the property. *Good v. Sherman*, 37 Tex., 660. 1872-3.

21. Interest. An execution must follow the judgment, and if the judgment does not call for interest, the execution cannot. *Solen v. Virginia and Truckee R. R. Co.*, 14 Nev., 405. 1879.

22. — Interest is allowable upon the amount of a judgment recovered in an action *ex delicto*. *Solen v. Virginia and Truckee R. R. Co.*, 15 Nev., 313. 1880.

23. In vacation. A judgment may be entered in vacation. Rev. Laws 1874, ch. 37, § 47. *Toledo, Peoria and Warsaw R'y Co. v. Eastburn*, 79 Ill., 140. 1875.

24. Levy of attachment on judgment. A judgment may be levied on and sold under execution like any other personal property, but can be attached by garnishment only on a writ of attachment. Ch. 167, Acts of 1870. *Ochiltree v. Mo., Ia. and Neb. R. R. Co.*, 49 Ia., 150. 1878.

25. Lien. A judgment against a railroad corporation becomes a lien upon its road and realty, in the same manner as upon the real estate of a natural person. *Ludlow v. Clinton Line R. R. Co.*, 1 Flippin (U. S. C. C.), 25. 1861.

26. — A judgment prior in point of time is paramount to a posterior judgment, even though the latter be first enforced, and the former is enforced by a bill in equity to which the owner of the second judgment is not made a party. *Howard v. Milwaukee and St. Paul R. R. Co.*, 7 Bissell (U. S. C. C.), 73. 1875.

27. — Judgment creditors who cause an execution to be levied upon lands of the defendant in Texas acquire a lien superior to that of his unrecorded mortgage, whereof, at the date of the levy, they had no notice. *Stevenson v. Texas R'y Co.*, 105 U. S., 703. 1881.

28. — Where the owner of land executes a bond for the conveyance of the same, he continues to be owner of the same as long as any part of the purchase money condi-

tioned in the bond remains unpaid; and his interest therein is bound by the lien of a judgment. *Minneapolis and St. Louis R'y Co. v. Wilson*, 25 Minn., 382. 1879.

29. Misnomer. A judgment rendered in the name of the St. Louis, Bloomfield and Louisville R. R. Co. was held good against the Bloomfield R. R. Co., on proof that the judgment was in fact rendered against the latter company by the former name. *Bloomfield R. R. Co. v. Burress*, 82 Ind., 88. 1882.

30. Municipal corporation; payment in bonds. This act of the legislature (ch. 87, Laws of 1872) confers upon any county or other municipal corporation, against which a judgment has been rendered, irrespective of the population of such county or municipal corporation, or the character of the indebtedness upon which the judgment is based, the power to issue bonds in payment thereof, if the judgment creditor shall so elect and the parties agree as to the character of the evidence of indebtedness. *Iowa Railroad Land Co. v. Carroll County*, 39 Ia., 151. 1874.

31. Nunc pro tunc entry. Judgment against a corporation cannot be corrected *nunc pro tunc* by striking out the name under which the defendant was sued and served with process, and substituting another name. *Brown v. Terre Haute and Indianapolis R. R. Co.*, 72 Mo., 567. 1880.

32. Practice. Points of practice in entering judgment determined. *Caro v. Elevated R'y Co.*, 48 N. Y. Superior Ct., 544; *Caro v. Metropolitan Elevated R'y Co.*, ib., 545. 1882.

33. Res adjudicata. In an action in equity in the circuit court of the United States the defendant answered to the merits without interposing technical objections; the attorneys for plaintiff having withdrawn their appearance, the court dismissed the bill, reciting in the decree that the cause had been submitted upon the "pleadings and proofs." *Held*, that the decree constituted a bar to an action upon the same cause of action in the state court. *Scully v. Chicago, Burlington and Quincy R. R. Co.*, 46 Ia., 528. 1877.

34. — demurrer. A judgment against the plaintiff, on a demurrer to a declaration, in an action for breach of contract for carriage of goods, *held*, to be a bar to a subse-

Sale of railway — Supersedeas.

quent suit. *Kimbro v. Va. and Tenn. Air Line R. R. Co.*, 56 Ga., 185. 1876.

35. — **evidence.** Parol evidence is inadmissible to show that the justice was directed by plaintiff's attorney, after the evidence was heard, to dismiss a suit, where the justice's transcript is introduced upon a plea of former recovery. *Cooksey v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 74 Mo., 477. 1881.

36. — **husband and wife.** A judgment in favor of the defendant in a suit brought by husband and wife is ordinarily no bar to a suit brought by the husband alone, nor are depositions taken in the first suit admissible as evidence in the other. *Louisville and Nashville R. R. Co. v. Atkins*, 2 Lea (Tenn.), 248. 1879.

37. — **indorsers.** A judgment in favor of an indorser upon a promissory note is not a bar to a subsequent suit against the maker of the note. *National Bank of the Republic v. Brooklyn City and Newtown R. R. Co.*, 14 Blatchford (U. S. C. C.), 242. 1877.

38. — **suit for instalment of interest.** A judgment against the plaintiff upon an action for an instalment of interest is a bar to an action upon another instalment of interest upon the same bonds, the same issue being presented as in the former suit. *Smith v. Town of Ontario*, 18 Blatchford (U. S. C. C.), 454. 1880.

39. **Sale of railway; lien.** Where judgments were rendered against a railway company in Wisconsin, and the assignee of the older one, in order to enforce his lien, filed his bill against another company, which, under claim of right, had obtained possession of the road, *held*, that the junior judgment creditor was not a necessary party, although, before the bill was filed, he had put on record in the proper office the sheriff's deed conveying the road to him pursuant to a sale under an execution sued out upon his judgment. That he could not maintain ejectment against the purchasers, under the decree directing the sale of the road to satisfy the older judgment. *Howard v. Railway Co.*, 101 U. S., 837. 1879.

40. **Satisfaction set aside.** The complainant had purchased all existing judgments against the defendant railroad company; and afterwards purchased all the company's

property sold under a trust deed junior to the judgment liens; and then marked as satisfied the judgments he held, on the proper dockets. In a subsequent litigation the deed of trust and his purchase under it were adjudicated to be illegal and void. He thereupon filed a bill in chancery against the company, praying that his satisfaction marked against the judgments might be set aside, that the defendant be decreed to pay the judgments, and that he might have general relief. A demurrer to this bill, on the ground that he had full remedy at law, and that therefore a bill in equity did not lie, was overruled. *Hay v. Alexandria and Washington R. R. Co.*, 1 Hughes (U. S. C. C.), 168. 1877.

41. — *Held*, also, that the judgments must be set up and constitute liens as they did before they were marked satisfied. *Same v. Same*, 4 Hughes (U. S. C. C.), 327. 1881.

42. **Set-off.** A court of equity will allow a set-off against a judgment held by an insolvent person. *Chicago, Danville and Vincennes R. R. Co. v. Field*, 86 Ill., 270. 1877.

43. — **splitting causes of action.** An entire contract, not payable in instalments, cannot be split up and made the foundation of two or more suits. If an action is brought on a part of it only, whether the plaintiff fails or succeeds he cannot afterwards maintain another action on it; and the same rule applies to a claim for damages, whether made the foundation of an action or set up in defense of an action. The owner of mules transported by railroad being sued for the carrier's charges before a justice of the peace, by an assignee of the claim, set up in defense that one of the mules was injured through the negligence of the carrier, and sought to recoup his damages; but the justice rendered judgment against him for the full amount of the charges. *Held*, that the judgment was a bar to a subsequent action by him against the carrier to recover such damages. *South and North Ala. R. R. Co. v. Henlein*, 56 Ala., 368, 1876; 19 Amer. R'y Rep., 200.

44. **Supersedeas.** Where a case was removed from the state supreme court to the supreme court of the United States by writ of error, but such writ was not lodged with the clerk until after the expiration of sixty

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days from the filing of the opinion, it was held that the judgment of the state court was not superseded, and the proper process for its enforcement was directed to issue upon application of the party entitled thereto. *Chicago, Rock Island and Pacific R. R. Co. v. Grinnell*, 53 Ia., 55. 1879.

45. Vacation. Where an attorney, disqualified for the further prosecution of a cause, transferred it to another, who had agreed with the attorney for the defendant to continue it, and the plaintiff, in the absence of both attorneys, employs other counsel, and procures a judgment, such judgment may be vacated on defendant's petition. *Chicago and Northwestern R. R. Co. v. Gillett*, 88 Ia., 434. 1874.

46. — equity. Equity will relieve a party against a judgment at law when its justice can be impeached by facts, or on grounds of which the party seeking its aid could not have availed himself at law. *Cairo and Fulton R. R. Co. v. Titus*, 27 N. J. Eq., 102. 1876.

47. — Courts of equity will not grant relief against a judgment at law, except where the injured party has had a verdict or judgment rendered against him in consequence of accident or mistake or fraud of the other party, without any fault of his own, and has no remedy, or has without fault lost his remedy at law. So held, where a judgment of \$22,000 in a personal injury case was obtained by default. But the defendant, having learned of the judgment during the term, had his remedy at law on a motion to vacate the judgment. *Railroad Co. v. Neal*, 1 Woods (U. S. C. C.), 353. 1870.

48. Vacation of; application by receiver. An affidavit filed by a receiver of a railway company to vacate a judgment in ejectment against the company, in which no one appeared for the company at the trial, and which alleges, on information and belief, that the plaintiff, by a written agreement, in consideration of the promise of the company to pay him a certain sum, sold the land to the company, and that he has reasonable hopes of obtaining the agreement or proving its contents, but which fails to show that the consideration had been paid, is fatally defective in not positively showing the existence of such agreement, and in not showing

payment. *Springfield and Northwestern R'y Co. v. Ross*, 88 Ill., 179, 1878; 21 Amer. R'y Rep., 295.

JUDICIAL NOTICE.

See CHARTER; EVIDENCE.

JUDICIAL SALE.

See APPRAISEMENT LAWS; EMINENT DOMAIN; EXECUTION; MORTGAGE.

JURISDICTION.

See BANKRUPTCY; EMINENT DOMAIN; EXECUTION; FEDERAL COURTS; HIGHWAYS; INJUNCTION; STATE RAILWAYS; STOCK AND STOCKHOLDERS.

1. Action by agent to recover back money from company. Where an agent under claim made by the company pays money that he does not owe the company, the implied promise to refund the money is to be performed at the place where the payment is made, and suit thereon must be brought in that county. *Georgia R. R. and Banking Co. v. Seymour*, 53 Ga., 499. 1874.

2. Action to recover lands conveyed to a railway company. An action cannot be maintained under ch. 49, Laws of 1875, to recover lands conveyed to a railway company by a town for a grossly inadequate consideration. *People v. N. Y. and Manhattan Beach R'y Co.*, 84 N. Y., 565, 1881; affirming *Same v. Same*, 22 Hun (N. Y.), 95, 1880.

3. Appearance. That an attorney was not authorized to accept service of notice will not affect the jurisdiction, if his subsequent appearance in the case was authorized. *Fanning v. Minnesota R. R. Co.*, 37 Ia., 879. 1873.

4. — Where a party appears so far as to consent to a continuance, he thereby waives any insufficiency of summons, and brings himself within the jurisdiction of the court. *Peters v. St. Louis and Iron Mountain R. R. Co.*, 59 Mo., 406. 1875. See, also, *Anderson v. Southern Minnesota R. R. Co.*, 21 Minn., 80. 1874.

5. — Appearance by a corporation and answering generally is a waiver of service of process in the proper district. *Kelsey*

Appearance of a State in the Courts of a Sister State—Federal Courts.

v. Pennsylvania R. R. Co., 14 Blatchford (U. S. C. C.), 89. 1877.

6. Appearance of a state in the courts of a sister state. A sister state cannot be sued in the courts of Tennessee without her consent. But if she appears and submits to the jurisdiction of the court, she must abide the decree made on the original or amended bill. But the charges of facts in the amended bill must be germane to and have a connection with the original bill, and must be necessary to supply some defect or failure of statement of complainant's rights as therein set forth, otherwise a demurrer will be sustained to the amended bill for want of jurisdiction. *Tappan v. Western and Atlantic R. R. Co.*, 3 Lea (Tenn.), 106. 1879.

7. Carriage of passengers partly performed in jurisdiction. The defendant issued through tickets at Derby, in England, to the plaintiffs for the conveyance thence of themselves and their luggage to their residence at Greenore, in Ireland, and during the trans-channel part of the journey the plaintiff's wife was injured and their luggage was lost outside Holyhead Harbour. *Held*, that enough of the cause of action arose in Ireland to give the court jurisdiction to substitute service of the summons and plaintiff. *Willis v. London and North Western R'y Co.*, 10 Irish Reports (Common Law), 95. - 1876.

8. Consent. The jurisdiction, in this case, is of such a character that it can be conferred by consent. *Iowa Northern Central R'y Co. v. Ritter*, 36 Ia., 568. 1873.

9. — Causes can only be heard in this court when properly removed from the lower courts by appeal or writ of error. Parties cannot, by stipulation, in the absence of a writ of error and a certified transcript of the record, confer jurisdiction upon this court. The law alone can confer jurisdiction over the subject matter of a cause. *Molandin v. Colorado Central R. R. Co.*, 3 Colo., 173. 1877.

10. Costs. The omission to enforce a rule requiring security for costs before going to trial can scarcely be regarded as an error affecting the jurisdiction of the court below. *Baltimore and Ohio R. R. Co. v. Waltmeyer*, 47 Md., 328. 1877.

11. Election as to two suits. Complainants were put to election between two suits pending, one in the state court and the other in the circuit court of the United States for this district. *Central R. R. Co. of New Jersey v. New Jersey West Line R. R. Co.*, 32 N. J. Eq., 67. 1880.

12. Equity; corporation. An allegation of want of property will not confer equitable jurisdiction in an action of damages for a breach of covenant against a corporation. *United New Jersey R. R. Co. v. Hoppock*, 28 N. J. Eq., 261, 1877; 14 Amer. R'y Rep., 23.

13. Federal and state courts. It is no defense to a suit in the federal courts, brought by the stockholders of a corporation, that a like suit had been brought in the state courts by the corporation, and dismissed to evade the jurisdiction of the state courts. *Dwight v. Central Vermont R. R. Co.*, 20 Blatchford (U. S. C. C.), 200, 1882; *Griswold v. Same*, ib., 212. A plea that the company was in possession of a receiver appointed by the state courts was likewise held bad. *Id.*

14. Federal courts. State and federal tribunals are entirely independent of each other, and the United States circuit courts cannot be called upon to close their doors to suitors because the questions which they seek to litigate are also involved in other actions between different parties in the courts of the state. *Currie v. Town of Lewiston*, 15 Federal Reporter, 377. 1883.

15. — admission of jurisdiction. Although consent of the parties to a suit cannot give jurisdiction to the courts of the United States, the parties may admit the existence of facts which show jurisdiction, and the courts may act judiciously upon such an admission. *Railway Co. v. Ramsey*, 22 Wallace, 322. 1874.

16. — alien corporation. A corporation of another state can sue an alien corporation in the federal courts. *Merchants' Manufacturing Co. v. Grand Trunk R'y Co.*, 63 Howard's Practice (N. Y.), 459. 1882.

17. — bills and notes. A promissory note of a corporation, with the seal of the corporation attached, is not a negotiable promissory note, and no action thereon can be maintained in the federal courts, unless the original holder might have maintained such action. Act of March 3, 1875. *Coe v.*

Federal Courts.

Cayuga Lake R. R. Co., 19 Blatchford (U. S. C. C.), 522, 1881; 8 Federal Reporter, 534, 1881.

18. — citizenship. The United States courts have no original jurisdiction under the act of March 3, 1875 (18 St., 470), in suits between citizens of one state and citizens of the same and of another state. *Karns v. Atlantic and Ohio R. R. Co.*, 10 Federal Reporter, 309, 1881.

19. — The jurisdiction of the circuit court for the northern district of Texas, so far as it is affected by the citizenship or residence of parties litigant, is not restricted by any of the provisions of the act of congress creating the northern district of Texas (Supp. Rev. St., 415), nor by any of those of the acts amendatory thereof, but is regulated by the provisions of the jurisdiction act of March 3, 1875 (18 St., 470). *Pacific R'y Imp. Co. v. Metcalf*, 16 Federal Reporter, 7, 1882.

20. — consolidated corporation. A railroad corporation which extended into two states, and was originally chartered in each state, and subsequently consolidated by law in both states, does not thereby lose its separate citizenship in each state, so as to preclude it from maintaining an action in the federal court against another corporation created and existing solely under the laws of one of the two states, where the declaration shows that the plaintiff sets out its corporate existence as derived from the other of said two states. *Nashua and Lowell R. R. Corp. v. Boston and Lowell R. R. Corp.*, 8 Federal Reporter, 458, 1881.

21. — contempt. The power of the United States court in matters of contempt is limited, by Rev. St., § 725, to punishment by fine and imprisonment. It has no power to impose any punishment by way of damages or compensation to the plaintiff in the original action. *United States ex rel. v. Atchison, Topeka and Santa Fe R. R. Co.*, 16 Federal Reporter, 853, 1883.

22. — corporations. Where a corporation sues in a federal court, the court, in order to assume jurisdiction, will conclusively regard all the shareholders as citizens of the state which created the corporation. *St. Louis Alton and Terre Haute R. R. Co. v. Indianapolis and St. Louis R. R. Co.*, 9 Bissell (U. S. C. C.), 144, 1879.

23. — The circuit court of the United

States for the southern district of New York has jurisdiction of an action between foreign corporations, where the defendant transacts business within the district, and process is served upon its proper officer there. *Merchants' Manuf'g Co. v. Grand Trunk R'y Co.*, 11 Abbott's New Cases (N. Y.), 183, 1882.

24. — corporation incorporated in two states. In an action between a citizen of the state of Nebraska and a railroad company, which, originally incorporated under the laws of the state of Iowa, had extended its road into the state of Nebraska, had filed a copy of its original articles of incorporation with the state secretary, and, in other respects, had complied with the state laws governing such companies, *held*, on a plea to the jurisdiction of the court, that, under the laws of the state of Nebraska, the company had become a domestic corporation. *Held*, also, that service upon the managing agent of the company for the state of Nebraska is not sufficient service on the Iowa corporation, though the line through both states is under one management, one set of officers, one board of directors, one set of stockholders; though the general offices are in Iowa, and though the agent makes his reports to the general offices. *Stout v. Sioux City and Pacific R. R. Co.*, 8 Federal Reporter, 794; 3 McCrary (U. S. C. C.), 1, 1881.

25. — corporation organized by act of congress. A suit by a corporation, created by an act of congress, is a suit arising under the laws of the United States. *Union Pacific R. R. Co. v. McComb*, 1 Federal Reporter, 799, 1880.

26. — creditors' bill. A creditors' suit was brought by a non-resident in the federal court, against a resident railway company, for the appointment of a receiver. The property lay wholly within the district where the suit was brought. The District of Columbia, in its corporate capacity, was beneficiary under a deed of trust, two of its citizens being trustees thereunder. *Held*, that the trustees were proper defendants, under act of March 3, 1875, authorizing the summons of non-resident claimants. *Hay v. Alexandria and Washington R. R. Co.*, 4 Hughes (U. S. C. C.), 381, 1882.

Federal Courts.

27. — federal question. A case arises, "under the constitution or laws of the United States," whenever, upon the whole record, there is a controversy involving the construction of either. *Van Allen v. Atchison, Colorado and Pacific R. R. Co.*, 3 Federal Reporter, 545; 1 McCrary (U. S. C. C.), 598. 1880.

28. — Where, on error to the supreme court of a state, the record shows a decision of the state court on a federal question properly presented, and of which this court could take jurisdiction, and shows also the decision of a local question, the writ of error will not be dismissed on motion in advance of the hearing. The parties are entitled to be heard on the soundness of the decision below on the federal question, on the sufficiency of that question to control the judgment in the whole case, and on the sufficiency of any other point decided to affirm the judgment, even if the federal question was erroneously decided. *Railroad Co. v. Maryland*, 20 Wallace, 643. 1874.

29. — The federal character of the cause must appear in the pleadings or of record; if it does not thus appear, the state court may lawfully proceed therein, and its action will be valid. *Ames v. Colorado Central R. R. Co.*, 4 Dillon (U. S. C. C.), 251. 1876.

30. — joint-stock companies. The reasons which induced the supreme court to hold that, for the purposes of federal jurisdiction, corporations are to be regarded as citizens of the states whose creatures they are, call with equal force for a similar ruling as to joint-stock companies organized under the laws of New York. *Fargo v. Louisville, New Albany and Chicago R'y Co.*, 6 Federal Reporter, 787; 10 Bissell (U. S. C. C.), 273. 1881.

31. — lien of a state. Where a state of the Union is a party in interest but not a party to the record, the jurisdiction of the United States circuit court attaches where that court has jurisdiction of the state's agent who has charge of the property as a trustee, and where the property which is the subject of the suit is stock in the company held in pledge as the security of a debt due to the complainant, for which a lien has been given by the state "in addition" to the pledge. *Swasey v. North Carolina R. R. Co.*,

1 Hughes (U. S. C. C.), 17. 1874. Also reported in 71 N. C., Appendix, 571.

32. — municipal bonds and coupons. A municipal bond under seal, which is in form a simple acknowledgment of indebtedness, and an unconditional promise to pay a sum certain at a certain time, can be assigned so as to enable the assignee to bring an action in the federal court. *Porter v. Janesville*, 11 Bissell (U. S. C. C.), 64, 1880; 3 Federal Reporter, 617, 1880.

33. — Municipal bonds do not come within the prohibition of the act of March 3, 1875, which enacts that "no circuit or district court shall have cognizance of any suit founded on contract, in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange. *Halsey v. Township of New Providence*, 3 Federal Reporter, 364. 1880.

34. — The holder of a coupon payable to bearer is not the assignee of a cause of action within the meaning of the act of congress of March 3, 1875; and therefore the federal court has jurisdiction in a suit on such coupons, by a purchaser. *Cooper v. Town of Thompson*, 13 Blatchford (U. S. C. C.), 484, 1876; *Pettit v. Town of Hope*, 18 ib., 180, 1880; *Thompson v. Perrine*, 106 U. S., 589, 1882; *Rich v. Town of Seneca Falls*, 19 Blatchford (U. S. C. C.), 558, 1881.

35. — pleading. The averment that the complainant is "a joint-stock association . . . formed in the state of New York . . . under the laws of the state of New York," neither imports that it is a corporation created by another state, nor that its members are citizens of another state; the bill is therefore dismissed by the United States circuit court for want of jurisdiction. *Dinsmore v. Philadelphia and Reading R. R. Co.*, 11 Philadelphia (U. S. C. C.), 483. 1875.

36. — process. Service upon a corporation in order to bring it into court must be made under the United States, not under a state, statute. *Hume v. Pittsburgh, Cincinnati and St. Louis R. R. Co.*, 8 Bissell (U. S. C. C.), 31. 1877.

37. — In a suit against a corporation in

Foreign Corporation.

the United States circuit court for the state, by a citizen of another state, service of process within the state upon a joint defendant, a citizen of a third state, gives the court jurisdiction over him. *Mowrey v. Indianapolis and Cincinnati R. R. Co.*, 4 Bissell (U. S. C. C.), 78. 1866.

88. — **stock holders.** A plea to a bill brought by certain stockholders in a railroad corporation, which set out that there were, when the bill was brought and the plea filed, certain other stockholders, who are not joined in the bill as parties, who are citizens of certain states, naming them, whose names are known to and ascertainable by the orators, and not by the defendants, held to be insufficient and overruled. *Dwight v. Central Vermont R. R. Co.*, 9 Federal Reporter, 785. 1881.

89. — **supreme court.** Where a judgment for the recovery of money, affirmed in the supreme court of the District of Columbia, is brought to the United States supreme court for re-examination, and the amount thereof, without adding interest or costs, does not exceed \$2,500, the court has no jurisdiction. *Railroad Co. v. Trook*, 100 U. S., 112, 1879. Costs should not be considered in estimating the amount. *Railroad Co. v. Grant*, 98 U. S., 398. 1878.

40. — No order or action of any kind can be taken in a state court in a cause which has been removed by writ of error to the supreme court of the United States. The writ suspends the jurisdiction of the state courts, until by some act of the supreme court of the United States itself, it is restored to them. *Dunn, Ex parte, In re Hand, v. Railroad Co.*, 6 So. Car., 807. 1875.

41. **Foreign corporation.** Where a foreign corporation transacts business in a state it becomes amenable to suit there. *Blackburn v. Selma, Marion and Memphis R. R. Co.*, 2 Flippin (U. S. C. C.), 525. 1879.

42. — A corporation can only be sued in a state other than that in which it is organized where there is express legislation authorizing such an action. *Lathrop v. Union Pacific R. R. Co.*, 1 MacArthur (Dist. of Columbia), 234. 1878.

43. — Under § 790, Revised Statutes, relating to the District of Columbia, an action can be brought in this court against a foreign

corporation only when it has an established place of business in the district, and the process can be served upon the agent or other person by it employed to conduct such business as it is engaged in here. *Dallas v. Atlantic, Miss. and Ohio R. R. Co.*, 2 MacArthur (Dist. of Columbia), 140. 1875.

44. — Corporations are artificial persons, existing only in contemplation of law. They must dwell in the place of their creation, and cannot migrate to another state. But they are liable to be sued like natural persons, in transitory actions arising *ex contractu* or *ex delicto* in any state where legal service of process can be had. Where the defendants in the court below appeared and pleaded to the action, they cannot object to the jurisdiction; and it is too late, after the plea of the general issue, to raise the question of the authority of the court finally to dispose of the case. *New Orleans, Jackson, etc., R. R. Co. v. Wallace*, 50 Miss., 244. 1874.

45. — This is in conformity to the general rule of law upon the subject of contracts and torts; and where railroad corporations are sued out of the jurisdiction by which they were created, and under whose laws alone they can act, the extent and degree of their responsibility must be determined by the law of the place of the existence and action of such corporation. *Id.*

46. — The agent of a foreign corporation may acknowledge service of a declaration in attachment so as to authorize a general judgment against his principal. *Atlantic and Gulf R. R. Co. v. Jacksonville, etc., R. R. Co.*, 51 Ga., 458. 1874.

47. — It is within the power of the legislature to authorize a suit against a foreign corporation *in personam*, and such power is not limited to the allowance of actions *in rem* only. There is nothing constitutional or fundamental in the method of procedure in an action. *Barnett v. Chicago and Lake Huron R. R. Co.*, 6 Thompson & Cook (N. Y. Supreme Ct.), 358. 1875.

48. — Jurisdiction over a non-resident corporation in *personam* cannot be acquired unless it voluntarily appears. And trustees appointed by the courts of another state to operate an insolvent railway company's property are entitled to the same rights and

Injunctions — International Bridge.

immunities. *Ogdensburg and Champlain R. R. Co. v. Vt. and Canada R. R. Co.*, 16 Abbott's Practice, N. S. (N. Y.), 249. 1874. See, also, *Same v. Same*, 4 Hun (N. Y.), 712. 1875.

49. — The plaintiff, a resident of New Jersey, brought an action in New York against the defendant, which had been incorporated under the laws of New Jersey, to recover damages for injuries sustained while he was there traveling upon one of its trains. *Held*, that the defendant, by voluntarily appearing and serving a general answer, waived any right it might have to object to the jurisdiction of the court. *Brooks v. New York and Greenwood Lake R. R. Co.*, 30 Hun (N. Y.), 47. 1883.

50. — Plaintiff made a contract with defendant, a non-resident corporation, to enter its service for a term of years, his business being to procure emigrants to purchase and settle on defendant's lands in Nebraska. Plaintiff was bound to maintain, during the whole time, an office in the city of New York, and was to go to Europe for a short time to arrange for emigration. Plaintiff entered upon the employment and kept open an office in said city until the contract was terminated by defendant. In an action for services under the contract, and for damages for its breach, *held*, that it was to be assumed that the parties understood that plaintiff's principal duties, under the contract, would be discharged in New York city; that the cause of action arose in New York, and, therefore, a service of the summons upon one of defendant's directors, while he was temporarily in that state on his own business, was a good service, although defendant had no property in the state. *Hiller v. Burlington and Missouri River R. R. Co.*, 70 N. Y., 223, 1877; 18 Amer. R'y Rep., 557.

51. — Where a suit is brought against a foreign corporation, though a general appearance by defendant before answering gives the court jurisdiction over its person, it does not necessarily give jurisdiction over the subject-matter of the action; and where some of the plaintiffs are non-residents, the complaint must be dismissed as to them, a case not being made out under § 1780 of the Code of Civil Procedure. A resident plaintiff, however, where the complaint makes

out a cause of action, may maintain the suit, though the acts out of which the cause of action arises were done, and the property from the management and disposition of which the plaintiff's loss and damage were sustained, are beyond the jurisdiction, and the relief within the power of the court to grant may be incomplete. *Ervin v. Oregon R'y Co.*, 62 Howard's Practice (N. Y.), 490. 1882.

52. — An act incorporating a company for making a railway from Dublin to Drogheda enacted that, in case of any summons or writ upon the company, "personal service thereof upon a secretary or clerk of the company, or leaving the same at the office of the company, or of a secretary or clerk, or delivering the same to some inmate at such office of the company, or at the usual place of abode of such secretary or clerk, or, in case the same respectively should not be found or known, then personal service thereof upon any other agent, etc., or on any director of the company," should be deemed good service. A writ of summons having been issued out of this court into Middlesex against the company, which had no office in England, or any secretary or clerk to represent it there, was served upon one of the directors of the company in London. *Held*, that such service was null and void; that the proper service was upon the secretary or clerk at the office; but that the parties, residing in Ireland, were not amenable to the jurisdiction of the court. *Evans v. Dublin R'y Co.*, 14 Meeson & Welsby (Exchequer), 142; 3 Eng. R. R. & Canal Cases, 760. 1845.

53. **Injunctions.** The courts of New York have no jurisdiction to restrain acts threatened to be done in another state, nor, if such acts be done, to compel them to be undone. *Atlantic and Pacific Tel. Co. v. Baltimore and Ohio R. R. Co.*, 46 N. Y. Superior Ct., 377. 1880.

54. **International bridge.** The Canadian courts refuse to grant the right to the public to pass over the International bridge, as only one-half the bridge is within its jurisdiction, and the action of the courts would be unavailing. *Attorney-General v. International Bridge Co.*, 6 Ontario Appeal Reports, 537. 1881.

Judgment Against Railway Company — Process.

55. Judgment against railway company; where enforced. An action to enforce a judgment against a railway company created by the laws of Kentucky, if not brought in the county whence the execution issued, must be brought either in the county in which it has its principal office or place of business, or in the county in which its president or chief officer resides. The Franklin circuit court has no jurisdiction of an action to enforce a judgment rendered by the Trimble circuit court against such a company, the principal office and place of business, and residence of the president, being in Jefferson county. *McDormant v. Louisville, Cincinnati and Lexington R. R. Co.*, 11 Bush (Ky.), 386, 1875; 14 Amer. R'y Rep., 370.

56. Judicial notice. In an action brought in Fountain county against a railway company for killing a cow, the complaint alleged that the place where the animal was killed was "about two and a half miles east of Covington." Held, on motion in arrest, that the supreme court knew judicially that the place so designated is in the county where the action was brought. *Indianapolis, Bloomington and Western R'y Co. v. Lyon*, 48 Ind., 119. 1874.

57. Justice of the peace. Justices of the peace have jurisdiction in actions *ex delicto* if the sum claimed does not exceed \$100. *Rhodes v. Railroad Co.*, 6 So. Car., 385, 1875.

58. — If one person have two causes of action against the same defendant, both cognizable before a justice of the peace, one because it is within the limit of a justice's jurisdiction, and the other because it is not a class which justices may entertain without regard to amount, the two may be united in one complaint in a justice's court, though the aggregate exceed the limit of his jurisdiction, in cases where jurisdiction depends upon the amount involved. So held in an action for conversion of a lot of staves, joined with an action for injury to live stock. *Fenton v. St. Louis, Kansas City and Northern R'y Co.*, 72 Mo., 259, 1880.

59. Missouri statute. Under the statute (Wagn. Stat., § 28, p. 294), suits may be brought against railway companies in any

county where such companies have or usually keep an office or agent for the transaction of their usual or customary business. *Hicks v. Hannibal and St. Joseph R. R. Co.*, 68 Mo., 329. 1878.

60. Municipal courts. The Michigan statute in relation to municipal courts construed. *Grand Rapids, Newaygo and Lake Shore R. R. Co. v. Gray*, 38 Mich., 461. 1878.

61. North Carolina statute; contract. An action by a passenger against a railway company for a violated contract of carriage is solely cognizable in a justice's court where the complaint shows upon its face that the claim asserted is less than \$300; and the court will take notice of the want of jurisdiction. *Hannah v. Richmond and Danville R. R. Co.*, 87 N. C., 351. 1882.

62. Overcharges; venue. An action against a railroad company to recover the excess of a payment for freight beyond what is allowed to be charged by the charter of the company may be brought under the act of March 4, 1869, in the county from which the articles were shipped; that being the place where the contract for shipment was made, although the payment was made in another county. *DuBose v. Ga. R. R. and Banking Co.*, 50 Ga., 304. 1878.

63. Personal injuries. An action against a corporation for personal injury may be brought in any county where the company has an office or agency. *Toppins v. East Tenn., Va. and Ga. R. R. Co.*, 5 Lea (Tenn.), 600. 1880.

64. Place of bringing suit. A railroad company may be sued in any county through or into which its road passes, without regard to the nature of the cause of action. *Railway Co. v. Jewett*, 87 Ohio St., 649, 1882; 8 Amer. & Eng. R. R. Cases, 702.

65. — An action against a common carrier in Kentucky, whether a corporation or not, upon a contract to carry property, must be brought in the county in which the defendant, or either of several defendants, resides, or in which the contract is made, or in which the carrier agrees to deliver the property. *Adams Express Co. v. Crenshaw*, 78 Ky., 186. 1879.

66. Process. The acceptance of service of process by an attorney is of no greater validity than actual service upon him. Such serv-

Residence of Corporation.

ice is not sufficient to enable the court to acquire jurisdiction over the corporation. *Northern Central R'y Co. v. Rider*, 45 Md., 24. 1876.

67. — Service upon an agent who has no fixed place of business, and whose business is to go from place to place soliciting business for the company, but who was not authorized to sell tickets, is not sufficient to confer jurisdiction against the company. *Chicago and Alton R. R. Co. v. Walker*, 9 Lea (Tenn.), 475. 1882.

68. — A railroad corporation, created by the legislature of Virginia, and also allowed to run its road, by act of congress, into the District of Columbia, borrowed a sum of money in the city of New York, through the agency of its treasurer, and, no part of it having been repaid, suit was commenced in the supreme court of the state of New York, by service of process upon its secretary, who was found there, and judgment rendered for the full amount. Action is brought in this court upon a transcript of the judgment. *Held*, that the corporation, having contracted the debt in the state of New York, the court there obtained complete jurisdiction by such service, and that such judgment is entitled to the same conclusiveness here as in the state where it was rendered. *Held*, also, that it is competent for a state legislature to authorize the commencement of suits by the service of process upon the president, secretary or treasurer of a foreign corporation having a place of business or making contracts within that state. *Weymouth v. Washington, Georgetown and Alexandria R. R. Co.*, 1 MacArthur (Dist. of Columbia), 19. 1873.

69. — By the 8 and 9 Vict., c. 162, incorporating the Caledonian R'y Co., six miles of which are in England and the rest in Scotland, the Companies Clauses Act (8 and 9 Vict., c. 16) is incorporated with the Company's Act so far as is necessary for carrying into effect the English portion of the line. The principal office of the company was in Scotland, and it had no office out of Scotland, except a station at Carlisle, used only for receiving passengers and goods. The plaintiff having a claim against the company, in respect of its amalgamation with another Scotch railway, *held*, that service of

the writ of summons on the secretary of the company, while attending a meeting in London, was good service. *Wilson v. Caledonian R'y Co.*, 5 Welsby, Hurlstone & Gordon (Exchequer), 822, 1850; 6 Eng. R. R. & Canal Cases, 772; 1 Eng. Law & Equity, 415.

70. — A corporation which has a legal existence in Pennsylvania is liable to be sued anywhere in the commonwealth where jurisdiction can be obtained by a proper service of the summons. *Eby v. Northern Pacific R. R. Co.*, 13 Philadelphia, 144. 1879.

71. — In trespass for killing a cow, the summons was returned, "served by leaving copy at Enon Station office;" defendant not having appeared, service held insufficient, not having been made upon an officer or agent of the company. *P. and P. R. R. Co. v. Brittain*, 1 Pittsburgh, 371. 1856.

72. Residence of corporation. An incorporated railway company had its principal office at Euston Square, in the county of Middlesex, where its seal was kept, and the meetings of its directors and shareholders held. It had likewise a large station at Chester, through which ran several branch lines, and the entire management of its lines there was conducted by a district superintendent, under the general management of the company at Euston Square. *Held*, that the company did not "dwell" or "carry on business" within the district of the county court where Chester is situated. *Brown v. London and North Western R'y Co.*, 4 Best & Smith, 326; 116 E. C. L., 326. 1863.

73. — The G. W. R. Co. has its principal station at Paddington, where the directors meet, the secretary resides, general meetings are held, and whence orders emanate. *Held*, that the company "dwells" at Paddington within the meaning of that word in the 9 and 10 Vict., c. 95, s. 128; and consequently that, where a plaintiff in an action against the company dwelt more than twenty miles from Paddington, the superior court had concurrent jurisdiction. *Adams v. Great Western R'y Co.*, 6 Hurlstone & Norman (Exchequer), 404. 1861.

74. — The domicile of a railway company is not limited to the *locus* of the principal station, but may be constituted wherever

Challenges — Corporation Cases.

the company carries on business. *Dick v. Great North of Scotland R'y Co.*, 3 Irvine's Justiciary (Scotch), 616. 1860.

75. — The "principal place of business" of a corporation is no test of residence, whether of a corporation or of a natural person, as a person may reside in one state and have his principal or sole place of business in another state. *Guinn v. Iowa Central R'y Co.*, 14 Federal Reporter, 323. 1832.

76. Superior court. The circuit court and a superior court in a city have concurrent jurisdiction of writs of error to justices of the peace within the township in which the city is situated. *Hickox v. Burlington, Cedar Rapids and Northern R'y Co.*, 55 Ia., 431. 1880.

77. Venue. The statute of Texas authorizing suit against a railway company in any county where the cause of action accrued is valid. *Breen v. Texas and Pacific R'y Co.*, 44 Tex., 302. 1875. The statute applies to actions already pending. *Houston and Texas Central R. R. Co. v. Graves*, 50 Tex., 181. 1878.

78. — In an action on a contract with a railway company instituted in a county other than that in which the corporation's chief place of business is situated, the pleadings should show that the contract was made or to be performed in the county in which the suit is brought. *Corley v. Georgia R. R. and Banking Co.*, 49 Ga., 636. 1878.

79. — All railroad companies are liable to be sued in any county in which the cause of action originated, by any one whose person or property has been injured by such company, for the purpose of recovering damages for such injury, without any special notice and claim for damages therefor, as a condition precedent to his right to recover for such injury. *Georgia R. R. and Banking Co. v. Monroe*, 49 Ga., 373. 1878.

80. — The court of the county whence cotton is shipped has jurisdiction to try a claim for failure to deliver the same, or part thereof, at the place of destination by a railroad company. *Central R. R. Co. v. Brunson*, 63 Ga., 504. 1879.

81. — An action for goods burned at the station of delivery will lie in the county where the goods were burned. *Central R. R. and Banking Co. v. Smith*, 54 Ga., 499. 1875.

82. — An action against the Central R. R. and Banking Co. for a trespass in entering upon land, occupying it with its road-bed, cutting down the timber, etc., is properly brought, under the act of 1869, in the county where the trespass was committed. *Central R. R. and Banking Co. v. Carswell*, 54 Ga., 251. 1875.

83. — It is not in violation of that clause of the constitution which requires civil suits to be tried in the county of the residence of the defendant, for the general assembly to prescribe by law that suits against railroad companies may be brought and tried in the county where the injury has been done, or where a contract has been made or is to be performed. *Georgia R. R. and Banking Co. v. Oaks*, 52 Ga., 410. 1874.

84. — Where a suit against a railway company is properly brought in a particular county, but, after a change in the law requiring such a suit to be brought elsewhere, the husband of the real plaintiff was dismissed from the suit as improperly joined, and the declaration amended so as to show this fact only, but showing no new cause of action, it was held that this was not, in effect, a new suit, and that the court did not lose its jurisdiction. *Dickson v. Chicago, Burlington and Quincy R. R. Co.*, 81 Ill., 215. 1876.

JURY. '1

See EMINENT DOMAIN.

1. Challenges. On a challenge for cause, where the trial judge is in doubt as to the impartiality of a juror, he should give the parties the benefit of the doubt, and excuse the juror. So held where a tax-payer was challenged, he having subscribed to a fund to aid in a case against the railway company. *Missouri, Kansas and Texas R. R. Co. v. Munkers*, 11 Kans., 223. 1878.

2. Corporation cases. As juries are given so much discretion in the allowance of damages, and the supreme court can only grant new trials where it sees clear evidence of passion, prejudice, or disregard of law, it is the duty of circuit judges to impress upon juries the necessity of great watchfulness on their part to guard themselves from being

Appeal — Pier.

influenced in the slightest degree by the fact that the defendants in these cases are corporations, and that only even-handed justice and at least approximate compensation for the real injury sustained, should be rigorously adhered to. *N. C. R. R. Co. v. Smith*, 11 Heiskell (Tenn.), 455. 1872.

3. Discharge of juror. Where a juror is discharged for insufficient reasons, and the party complaining of the error has not exhausted his peremptory challenges, and an unexceptionable jury is obtained, the error is without prejudice. *Atchison, Topeka and Santa Fe R. R. Co. v. Franklin*, 23 Kans., 74. 1879.

4. Employes. An employe of a railroad company is not a competent juror to try a case in which the company is a party. *Central R. R. Co. v. Mitchell*, 63 Ga., 173, 1879; 1 Amer. & Eng. R. R. Cases, 145.

5. Misconduct. A juror stated in the jury room that the defendant had offered the plaintiff \$1,000 to compromise, and that unless a larger sum were allowed the plaintiff would have to pay the costs. The juror, on his *voir dire*, had stated his knowledge of such an offer, and was not challenged peremptorily, although defendant did not exhaust its peremptory challenges. *Held*, that his incompetency was waived; and *held*, under the evidence, that the jury were not influenced by his statements in the jury room. *Florence, El Dorado and Walnut Valley R. R. Co. v. Ward*, 29 Kans., 354. 1883.

6. Shareholder as jurymen. Where a public company is a party to an action, the mere fact that one of the jurymen was a shareholder in the company is no ground for granting a new trial. *Williams v. Great Western R'y Co.*, 3 Hurlstone & Norman (Exchequer), 869. 1858.

7. Son of stockholder disqualified. The son of a stockholder is incompetent as a juror in a case to which the corporation is a party. The ground of his disqualification is near relationship to a person having an interest in the suit. The disqualification being unknown to the adverse party and his counsel until after the trial, is cause for a new trial. *Ga. R. R. Co. v. Hart*, 60 Ga., 550. 1878.

8. Special jury; costs. The entire cost of a special jury shall be taxed to the losing

party. Code, § 4029. *Dunn v. Nashville and Chattanooga R. R. Co.*, 3 Baxter (Tenn.), 415. 1874.

9. Statutes. Statutes giving a right of trial by jury are to be liberally construed in favor of that mode of trial. *Poyer v. N. Y. Central, etc., R. R. Co.*; 7 Abbott's New Cases (N. Y.), 371. 1879.

10. View; costs. Jurors are entitled to the same compensation when serving on a view as when actually in attendance on the court within the court-house. *Freeland v. Pa. R. R. Co.*, 2 Pearson (Pa.), 74. 1870.

JUSTICE OF THE PEACE.

See CONTINUANCE; INJURIES TO DOMESTIC ANIMALS; JUDGMENT.

1. Appeal. Since the passage of the act of March 30, 1875 (72 Ohio L., 161), amending § 111 of the Justices' Code, there is no appeal from the judgment of a justice of the peace rendered on the verdict of a jury in an action for the recovery of specific personal property, where such judgment, exclusive of costs, amounts to less than \$100. *Ohio and Toledo R. R. Co. v. Bates*, 26 Ohio St., 32. 1875.

KILLING EMPLOYES.

See INJURIES TO EMPLOYES.

KILLING PASSENGERS.

See INJURIES TO PASSENGERS.

KILLING STOCK.

See INJURIES TO STOCK.

LADIES' CAR.

See INJURIES TO PASSENGERS.

LAKES.

See EMINENT DOMAIN.

1. Pier. A railway company which had acquired a strip of ground coming down to

Abandonment of Railway — Assignment of Certificate.

the margin of Loch Lomond, having proposed to erect a pier running out from it into the Loch, *held*, that the proprietor from whom the ground had been acquired had a sufficient title to object thereto. *Buchanan v. Caledonian and Dumbartonshire R'y Co.*, 12 Scotch Session Cases (2d series), 778. 1850.

2. Riparian rights. Plaintiffs' lots abutted upon a navigable lake, and defendant, without their consent, constructed its railway within the water of the lake, but so near the front of their lots as to cut off their access to the body of the lake, leaving along such front a stagnant pool, and by reason thereof said lots have been greatly depreciated. *Held*, that plaintiffs are entitled to recover damages for the injury. *Delaplaine v. Chicago and Northwestern R'y Co.*, 42 Wis., 214, 1877; 15 Amer. R'y Rep., 28.

3. — If the charter of the defendant, by authorizing it to build its railway between certain points, confers authority to occupy for that purpose the bed of a navigable lake situate between those points, there is nothing in the charter indicating a legislative intention to relieve the company from its common law liability in case of injury to a riparian owner. *Ib.*

4. — Though as to watercourses the land owner takes to the center of the stream, it is not so with navigable lakes. Yet the right to free access to such lake cannot be taken from the land owner without compensation. *Delaplaine v. Chicago and Northwestern R'y Co.*, 42 Wis., 214, 1877; 15 Amer. R'y Rep., 28; *Diedrich v. Northwestern Union R'y Co.*, 42 Wis., 248, 1877.

LAND GRANTS.

See MANDAMUS; PACIFIC RAILROADS; RECEIVERS; TAXATION.

1. Abandonment of railway. Where a railroad company has received a grant of land from the state, upon condition that it would build a railroad from one town to another, it has no authority whatever afterwards to abandon any portion of such line and take up and remove the track. The unprofitableness of operating the road furnishes no excuse whatever for a failure to

comply with the conditions of the grant. *State v. Sioux City and Pacific R. R. Co.*, 7 Neb., 857. 1878.

2. — A railroad company in accepting a grant from the state thereby enters into a contract with the state to build and maintain its line and operate the same, and the state may enforce the contract by *mandamus* or other appropriate proceeding. *Ib.*

3. Acceptance. Congress, by an act passed June 3, 1856, granted certain lands to the state of Michigan, to be used solely in aid of the construction of railways. The state, by Act 126 of 1857, set them apart for the benefit of certain designated lines, on condition that the beneficiaries should accept them subject to the terms of the act. *Held*, in a suit in which the acceptance was qualified, that the company acquired no title, and that a bill would not lie to quiet a title to the lands obtained by a levy of execution against the beneficiary intended by the statute. *Rogers v. Port Huron and Lake Michigan R. R. Co.*, 45 Mich., 460, 1881; 10 Amer. & Eng. R. R. Cases, 635.

4. — Railway companies which accepted the congressional grant acquired rights which could not be destroyed, except by their own neglect. *Ib.*

5. Action to restrain receiving grant; pleading. Where the cause of action, as stated in the complaint, relates to property rights belonging to a corporation as the absolute owner, vested with the legal title, such corporation is the real party in interest to prosecute the action. It is no defense to such an action that another party has become the owner "of the sole beneficial interest in the rights, property and immunities" of the corporation, and an averment of that character in the answer may properly be stricken out, on motion, as immaterial and irrelevant. *Winona and St. Peter R. R. Co. v. St. Paul and Sioux City R. R. Co.*, 28 Minn., 359. 1877.

6. Assignment of certificate; trust. Under the Kickapoo treaty of 1802 (18 U. S. Stat. at Large, 623), the Central Branch Union Pacific R. R. Co., otherwise known as the Atchison and Pike's Peak R. R. Co., purchased from the government of the United States all the surplus lands belonging to the Kickapoo Indian reservation, and obtained

Atchison, Topeka and Santa Fe Grant.

certificates of purchase therefor from the secretary of the interior; and before the railroad company obtained patents for said land, one S. C. P., who was the president and attorney-in-fact for said company, and duly authorized, did by an assignment, written and printed on the same piece of paper on which one of said certificates of purchase was written and printed, "transfer and assign to N. J. W. all the right, title and interest of the said Atchison and Pike's Peak R. R. Co." to a certain quarter-section of said land, "and required the issue of a patent to N. J. W. as assignee of said company, in accordance with the terms of said certificate;" and the said N. J. W. afterward took possession of said land under said certificate and the assignment thereof, and made valuable improvements thereon; and afterward the said company caused the patent for said land to be issued to itself, and now refuses to transfer the legal title to said land to said N. J. W. *Held*, that the railroad company holds the legal title to said land in trust for said N. J. W., and that the company may be compelled to transfer the same by deed to said N. J. W. *Central Branch Union Pacific R. R. Co. v. Wilcox*, 14 Kans., 259. 1875.

7. Atchison, Topeka and Santa Fe grant.

The grant in aid of the branch of the Atchison, Topeka and Santa Fe R. R. Co. was only of lands on either side, and did not extend beyond its terminus. This terminus was where the Leavenworth, Lawrence and Galveston R. R. entered the Neosho Valley, and lands on the east of said last named railroad were not within the terms of the grant to this branch. *Neer v. Williams*, 27 Kans., 1, 1882; 10 Amer. & Eng. R. R. Cases, 561.

8. — Atchison, Topeka and Santa Fe grant construed. *Atchison, Topeka and Santa Fe R. R. Co. v. Pracht*, 12 Amer. & Eng. R. R. Cases, 267 (Kans.). 1883.

9. Burlington and Missouri River grant. The Burlington and Missouri River R. R. land grant construed. *Hunnewell v. Burlington and Missouri River R. R. Co.*, 3 Dillon (U. S. C. C.), 313, 1874; *Burlington, etc., R. R. Co. v. Lawson*, 10 Amer. & Eng. R. R. Cases, 655 (Ia.), 1883.

10. — Under the act of July 2, 1864 (13 Stat. at Large, 364), which gave to the Bur-

lington and Missouri River R. R. Co. every alternate section of the public lands to the amount of ten alternate sections per mile on each side of the road on the line thereof, but enacted in § 21 that "before any land granted by this act shall be conveyed to the said company there shall first be paid into the treasury of the United States the cost of surveying, selecting and conveying the same by the said company," it is not clear what the "cost of conveying" is, no statute known to the court authorizing a charge or fee for issuing a patent. Nor is it clear whether, under the terms, the "cost of selecting and conveying," the fees of one dollar for each final location of one hundred and sixty acres, given to registers and receivers by the act of congress of July 1, 1864 (13 Stat. at Large, 365), is meant or not. *Hunnewell v. Cass County*, 22 Wallace, 464. 1874.

11. — Where the odd-numbered sections within the limit of twenty miles from the line were, conformably to the act, withdrawn, *held*, that so much of the land thereby embraced as was not sold, reserved or otherwise disposed of, or to which a pre-emption or a homestead claim had not attached, was subject to the grant, and that no right in conflict therewith could be there-after acquired. The grant was *in presenti*. *Wood v. Railroad Co.*, 104 U. S., 329, 1881; 10 Amer. & Eng. R. R. Cases, 611. See *United States v. Burlington and Missouri River R. R. Co.*, 98 U. S., 334. 1878.

12. — In an action by plaintiff to recover lands alleged to have been included in its grant, but claimed by defendants under homestead entries, it was held that, under the amendatory act of congress of June, 1864, the grant of 1856, which was a grant *in presenti* in the nature of a float, was made definite and certain by reference to the line of said railroad as then located, and the lands granted became susceptible of accurate, certain and determinate designation. *Burlington and Missouri River R. R. Co. v. Lawson*, 58 Ia., 145, 1882; 10 Amer. & Eng. R. R. Cases, 548.

13. — The land-grant act of July 2, 1864, was a definite and explicit grant of all the land embraced within ten alternate sections on each side of the line of the road, on the line of the road, and not sold, reserved or

Cairo and Fulton Railroad.

otherwise disposed of by the United States, and to which a pre-emption or homestead claim had not attached at the time the line of the road was definitely fixed; and the fact that congress did not prescribe any lateral limit in the selection of lands in lieu of those previously sold or disposed of by government, cannot affect the construction of the grant. *Tuboreck v. Burlington and Missouri River R. R. Co.*, 18 Federal Reporter, 103; 2 McCrary (U. S. C. C.), 407. 1881.

14. — The grant of lands to the Burlington and Missouri River R. R. Co. was of a present interest, and effective against adverse claimants, as to all of the odd-numbered sections not excepted in the grant, on each side, and within twenty miles of the line of the road, immediately upon and from its definite location upon the ground, which was done June 15, 1865. As to such lands no specific selection by numbers was necessary to the perfection of the company's right. *Vance v. Burlington and Missouri River R. R. Co.*, 12 Neb., 285, 1882; 10 Amer. & Eng. R. R. Cases, 628.

15. — The grant of lands made to the Burlington and Missouri River R. R. Co., by the act of July 2, 1864 (18 Stat., 356), embraced ten odd-numbered sections per mile to be taken on the line of the road and in equal quantities on each side thereof, which had not been sold, reserved, or otherwise disposed of by the United States, and to which, at the time of the definite location of such line, a pre-emption or a homestead claim had not attached. *United States v. Burlington and Missouri River R. R. Co.*, 98 U. S., 334, 1878. See *Wood v. Railroad Co.*, 104 ib., 329. 1881.

16. — The B. and M. R. R. extension is one of the branches of the Union Pacific R. R., and the lands within the limits of the grant to that corporation are not subject to private entry. *Stalnaker v. Morrison*, 6 Neb., 863. 1877.

17. — Pre-emption certificates on the Burlington and Missouri River land grant construed. *Reynolds v. Burlington and Missouri River R. R. Co.*, 11 Neb., 186. 1881.

18. — The word "claim," in § 19 of the act of congress granting lands to the Burlington and Missouri R. R. Co., approved July 2, 1864, is not restricted to such claims

as shall afterwards ripen into perfect titles, but includes all that are made in due form, whether they are afterwards either perfected, abandoned or forfeited, or not. *Burlington and Missouri River R. R. Co. v. Abink*, 14 Neb., 95, 1883; 10 Amer. & Eng. R. R. Cases, 686.

19. — It was a condition of the settlement between the parties that the railway company should construct its road through Mills county and should locate a station at Glenwood. By the act of congress conferring a grant of land upon the company, it was required to extend its line to a point on the Missouri river near the mouth of the Platte river, and this point would necessarily be in Mills county. *Held*, that the company was not bound by the act of congress to run its line by the way of Glenwood or locate a station there, and an agreement to do so constituted a valid consideration for the agreement to compromise. *Mills County v. Burlington and Mo. River R. R. Co.*, 47 Ia., 66. 1877.

20. — A county possesses power through its proper officers to compromise pending litigation involving the title to its swamp lands, and it cannot afterwards set up the fact, in order to defeat the compromise, that the lands in controversy were swamp, and that it therefore had no power to convey them as provided by the terms of the compromise. *Ib.*

21. — The county having agreed in the compromise to convey to the railroad company all the lands the latter claimed, except a certain specified number of acres, reserved, in lieu of which it offered \$10,000 in money, it could not afterwards plead that the compromise was invalid on the ground that the company obtained by the compromise all it sought by its suit, until it had been shown that the excepted lands were worth no more than \$10,000. *Ib.*

22. **Cairo and Fulton Railroad.** The lands granted to the state of Missouri by the United States by act of congress of February 9, 1853 (10 U. S. Stat., 155), and by the state appropriated to the construction of the C. and F. R. R. by the act of the legislature of February 20, 1855, were subject to the lien reserved by the state in her own favor to secure the payment of the bonds issued by her for the benefit of that company, and title

Cedar Rapids and Missouri River Railroad — Cherokee Lands.

passed to the purchaser at the foreclosure sale made in pursuance of the acts of February 19 and March 19, 1866 (Acts 1866, pp. 107, 115). *Chouteau v. Allen*, 70 Mo., 290. 1879.

23. — The act of congress of February 9, 1853, granted certain lands to the states of Arkansas and Missouri for the purpose of aiding in the construction of the Cairo and Fulton Railroad, subject to the condition that the lands should revert to the United States if the road should not be completed within ten years (10 Stat. at Large, 155). The road not having been completed, on June 28, 1868, congress passed an act declaring that the act of 1853, "with all the provisions therein made, be and the same is hereby revived and extended for the term of ten years from the passage of this act, and all the lands therein granted, which reverted to the United States under the provisions of said act, be and the same are hereby restored to the same custody, control and condition, and made subject to the uses and trusts in all respects as they were before and at the time such reversion took place" (14 Stat. at Large, 338). *Held*, that the act of 1866 was not such a legislative declaration of forfeiture as would divest the state of the title granted by the act of 1853. It was rather the intention to waive the right of forfeiture accruing under that act. *St. Louis, Iron Mountain and Southern R'y Co. v. McGee*, 75 Mo., 522, 1882; 10 Amer. & Eng. R. R. Cases, 449.

24. Cedar Rapids and Missouri River Railroad. The Cedar Rapids and Missouri River R. R. Co., to which a grant of lands had been made, was permitted by an act of congress of June 2, 1864, to modify and change the location of the uncompleted portion of its line, said act providing that the company should "be entitled, for such modified line, to the same lands, and to the same amount of lands per mile, . . . as originally granted to aid in the construction of the main line, subject to the conditions and forfeitures mentioned in the original grant." The line as modified and constructed was shorter by several miles than the one first proposed. *Held*, that the words "per mile" in the act were words of limitation, and that the company was limited thereby to the

same number of acres per mile of constructed road that it would have been entitled to receive under the original grant. *Cedar Rapids and Missouri River R. R. Co. v. Herring*, 52 Ia., 687. 1879.

25. — The lands granted to the plaintiff by the act of congress of June 2, 1864, did not become subject to taxation until they were selected or ascertained to be the lands embraced in the grant. The earliest evidence of their identification is the certificate of the commissioner of the general land office, approved by the secretary of the interior. *Cedar Rapids and Missouri River R. R. Co. v. Carroll County*, 41 Ia., 153. 1875.

26. Change of grant; constitutional law. When the right to property is vested by grant for a particular purpose, by legislative authority or otherwise, the legislature cannot vest it for another. If the legislature declares the purpose to which the subject-matter of a grant shall be applied, its power over it is exhausted, and it cannot by legislative grant be appropriated for another and different purpose, except in case of a grant with conditions subsequent, where there is a clear forfeiture by the grantee of the conditions annexed to the grant. *Koenig v. Omaha and Northwestern R. R. Co.*, 3 Neb., 373. 1874.

27. — The act of the legislature of Nebraska, approved February 15, 1869, donating to railroad companies which should comply with its conditions the lands donated to the state by the United States for works of internal improvement, is a contract between the state and the railroad companies which have accepted the grant of lands contained in that act, and the act of the legislature, approved March 1, 1871, which undertakes to dispose of a portion of the same lands for the purpose of building highway bridges across the Platte river, impairs the obligations of the contract between the state and the railroad companies above cited, and is unconstitutional and void. *Id.*

28. Cherokee lands. In the treaty between the United States and the Cherokee Nation of Indians (14 Stats. at Large, 804), for the sale of a large tract of land known as the "Cherokee Neutral Lands," a preferable right was given to "actual settlers" to purchase on certain terms the land owned

Chicago and Northwestern Railway — Conflicting Grants.

and personally occupied by them. *Held*, construing the treaty, as amended, that one who is an actual settler, within the meaning of the treaty, at the date of its ratification, and entitled to the benefit of its provisions, may, after that time, and before making proof under the regulations of the secretary of the interior, transfer his right to purchase the land to which he is entitled, and the grantee may make the required proof and purchase the land. *Stroul v. Missouri River, Fort Scott and Gulf R. R. Co.*, 4 Dillon (U. S. C. C.), 396, 1877; *Armsworthy v. Same*, 5 ib., 491, 1879.

29. Chicago and Northwestern Railway. The fundamental principle established by the act of congress of April 24, 1830, and since governing the matter of the sales of the public lands, that private entries are not permitted until the lands have been exposed to public auction at the price for which they are afterwards sold, held to be applicable to a case — that of the grant by congress, June 3, 1856, of alternate sections designated by odd numbers, to the state of Wisconsin for the aid of the Chicago and Northwestern R'y. *Eldred v. Sexton*, 19 Wallace, 189. 1873.

30. Compromise. Where a dispute arose between the claimant to a homestead and a railway company in regard to the title to a tract of land, an agreement of compromise between them was held valid. *Atchison, Topeka and Santa Fe R. R. Co. v. Starkweather*, 21 Kans., 322. 1878.

31. Condition; a failure to comply. Where lands were conferred upon a railroad company by the legislature of the state of Iowa, upon the conditions that the company should receive them in instalments as the work of construction progressed, and that, if the road were not completed to a designated point at the time specified, then the state might resume the rights conferred by the act making the grant, it was held that, even in the absence of an act of the legislature after a default by the railroad company, the latter, by reason of a non-compliance with the conditions, did not possess any rights which could be enforced in the courts. *M. and M. R. R. Co. v. Sioux City and St. P. R. R. Co.*, 49 Ia., 604. 1878.

32. Conflicting grants. Construing the alleged conflicting grants to the defendant

and the Union Pacific R. R. Co., *held*, that the land department correctly decided that the title of the Union Pacific R. R. Co. to lands within twenty miles of its road was paramount to the title of the defendant company. *United States v. Burlington and Missouri River R. R. Co.*, 4 Dillon (U. S. C. C.), 297. 1876.

33. — Where the land grant of congress to the Union Pacific R. R. Co. and the Sioux City branch (12 Stats. at Large, 489; 13 ib., 356) conflict, and the limits of the respective grants overlap each other, and lands in the common territory were patented to the two companies jointly, as tenants in common, *held*, upon a construction of the legislation of congress in this regard, that the patent was rightly issued and that neither company was the exclusive owner of the said lands, and a partition was decreed. *Sioux City and Pacific R. R. Co. v. Union Pacific R. R. Co.*, 4 Dillon (U. S. C. C.), 307. 1876.

34. — Certain lands were certified to defendants under a railroad grant, and while holding such title they paid the taxes levied thereon. In an action in equity to quiet title, it was adjudged that the lands passed to plaintiff's grantor under the prior swamp land grant; whether or not they passed under such grant was a question of fact, depending upon the character of the lands. *Held*, that the plaintiff should be required to reimburse the defendants for the taxes paid prior to the determination of such question. *American Emigrant Co. v. Iowa Railroad Land Co.*, 52 Ia., 323. 1879.

35. — W. claimed to have entered by an agent a tract of land situated in township No. 80, and a register's certificate corresponded with his claim, while the records of the land office, in the absence of the original entries, which had been destroyed, showed that his entry was in township No. 81. *Held*, that in an action by W. to quiet his title to the tract in township 81, the burden was upon him to show that the original entry was as he claimed, and, failing in this, that he was not entitled to the relief asked. *White v. Chicago, Rock Island and Pacific R. R. Co.*, 46 Ia., 222. 1877.

36. — G., being entitled to a land warrant for eighty acres, by mistake was given one for forty acres, which he assigned to C., al-

Constitutional Law — Des Moines River Grant.

though by its terms it was not assignable, and subsequently entered the land in his own name, agreeing upon the issuance of the patent to convey to C.; the commissioner of the land office afterwards canceled the entry, and a warrant for eighty acres was issued to G. in lieu of the one first issued; the land entered under the first warrant was afterwards selected by the plaintiff, under the act of congress, approved May 15, 1856, granting lands to aid in the construction of railways, and the selection duly approved. *Held*, 1. That the legal title to the land was in plaintiff. 2. That any claim by G. to the land entered under the first warrant was a fraud upon the government. *Burlington and Mo. River R. R. Co. v. Clingman*, 43 Ia., 306. 1876.

37. — When the limits of two congressional railroad land grants made in the same act overlap, and there is no express priority in the disposition of such lands, or provision for the same, *held*, that each of the two railroads is entitled to an undivided half of the land. *Chicago, Milwaukee and St. Paul R'y Co. v. Sioux City and St. Paul R. R. Co.*, 10 Federal Reporter, 435; 3 McCrary (U. S. C. C.), 280. 1882.

38. Constitutional law. An act of the legislature of Texas, whereby a railroad company was incorporated and a grant of lands made on certain conditions to be performed by the company, is a contract between the state and the company within the meaning of § 10, art. I, of the constitution of the United States. *Gray v. Davis*, 1 Woods (U. S. C. C.), 420. 1871.

39. Contract to obtain grant. By the terms of a contract between S. and the defendant, they were together to endeavor to obtain a certain grant of land for the construction of a railway from A. to the Missouri river; the defendant constructed from C. to the last named terminus, and S. became subrogated to the rights of those who had constructed from A. to C.; a certain grant was obtained by the defendant, although it did not appear that any part of it was for constructing from A. to C. *Held*, that S. was entitled, under the contract, to no part of the grant obtained by defendant. *Smith v. Cedar Rapids and Missouri River R. R. Co.*, 43 Ia., 239, 1876; 14 Amer. R'y Rep., 426.

40. Denver City and St. Joseph grant. Subject to the exceptions therein mentioned, the act of July 23, 1866, ch. 212, granted, for the use and benefit of the St. Joseph and Denver City R. R. Co., the odd-numbered sections of public land within a prescribed distance on each side of the proposed road. The company duly filed in the office of the secretary of the interior a map showing the definite location of the line of the road. *Held*, that the grant was *in presenti*, and attached to those sections as soon as the map was so filed. No valid adverse right or title to any part of them could be acquired by a subsequent settlement or entry. *Van Wyck v. Knevals*, 103 U. S., 360, 1882; 10 Amer. & Eng. R. R. Cases, 634. See, also, *Knevals v. Hyde*, 5' Dillon (U. S. C. C.), 469. 1879.

41. Des Moines river grant. Under the decisions of the United States supreme court all lands situated above the Raccoon Fork of the Des Moines river, which were reserved by the land department under the river grant prior to 1856, and granted to the state to aid in the improvement of the river by the act of July 12, 1862, were excepted from the railroad grant of May 15, 1856, although a portion of such lands were not surveyed at the time of their reservation, and not certified to the state under the river grant until after the grant of 1856. *Dubuque and Sioux City R. R. Co. v. Des Moines Valley R. R. Co.*, 54 Ia., 89, 1880; 21 Amer. R'y Rep., 245.

42. — It has been settled in the United States supreme court that the title of the Des Moines Navigation and R. R. Co. to the lands donated to the state of Iowa for the improvement of the Des Moines river by the act of August 8, 1846 (9 Stat., 77), is good against the state; the railroad companies claiming under the act of May 15, 1856 (11 ib., 9), and, after 1855, as against pre-emptors, under the act of September 4, 1811 (5 ib., 453). *Wolsey v. Chapman*, 101 U. S., 755, 1879; *Litchfield v. Webster County*, ib., 773, 1879.

43. — For the purpose of determining the extent of the original grant of lands to the state of Iowa, under the act of congress approved August 8, 1846, the northern terminal line adopted by the government is one drawn at right angles with the general direction of the Des Moines river. *Des Moines*

Duty of Land Grant Road to Carry Troops — Forfeiture.

Navigation and R. R. Co. v. Cooper, 41 Ia., 275. 1875.

44. Duty of land grant road to carry troops. A provision in a land grant that "said railroad shall be, and remain, a public highway for the use of the government of the United States, free from all toll or other charge for the transportation of any property or troops of the United States," secures to the government the free use of the road, but does not entitle the government to have troops or property transported over the road by the railroad company free of charge for transporting the same. *Lake Superior and Mississippi R. R. Co. v. United States*, 98 U. S., 442. 1876.

45. Entry; mistake. Where the description in an application at a United States land office to purchase public land, and in the duplicate receipt of the receiver in the entry in the tract book, in the receiver's receipt book, and in the record of certificates, all correspond, the fact that the number of the application was written upon another tract on the plat in the land office is not evidence of a mistake entitling the plaintiff to relief in equity. *Iowa Railroad Land Co. v. Adkins*, 38 Ia., 351. 1874.

46. Estoppel; payment of taxes. Where, in an action by a county to quiet title to certain lands, it was answered that the county had received taxes on the same, an amendment to the effect that the taxes had been received by inadvertence was the introduction of new matter proper to be shown. *Adams County v. Burlington and Mo. River R. R. Co.*, 44 Ia., 335. 1876.

47. Evidence. In an action to recover land claimed to have passed to plaintiff's grantor under a congressional grant, as deficiency lands selected within the fifteen-mile limits, it was held that a certified copy of the list of such selections, from the records of the general land office, was competent evidence. *Chicago, Burlington and Quincy R. R. Co. v. Lewis*, 58 Ia., 101. 1880.

48. — The certificate of the governor of the state, made February 27, 1872, showing the construction of the road of the B. and M. R. R. Co. in accordance with the provisions of its grant, was held sufficient, and competent evidence of such fact. *Ib.*

49. Executive department. No act done, or threatened to be done, by any member of the executive department of the state government, in his official but not in his individual capacity, can be brought under judicial control or interference by *mandamus* or injunction, whether such act proceeds from an error of judgment or misapprehension of official duty under the law. *Western R. R. Co. of Minnesota v. DeGruff*, 27 Minn., 1, 1880; 21 Amer. R'y Rep., 419.

50. Failure to build railway; right to resume. The forfeiture of lands granted by congress to the state of Iowa to aid in the construction of a railway, by the failure of a company to construct its line within the time prescribed by the grant, can only be insisted upon by the United States. *Chicago, Burlington and Quincy R. R. Co. v. Lewis*, 58 Ia., 101. 1880.

51. — The right to resume the lands, reserved by the state in case of the failure of the company to complete its road by a specified date, may be waived, and such reservation does not affect the title of the company to the lands granted until the right is exercised. *Ib.*

52. Forfeiture. On the failure of the company to complete the work, a forfeiture of the grant, if it resulted therefrom, can be enforced only by the United States through judicial proceedings, or the action of congress. A third party cannot set it up to validate his title, nor avail himself of the fact that the company, in constructing, deviated from the original line, if the lands which he claims are within the prescribed distance from it and the road as built. *Van Wyck v. Knevals*, 106 U. S., 300, 1882; 10 Amer. & Eng. R. R. Cases, 604.

53. — Under the act of congress of March 3, 1863 (12 U. S. Stat. at Large, 772), lands not within the grant in place, but within the limits of the indemnity strip, were not earned by, and were not to be conveyed to, the Leavenworth, Lawrence and Galveston R. R. Co., one of the beneficiaries in said act, or sold for its benefit, until the completion of the entire road and branches; and if said road and branches were not completed within ten years, they reverted to the United States. The road was not completed within ten years, and has never yet been

Ft. Riley Reservation — Homestead.

completed; and congress, in 1876, by resolution (19 U. S. Stat. at Large, 101), formally declared a forfeiture of all unearned lands. *Held*, that such lands were freed from all rights or claims arising under said grant, and that a patent therefor from the governor of the state, executed more than ten years after the passage of the act, passed no title. *Neer v. Williams*, 27 Kans., 1, 1882; 10 Amer. & Eng. R. R. Cases, 561.

54. Ft. Riley reservation. The joint resolution of congress approved July 26, 1866, authorizing the president, among other things, to set apart to the Union Pacific R. R. Co. twenty acres of the Fort Riley reservation for depot and *other purposes*, in the bottom opposite Riley City; also, fractional section one on the west side of said reservation, near Junction City, for the same purposes, with a proviso that the president should not so do, so as in any manner to impair the usefulness of the reserve for military purposes, is a grant of land, dependent upon the favorable judgment and action of the president therein; and when the president, by executive order, set apart the land, the title of the railway company thereto became absolute. *Republican River Bridge Co. v. K. P. R. R. Co.*, 12 Kans., 409, 1874; 8 Amer. R'y Rep., 271.

55. Hannibal and St. Joseph R. R. grant. Under the statute of Missouri of December 10, 1855, § 18, providing that "after the Hannibal and St. Joseph Railroad shall be completed, equipped and in operation, said road shall be required to pay into the treasury of the state the surplus proceeds of all land sales or such other securities as may be provided by the company, in a deed of trust or otherwise, in a place to be adopted by said company, to raise funds to complete the road," only so much of such proceeds should be paid to the state as remains after deducting the amount of all expenses and obligations legally incurred by the company in completing, equipping and putting its line into operation, including sums advanced by the company to trustees for expenses of the management, surveying and disposing of lands granted by congress and included in deeds of trust, and for taxes thereon, and to satisfy reclamations on bad titles and other incidental expenses, sums paid, either in

money or in stock, to discharge the bonds issued by the company and secured by deeds of trust, and the interest on such bonds, and sums paid and obligations incurred to other parties than the state to raise money to complete the road and not secured by mortgage thereon. *Hannibal and St. Joseph R. R. Co. v. Bartlett*, 123 Mass., 15, 1877.

56. — Where a suit on covenant was brought against the defendant, and it appeared that prior and subsequent to the act of congress of 1850, known as the swamp land grant, the land was partially covered with water, and plaintiff had voluntarily surrendered it to the county of Livingston; but there was no proof to show that it was ever selected as swamp land under the provisions of that act, or that it had ever been confirmed or patented to the state, plaintiff could not recover. And such would be the case, even though, under the act of congress of June 10, 1852, the land was, in fact, exempted from the grant to defendant. It would not follow therefrom that the title to the land was necessarily in the county. *Morgan v. Hannibal and St. Joseph R. R. Co.*, 63 Mo., 129, 1876; 20 Amer. R'y Rep., 444.

57. Homestead. The land in controversy — a part of an odd-numbered section, and within the ten-mile grant of land to the A., T. and S. F. R. R. Co., by virtue of the act of congress of March 3, 1863 — was, in 1863, public land, open to homestead settlement; in October, 1863, one R. homesteaded it; in 1868 he voluntarily abandoned it; in June, 1869, the line of the railroad of the A., T. and S. F. R. R. Co. was definitely located opposite to this land. At the time of such definite location the land was abandoned, but the entry or filing of R.'s homestead was uncanceled; on November 3, 1869, a withdrawal of lands was made, under the act of March 3, 1863, within the limits of which withdrawal the land is situate; in May, 1874, the land was certified to the state of Kansas, and in February, 1875, patented by the state of Kansas to the company; in October, 1871, one S. had R.'s entry canceled, and then homesteaded the land himself. S.'s entry was, on application of the railroad company, afterward canceled, but, on August 14, 1878, reinstated by the secretary

Illinois Central Grant — Indemnity.

of the interior, under the provisions of the act of congress of April 21, 1876, and on April 2, 1879, a patent was issued to S. *Held*, that the title to the land vested in the company in June, 1869; that the entry of S. was erroneously reinstated; that the title of the company to the land could not be disturbed by an act of congress subsequent to June, 1869; and that the decision of the land department awarding the land to S. in 1878, by a mistake of law, is not conclusive. *Emslie v. Young*, 24 Kans., 732, 1881; 5 Amer. & Eng. R. R. Cases, 422.

58. — Where a contest was made before the United States land officers between the claimant of a homestead and a railway company, the latter asserting title under a land grant, and the land officers decided adversely to the company, and a patent issued to the claimant of the homestead, *held*, that this decision was conclusive, except in case of fraud. *Kansas Pacific R'y Co. v. Dunmeyer*, 24 Kans., 725, 1881; 5 Amer. & Eng. R. R. Cases, 417.

59. — The initial or inceptive right of a homestead settlement under the act of congress dates from the entry of the land at the local land office. The possession and settlement of public land, prior to the application and entry, give a party no vested right to land as a homestead in opposition to the rights of a railroad company deriving title to said land under provisions of the act of congress of March 3, 1863, granting lands to the state of Kansas to aid in the construction of railroads, when the line of road is definitely fixed antecedently to such application and entry of the land as a homestead. *Atchison, Topeka and Santa Fe R. R. Co. v. Mecklim*, 28 Kans., 167. 1879.

60. Illinois Central grant. Upon the selection of the lands, granted the state for railway purposes, by the Illinois Central R. R. Co., as provided in the statute, the grant to the state under the act of congress of September 20, 1850, became certain, and the grant attached to the particular lands selected, and the title to them vested in the railway company. *Illinois Central R. R. Co. v. County of Union*, 94 Ill., 70. 1879.

61. — Swamp and overflowed lands selected by the Illinois Central R. R. Co., in lieu of other lands sold or pre-empted, after

the list thereof, properly certified, was filed for record in the proper county, cannot be recovered by the county in which they lie, as the legal title to such lands is in the railroad company and not in the county. *Ib.*

62. — The act of congress granting lands to the state of Illinois, in aid of the Illinois Central Railroad, and the certified schedules issued by the secretary of the interior and the commissioner of the general land office, are evidence of title in the state. *Sawyer v. Cow*, 63 Ill., 130. 1872.

63. — By the act of the general assembly in force February 27, 1854, the charter of the Illinois Central R. R. Co. was so altered and amended as to authorize a sale of its lands upon a credit, and a new contract was thereby entered into between it and the state, which the state has no authority to change without the consent of the company. *People v. Ketchum*, 72 Ill., 212. 1874.

64. — By the act of 1854 (Sess. Laws, 192), a reasonable discretion was granted to the Illinois Central R. R. Co. to sell its lands upon credit, and authority may properly be inferred to fix a reasonable minimum price. *People v. Illinois Central R. R. Co.*, 62 Ill., 510. 1872; 6 Amer. R'y Rep., 201.

65. — The company should not permit purchasers to retain the purchase money after maturity to evade the law, or with the view of relief from taxation, but should use all usual and reasonable efforts to enforce collections without oppression of the debtor. Ordinary delay, not intended to further any bad or unlawful purpose, will not afford sufficient grounds for awarding a writ of *mandamus*. *Ib.*

66. Indemnity. There is a distinction between indemnity against a failure of title to specific lands or land in place, and indemnity against a failure of quantity, where a grant is made of mere quantity, and the lands are not in place. In the latter case the indemnity consists of the mere right to select secondarily from larger limits, if the quantity intended to be granted is not first found within the narrower limits; and as in this case congress, by the grant to the Cedar Rapids and Missouri River R. R. Co., by act of June 2, 1864, could not have intended any provision of indemnity, the burden of proof is on the company to show that there

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is not enough of the land to satisfy the grant, before it can establish its claim to the land of defendant, who has obtained a patent for a part of such land from the government. *Cedar Rapids and M. R. R. Co. v. Jewell*, 12 Amer. & Eng. R. R. Cases (Ia.), 277. 1883.

67. Indian reservation. Where the right of an Indian tribe to the possession and use of certain lands as long as it may choose to occupy the same is assumed by treaty, a grant of them, absolutely or *cum onere*, by congress, to aid in building a railroad, violates an express stipulation; and a grant in general terms of "land" cannot be construed to embrace them. *Leavenworth, Lawrence and Galveston R. R. Co. v. United States*, 92 U. S., 733. 1875.

68. Iowa Central Air Line grant. The Iowa Central Air Line Railroad grant construed. *Railroad Co. v. Courtright*, 21 Wallace, 310. 1874. See, also, *Courtright v. Cedar Rapids and Missouri River R. R. Co.*, 35 Ia., 336, 1572; 5 Amer. R'y Rep., 67.

69. — Under the act of congress of May 15, 1856, and the act of the general assembly of Iowa of July 14, 1856, the Central Air Line R. R. Co. acquired an absolute title to one hundred and twenty sections of land, which it had a right to dispose of without the necessity of the approval of the state. A conveyance by a trustee to himself is not void, but only voidable at the option of the *cestui que trust*. Defendant in this action held not to be in a position to question a sale of land by the Air Line Co. to trustees of the road. *Miller v. Iowa Land Co.*, 3 Amer. & Eng. R. R. Cases (Ia.), 27. 1881.

70. Iowa grant; Chicago, Rock Island and Pacific Railroad. The grant made to Iowa by the act of May 15, 1856, ch. 28 (11 Stat., 9), to aid in the construction of a railroad from Davenport to Council Bluffs, is *in presenti*, and, with certain exceptions therein specified, it vested in the state the title to every section of public land designated by odd numbers for six miles in width on each side of the road, when the line thereof should be definitely fixed. *Grinnell v. Railroad Co.*, 103 U. S., 739, 1880; 5 Amer. & Eng. R. R. Cases, 447; *Chicago, Rock Island and Pacific R. R. Co. v. Grinnell*, 51 Ia., 476, 1879.

71. Kansas grant. Under the act of congress of July 26, 1863, granting lands to the state of Kansas to aid in the construction of the southern branch of the Union Pacific railway and telegraph, from Fort Riley, Kans., to Fort Smith, Ark., where the line of the railway was definitely located, the title of the railway company to the odd sections within the ten-mile limit became fixed and absolute. With respect to the land in the indemnity territory, the right of the company was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed by the act. *Missouri, Kansas, and Texas R'y Co. v. Noyes*, 25 Kans., 340, 1881; 5 Amer. & Eng. R. R. Cases, 440. See, also, *Atchison, Topeka and Santa Fe R. R. Co. v. Rockwood*, 25 Kans., 292, 1881; 5 Amer. & Eng. R. R. Cases, 432.

72. — Where N., having the qualifications therefor, made a homestead entry for eighty acres of public land, and within the indemnity territory from which the deficiency in the ten-mile limit was to be supplied to the railway company, under the act of July 26, 1866, prior to any withdrawal of the lands from market or entry, and before such tract had been selected to help satisfy any deficiency, and afterward, and while N. was in possession of the land under such entry, and after he had complied with all the provisions of the homestead act, the secretary of the interior selected the tract to supply a deficiency in the odd section of land in the ten-mile limit, and the railway company, upon such selection, obtained a patent from the United States therefor, held, that the selection and the issuance of the patent were without authority of the statute. *Missouri, Kansas and Texas R'y Co. v. Noyes*, 25 Kans., 340, 1881; 5 Amer. & Eng. R. R. Cases, 440; *Same v. Watson*, 25 Kans., 387.

73. — The plaintiff was a beneficiary of the grant made by the act of congress of March 3, 1863, granting lands to the state of Kansas to aid in the construction of certain railroads. The line of its road was definitely located and fixed in and through the county of Rice on December 10, 1870; but no order was made by the secretary of the interior withdrawing lands along such line from sale and the operation of the home-

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stead and pre-emption laws, until February 13, 1871. *Held*, that the title passed on December 10, 1870, and that a settlement by defendant on a tract of land within the limits of the grant, made between December 10, 1870, and February 13, 1871, gave to the latter no right to homestead or pre-empt the land. *Atchison, Topeka and Santa Fe R. R. Co. v. Bobb*, 24 Kans., 673, 1881; 5 Amer. & Eng. R. R. Cases, 412.

74. — Northern Kansas R. R. land grant construed. *St. Joseph and Denver City R. R. Co. v. Baldwin*, 5 Amer. & Eng. R. R. Cases (U. S. S. C.), 408. 1881.

75. **Little Rock and Ft. Smith R. R. grant.** By act of November 26, 1856, the legislature granted to the Little Rock and Fort Smith R. R. Co. the lands donated by congress to the state to aid in the construction of the Cairo and Fulton Railroad and its branches, which were adjacent to the route of the former road, subject to all the provisions, restrictions, limitations and rights created by the acts, so far as the same were applicable. The act also granted to the Cairo and Fulton R. R. Co. all of the aforesaid lands adjacent thereto. The second section provided that occupants by residence and cultivation of any of the lands comprised in the grant made by congress might purchase of the Cairo and Fulton R. R. Co. the legal subdivisions containing his residence and improvement, not exceeding one quarter section, at two dollars and a half per acre, by complying with other provisions of the act. Both companies having failed to comply with certain conditions of the act, the legislature on the 1st of February, 1859, passed an act releasing them from the condition, and in the third section provided that actual residents and cultivators on the 1st of November, 1858, might purchase of the Cairo and Fulton R. R. Co., as provided in the former act. *Held*, that, although the Little Rock and Fort Smith R. R. Co. was not named in the second section of the first, nor the third section of the last, act, it was within the provisions of said sections. The fact that the land was donated to the state by congress in trust to aid in the construction of the roads did not impair the legislative control over it. It was the sole judge of the measures appropriate to effect the ob-

ject of the grant, and to enable the state to discharge the trust reposed in it by congress. *Little Rock and Ft. Smith R. R. Co. v. Howell*, 31 Ark., 119. 1876.

76. **Location of railway.** On November 28, 1870, the Atchison, Topeka and Santa Fe R. R. Co. made a survey of its line from Wichita to Fort Dodge, running through Barton county; the company had the survey mapped, and a copy filed with the secretary of state of Kansas, and also with the secretary of the interior, as designating the definite location of its road. The map was filed in the office of the secretary of state December 26, 1870, and with the department of the interior on January 10, 1871. In August, 1871, another survey was made by the company, which changed the road from Newton to Hutchinson, and also changed the route in the vicinity of Fort Dodge; this survey was continued on through the county of Barton, but did not change materially the line of the road in that county. Before December 8, 1872, the railroad was constructed through Barton county upon the survey of 1870, being the same survey as 1871, excepting some unimportant alterations. *Held*, that, notwithstanding said changes, the line of the railroad was definitely fixed in Barton county, in November, 1870, within the provisions of the act of congress of March 3, 1863, and that the rights of the company attached to the lands situated in that county, and granted under the provisions of said act of congress of that date. *Atchison, Topeka and Santa Fe R. R. Co. v. Mecklim*, 23 Kans., 167. 1879.

77. — Until the line of railroad is definitely fixed, to which a grant of alternate sections of land on either side has been made, the title to any particular section does not rest in the company, the grant being in the nature of a float, previous to the permanent location of the line. *American Emigrant Co. v. Chicago, Rock Island and Pacific R. R. Co.*, 47 Ia., 515. 1877.

78. **Minnesota grant.** The Minnesota grant of indemnity construed. *Barney v. Winona and St. Peter R. R. Co.*, 6 Federal Reporter, 802; 2 McCrary (U. S. C. C.), 421. 1880.

79. — Both railroad companies claim under the grant by the act of congress of March 3,

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1857, entitled "An act making a grant of land to the territory of Minnesota," etc., and the defendant company claims part of the lands under a congressional grant of 1864. The line of defendant was located through the territory where the lands in controversy lie in 1859; the line of the plaintiff in 1868. No valid selection of lands for indemnity purposes was made till 1872, when defendant first selected the lands in controversy for such purposes, and they were certified by the secretary of the interior to the state for defendant's line. *Held*, that the line within the six-mile limits of plaintiff, and between the six and fifteen-mile limits of the defendant, belong to plaintiff. The lands lying between plaintiff's six-mile and fifteen-mile limits and between defendant's fifteen-mile and twenty-mile limits belong to plaintiff. The lands lying between the six-mile and fifteen-mile limits of each company belong to both companies in common. *Winona and St. Peter R. R. Co. v. St. Paul and Sioux City R. R. Co.*, 27 Minn., 123. 1880.

80. — On March 3, 1857 (11 Stat., 197), congress passed an act granting certain lands to the territory of Minnesota, for the purpose of aiding in the construction of several lines of railroad. The act declared that the lands should be exclusively applied to the construction of that road on account of which they were granted, and to no other purpose whatever; and that they should be disposed of by the territory or future state only as the work progressed, and only in the manner following, that is to say, a quantity of land, not exceeding one hundred and twenty sections for each of the roads, and included within a continuous length of twenty miles of the road, might be sold; and when the governor of the territory or the future state should certify to the secretary of the interior that any continuous twenty miles of any of the roads were completed, then another like quantity of land might be sold; and so, from time to time, until the roads were completed. *Held*, that the construction of portions of the road on account of which lands were granted, as thus designated, was a condition precedent to a conveyance by the territory or future state of any of the lands beyond the first

one hundred and twenty sections. Accordingly, an act of the territory, transferring to a railroad company these lands in advance of any work on its road, only conveyed title to the first one hundred and twenty sections. *Farnsworth v. Minnesota and Pacific R. R. Co.*, 93 U. S., 49. 1875.

81. — No further disposition of the land along either road was allowed, except as the road was completed in divisions of twenty miles. *Chamberlain v. St. Paul and Sioux City R. R. Co.*, 92 U. S., 299. 1875.

82. **Missouri, Kansas and Texas Railway grant.** The claim of the Missouri, Kansas and Texas R'y Co. to the lands in controversy arises under the act of July 26, 1866 (14 Stat., 289), under which the route of its road was designated, a map thereof filed, and the road constructed. At that date the title to the lands along that route, which were covered by the previous grant to the Kansas Pacific R'y Co., had already passed from the United States. Although the rights of said companies are determined by the date of their respective grants, it appears that the location of the Kansas Pacific was earlier than that of the Missouri, Kansas and Texas road. *Missouri, Kansas and Texas R'y Co. v. Kansas Pacific R'y Co.*, 97 U. S., 491. 1878.

83. **Occupying claimants.** Where the occupying claimant of a land grant has no apparent title he cannot avail himself of the benefit of the occupying claimant act. *Central Branch Union Pacific R. R. Co. v. Hardbrook*, 21 Kans., 440. 1879.

84. — Where, after judgment in favor of the plaintiff in an action to recover land under a congressional grant, and while the action was still pending in the United States supreme court on writ of error sued out by the defendant to the supreme court of this state, the defendant filed a petition for improvements under the occupying claimant act, it was held that the court properly refused to grant a writ of possession to the plaintiff until such petition was disposed of. As to the effect of its filing on the appeal, and the jurisdiction of the court to try the same while the appeal was pending, query? *Chicago, Rock Island and Pacific R. R. Co. v. Tharnish*, 54 Ia., 690. 1880.

85. — When the occupying claimant of

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railway land is a vendee of the land under a contract providing for a forfeiture of all his improvements in case of non-performance on his part, he is not, in case of eviction at the suit of the vendor, entitled to the benefits of the act for the relief of occupying claimants. *Vance v. Burlington and Missouri River R. R. Co.*, 12 Neb., 285, 1882; 10 Amer. & Eng. R. R. Cases, 628.

86. Osage lands. On a construction of the treaty of the United States with the Osage Indians, of June 2, 1825 (7 Stats. at Large, 240), and the subsequent treaty with the same Indians, proclaimed January 21, 1867 (14 Stats. at Large, 687), and of the act of congress of March 3, 1863 (12 Stats. at Large, 772), granting lands to the state of Kansas to aid in the building of railroads, *held*, that land which, under the said treaty of 1825, had been set apart and reserved for the said Indian tribe, and which were in their actual use and occupancy, did not pass under the said railroad grant, and that the United States were entitled to have canceled patents which had issued to the railroad company under the erroneous assumption that the lands were embraced in the railroad grant. *United States v. Leavenworth, Lawrence and Galveston R. R. Co.*, 1 McCrary (U. S. C. C.), 610, 1874. See *Same v. Mo., Kans. and Tex. R'y Co.*, *ib.*, 624, 1874. See, also, *Leavenworth, Lawrence and Galveston R. R. Co. v. Coffin*, 16 Kans., 510, 1876.

87. — Osage treaty. A person who, on July 22, 1871, settled upon and occupied a certain piece of land belonging to the United States and situated within the Osage ceded lands, had no right to pre-empt the same, for such lands were not at that time subject to pre-emption. *Wood v. Mo., Kans. and Tex. R. R. Co.*, 11 Kans., 328, 1878.

88. Pacific railroad grants. On July 1, 1862, the original Pacific Railroad Act was passed, granting a certain portion of the public lands for the construction of railroads; and on July 2, 1864, an amendatory act was passed enlarging the original grant. The lands in controversy were not included in the original grant, but are included in the grant under the later amendatory act, under which complainant claims title. *Held*, that such lands, during the intervening period, were subject to be reserved from sale, pre-

emption or homestead settlement by the proper authority. *Kansas Pacific R'y Co. v. Atchison, Topeka and Santa Fe R. R. Co.*, 18 Federal Reporter, 103; 2 McCrary (U. S. C. C.), 550, 1881.

89. — The words "public lands" are used to describe such lands as are subject to sale or other disposition under general laws. *Newhall v. Sanger*, 92 U. S., 761, 1875.

90. — Central Pacific Railroad. By the act of congress of July 1, 1862, entitled "An act to aid in the construction of a railroad," etc., the timber growing on the odd-numbered sections of public mineral land of the United States was granted to the Central Pacific R. R. Co. of California; and under the term *timber* is included all the wood. *Held*, accordingly, that a subsequent patentee of such lands took no title to the timber. *Carr v. Central Pacific R. R. Co.*, 55 Cal., 192, 1830.

91. — There being a deficiency of sections to satisfy the grant to the Central Pacific R. R. Co., the company, with the approval of the secretary of the interior, selected as part indemnity a quarter of an odd-numbered section of public land within ten miles beyond these limits, and obtained a patent therefor from the United States. When so selected it was within a tract formerly covered by a Mexican claim, which, although *sub judice* at the date of the act, had been finally rejected as invalid. *Held*, that the patent conveyed a perfect title to the company. *Ryan v. Railroad Co.*, 90 U. S., 382, 1878; *Ryan v. Central Pacific R. R. Co.*, 5 Sawyer (U. S. C. C.), 260, 1878; *Central Pacific R. R. Co. v. Yolland*, 49 Cal., 438, 1875; 6 Amer. R'y Rep., 272. See, also, *United States v. Central Pacific R. R. Co.*, 11 Federal Reporter, 449, 1882.

92. — The act of congress of July 23, 1866, confirming selections of public land made by or on behalf of this state under grants of congress, which selections were void when the act passed, did not have the effect of confirming the title of the state to a selection of an odd section within the belt granted by congress to the Central Pacific R. R. Co. of California, by the acts of July 1, 1862, and July 2, 1864. *Central Pacific R. R. Co. v. Robinson*, 49 Cal., 446, 1875.

93. — The odd sections of land included

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within the boundaries of a rejected Mexican grant, which was rejected after the passage of the acts of congress of July 1, 1862, and July 2, 1864, granting land in aid of the construction of the Central Pacific R. R. Co. of California, passed, by said acts, to the railroad company, and the state, after the passage of said acts, could not select such sections as *lien* lands. *Ib.*

94. — Northern Pacific grant. The Northern Pacific land grant construed. *Northern Pacific R. R. Co. v. Peronto*, 10 Amer. & Eng. R. R. Cases, 670 (Dak.), 1882; *Cass County v. Certain Lands, etc.*, 5 Amer. & Eng. R. R. Cases (Minn.), 404, 1881.

95. — St. Paul and Pacific. The St. Paul and Pacific land grant construed. *Nash v. Sullivan*, 10 Amer. & Eng. R. R. Cases, 552 (Mich.). 1882.

96. — The act of March 6, 1863, entitled "An act granting land to aid the St. Paul and Pacific R. R. Co. in the construction of its branch road from St. Paul to Winona," whether it be construed as a present grant of lands or as an executory promise to convey on conditions stated, was, after the company had complied with the conditions, a valid contract, and entitled the company to select, in order to make up deficiencies of swamp lands within the prescribed limits, from any such lands belonging to the state at the time the right to select became perfect. *St. Paul and Chicago R'y Co. v. Brown*, 24 Minn., 517. 1878.

97. — Southern Pacific Railroad. The Southern Pacific land grant construed. *Southern Pacific R. R. Co. v. Orton*, 6 Sawyer (U. S. C. C.), 157. 1873.

98. — taxation. Lands are taxable after the issue of a patent. *Union Pacific R. R. Co. v. McShane & Dillion* (U. S. C. C.), 303. 1873.

99. — Union Pacific Eastern Division. On the 26th of July, 1866, the lands adjacent to the then selected line of plaintiff's road up the Smoky Hill river, including the lands in controversy, were, in pursuance of positive and direct legislation, reserved from sale by the United States, and on the 23d of January, 1867, the road along these lands was completed, accepted by the president, and patents by him ordered to be issued for said lands. The land grants to the defendant provided that, in case it should appear, where

the line or route of its road was definitely fixed, that the United States had sold any section, or that it had been reserved by the United States for any purpose whatever, then the secretary of the interior should cause other lands in equal amount to be selected for the grant. The line of defendant's road adjacent to the lands in dispute was definitely fixed between the 5th and 20th of September, 1866. *Held*, that the grant to the defendant never attached to the said lands, but that the full title thereto passed to the plaintiff by the construction and acceptance of its road. *Kansas Pacific R'y Co. v. Missouri, Kansas and Texas R'y Co.*, 15 Kans., 15. 1875.

100. — Union Pacific grant. The even-numbered sections along the line of the Union Pacific R. R. and its branches may be settled upon and entered under the provisions of the pre-emption and homestead laws, but are not subject to private entry. *Stalnaker v. Morrison*, 6 Neb., 368. 1877.

101. Patents. Where patents for lands have been issued without authority of law, the United States may, in their own name, maintain a bill in equity, in the circuit court, to annul and set aside the patents. *United States v. Leavenworth, Lawrence and Galveston R. R. Co.*, 1 McCrary (U. S. C. C.), 610. 1874. See *Same v. Mo., Kans. and Tex. R'y Co.*, *ib.*, 624. 1874.

102. — trustee. Where one party has acquired from the state, through one of its officers duly authorized to make a deed of conveyance, the legal title to lands which of right, under its laws, belong to another, the former will be treated in equity as a trustee of the latter, and compelled to transfer the legal title as to such of the lands as he still holds, and to account for the proceeds of such portion as may have been sold. *Winona and St. Peter R. R. Co. v. St. Paul and Sioux City R. R. Co.*, 26 Minn., 179. 1879.

103. Pre-emption. Special Laws 1862, ch. 20, § 8, provide that "all persons who in good faith settled upon any of the lands hereby granted to the Saint Paul and Pacific R. R. Co. at or prior to the time when the line of said road and branch was definitely fixed and located, with a view to pre-empt, and who have continued to occupy the

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same, shall be at liberty to purchase such land at \$2.50 per acre, if within the six-mile limits of the line of said road, and, if without such limits, \$1.25 per acre." *Held*, that the line definitely fixed and located, here meant, is the company's preliminary survey of its line, made in the summer and fall of 1857, and approved by its board of directors November 9, 1857. Also, that the words "at or prior" do not go any further than to include those persons who had settled on the lands at any time before such location of the line, and those who were such settlers at the time of such location. Also, that to have settled on the lands in good faith and with a view to pre-empt, a person must have made an actual, genuine and not sham settlement thereon, with the view and intent of obtaining title thereto by complying with the provisions of the pre-emption laws of the United States. *Peterson v. St. Paul and Pacific R. R. Co.*, 27 Minn., 218. 1880.

104. — In 1870 a railway pre-emption claim to land could not be acknowledged before a notary, especially one residing in a different county. *Cravens v. Moore*, 61 Mo., 178. 1875.

105. — Defendant's pre-emption settlement was made May, 1868, and his entry June 1, 1872, as shown by certificates such as are provided for in Gen. St. 1878, c. 73, §§ 91, 92, and are thereby made *prima facie* evidence of his title. *Held*, that these certificates are *prima facie* evidence of a pre-emption right commenced in May, 1868, and consummated in June, 1872. *Winona and St. Peter R. R. Co. v. Randall*, 29 Minn., 283, 1882; 10 Amer. & Eng. R. R. Cases, 558.

106. **Prior reservations.** Lands within the indemnity limits named in the act of March 3, 1863, having been, prior to the act of congress of July 26, 1866 (14 U. S. Stat. at Large, 289), reserved by competent authority for the purpose of aiding in an object of internal improvement, never fell within the terms of the grant in said last named act. *Neer v. Williams*, 27 Kans., 1, 1882; 10 Amer. & Eng. R. R. Cases, 561.

107. **Receiver appointed to comply with terms of grant.** The charter of a railroad company conferred on it a large grant of land, but provided that, unless twenty miles of its road were completed and in order for

use before a date named, both the charter and the land grant should become forfeited. The company had issued and sold two hundred and fifty bonds of \$1,000 each, which were secured by a deed of trust on its road and other property. The company was insolvent. About two miles of the twenty miles of its track remained to be built, and little over one month of the time limited for the completion of the twenty miles remained. The company was unable to procure the means to build the remaining two miles, the contractor for building the road had failed and abandoned his contract, and there was imminent danger of the forfeiture of the charter of the company and of its grant of lands. *Held*, that under these circumstances it was the duty of the court, upon the application of trustees of the bondholders, to appoint a receiver, with authority and orders to complete the twenty miles of road within the time limited by the charter. *Allen v. Dallas and Wichita R. R. Co.*, 3 Woods (U. S. C. C.), 316. 1878.

108. **Right of way.** The grant of right of way to the Burlington and Missouri River R. R. Co. over the lands of the United States, by § 18 of the act of July 2, 1864, was of a present interest, and notice from the passage of the act to all persons dealing with public lands, within the prescribed limits of the company's interest therein. *Rider v. Burlington and Missouri River R. R. Co.*, 14 Neb., 120, 1883; 10 Amer. & Eng. R. R. Cases, 688.

109. — And where, after one location of its road, the company changed its line pursuant to the act of congress approved May 6, 1870 (U. S. Stat. at Large, 118), *held*, that a purchaser of land from the United States, after the passage of the act, took it subject to the right of way under the new location afterwards made. *Id.*

110. — In the year 1869, B. purchased from the United States certain lands in section eleven, in township one, range three, in Jefferson county, Nebraska. In July, 1866, congress passed an act granting to the state of Kansas, for the use and benefit of the St. J. and Denver R. R. Co., every alternate odd section of land for a distance of ten miles on each side of the track, and providing that if, when the line or route was

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definitely fixed, the United States had sold any section so granted or any part thereof, or that the right of pre-emption or home-stead settlement had attached to the same, or they had been reserved by the United States, that other lands might be selected in lieu thereof. The act also granted the right of way to said company across the public lands. In 1871 the plaintiff located its line through the above described lands. B. took the necessary steps under the statutes of the state for the assessment of damages, and judgment was rendered in his favor for the sum of \$200. *Held*, that B. was entitled to compensation for the right of way. *St. Joseph and Denver R. R. Co. v. Baldwin*, 7 Neb., 247. 1878.

111. Sioux City and St. Paul Railroad. The act of congress of May 12, 1864, granting certain public lands to the state to aid in the construction of a railway, did not specify any beneficiary corporation, but conferred them upon the state as trustee, charged with the duty of appropriating them for the purpose, and under the conditions, specified in the act. The title was not to pass until the issuance of the patents, after they had been earned by the construction of certain specified portions of the road, and prior to that the lands could not be disposed of nor incumbered. *Sioux City and St. Paul R'y Co. v. County of Osceola*, 43 Ia., 318, 1876; 14 Amer. R'y Rep., 450; *Same v. County of Lyon*, 43 ib., 688, 1876; *Same v. County of O'Brien*, 44 ib., 699, 1876.

112. — Chs. 134 and 144, Acts of 1866, conferred upon the Sioux City and St. Paul R'y Co. the title to the lands embraced in the acts of congress, conditioned upon its compliance with the conditions of the grant, which was to be determined by subsequent legislation. *Ib.*

113. Spanish grants. Conflicts between Spanish grant and United States land grants determined. *Southern Pacific R. R. Co. v. Crampton*, 10 Amer. & Eng. R. R. Cases, 613 (Cal.), 1882; *United States v. Central Pacific R. R. Co.*, 8 Sawyer (U. S. C. C.), 81, 1882.

114. Swamp lands. The act of the commissioner of the general land office in certifying these swamp lands within the limits

of the railroad grants, as a part of such grants, is in contravention of the vested rights of the counties and void. *Montgomery County v. Burlington and Missouri River R. R. Co.*, 38 Ia., 208. 1874.

115. — The act of congress of September 28, 1850, granting swamp and overflowed lands to the state of Iowa, operated to convey a present title without a patent or formal conveyance. *Chicago, Rock Island and Pacific R. R. Co. v. Brown*, 40 Ia., 333, 1875; *Page County v. B. and M. R. R. Co.*, 40 Ia., 520, 1875.

116. — In an action at law to recover certain lands the plaintiff claimed title under a railroad grant, and introduced in evidence the commissioner's certificate, approved by the secretary of the interior; *held*, that parol evidence was not admissible to impeach plaintiff's title by showing that the land was in fact swamp, and hence passed under the prior swamp land grant. *Iowa Railroad Land Co. v. Antoine*, 52 Ia., 429. 1879.

117. — Under the act of congress of March 3, 1857, confirming and approving the selections of swamp lands which had been theretofore made and reported to the general land office, the title to all lands which had been so selected, and which remained vacant, vested absolutely in the state, whether the same were or were not actually swamp. *American Emigrant Co. v. Chicago, Rock Island and Pacific R. R. Co.*, 47 Ia., 515. 1877.

118. — The state of Iowa having granted its swamp lands to the counties in which they are situate, Mills county, insisting that certain lands were of this character, made claim thereto. The Burlington and Missouri River R. R. Co. claimed them under the act of May 15, 1856, ch. 28. These conflicting claims gave rise to a suit between the parties, which was decided by the state courts in favor of the county. A writ of error was thereupon brought, and, whilst it was pending here, a compromise was entered into by which the county was to make certain conveyances to the company, and to pay it the sum of \$10,000 for lands previously disposed of. Conveyances were executed accordingly. Afterwards the county instituted suit to have the compromise declared void, and the company sued for the \$10,000.

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The state courts having sustained the compromise, and decided against the county in both suits, writs of error were brought here. *Held*, that the county cannot set up that the lands were disposed of contrary to the provisions of the act of 1850. Although, after the compromise was made, the writ then pending was submitted to this court, and decided in favor of the county, yet that this did not abrogate the compromise, as the parties continued to act under it. The decision of the state court is not repugnant to, nor in disaffirmance of, the opinion and judgment of the supreme court of the United States. *Mills County v. Railroad Companies*, 107 U. S., 557, 1882; 10 Amer. & Eng. R. R. Cases, 693.

119. — Title to swamp land was not vested by the act of congress of September 28, 1850, until the admission of a territory into the Union. Hence, the state of Minnesota, not having been admitted into the Union at the date of the passage of the act granting lands to the territory or future state of Minnesota for the construction of railroads, approved March 3, 1857, a grantee of the state, by virtue of the acts of the legislature approved March 8, 1861, and March 4, 1864, has a good title as against one whose title depends upon the proper construction of the acts of congress approved September 28, 1850, and March 12, 1860. *Sioux City and St. Paul R. R. Co. v. Rice*, 3 McCrary (U. S. C. C.), 410. 1881.

120. — Under the act of congress of June 10, 1852, entitled "An act granting the right of way to the state of Missouri, and a portion of the public lands to aid in the construction of certain railroads in said state," and the act of congress approved August 3, 1854, a descriptive list of lands accruing to the state under the former act, containing the land in controversy, made out and certified on February 9, 1854, by the commissioner of the general land office, and approved by the secretary of the interior, and again certified in May, 1856, by said commissioner, in conformity with the latter act, confers upon the state a title to the land in controversy, unless it be swamp land or embraced in some other grant; such land was not vacant or unappropriated. *Funkhouser v. Peck*, 67 Mo., 19. 1877.

121. — When the plaintiff's claim to the land in controversy, in an action of ejectment, is founded on the swamp land grant of congress of September 28, 1850, he cannot recover if it appears that the land is, in point of fact, high and dry, rolling prairie, and has never been selected as swamp land by the proper officers of the general government, notwithstanding the defendant, who claims under the railroad land grant of congress of June 10, 1852, fails to show that the railroad company either had built its road into the county where the land lay, when it was selected by the company, or had recorded a map of the lands selected in the proper county as required by the act of the state legislature of September 20, 1852. *Id.*

122. — As against a plaintiff claiming title to land under the railroad grant of congress to the state of Missouri (10 U. S. Stats., 8), it is a sufficient defense in ejectment, if it is shown that the land was swamp and overflowed land within the meaning of the act of congress granting such lands to the several states (U. S. R. S., §§ 2479-2481), whether the proper steps have been taken to perfect the defendant's title or not. Swamp lands are excepted from the operation of the railroad grant. *Hannibal and St. Joseph R. R. Co. v. Snead*, 65 Mo., 239. 1877.

123. — Where the secretary of the interior had certified the swamp lands of a certain county to a railroad company, and thereafter the county had for seven years taxed the lands to the company, and for one or more years had advertised and sold them for taxes, and the company had sold some of them to persons who had been in actual possession for periods of from two to six years, *semble*, that the county would be estopped from asserting title to the lands. *Adams County v. Burlington and Missouri River R. Co.*, 39 Ia., 507. 1874. Such reception of tax does not work an estoppel. *Buena Vista County v. Iowa Falls and Sioux City R. Co.*, 46 Ia., 226. 1877.

124. Taxation. Lands granted to railways upon the issuing of the patents become subject to taxation. *North Wisconsin Ry Co. v. Board of Supervisors*, 8 Bissell (U. S. C. C.), 414. 1879.

125. — The question of the taxation of the

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lands, where there is no exemption in the grant, is governed by the laws of the state. *White v. Burlington and Missouri River R. R. Co.*, 5 Neb., 393. 1877.

126. — Lands granted under the act of congress of May 15, 1856, and ch. 124, Laws of the Tenth General Assembly, became subject to taxation only after they had been conveyed to the grantee by patents of the governor of the state, in accordance with the provisions of the latter act. *Iowa Falls and Sioux City R. R. Co. v. Woodbury County*, 38 Ia., 498. 1874. See, also, *Iowa Falls and Sioux City R'y Co. v. Cherokee County*, 37 Ia., 483. 1873.

127. — The fact that lands were granted by congress, subject to the disposal of the legislature, to aid in the construction of a railway described in the act, and for no other purpose, does not deprive the legislature of the power to tax them after they have been earned by, and become the property of, the railway company. *West Wisconsin R'y Co. v. Supervisors of Trempealeau County*, 35 Wis., 257. 1874.

128. — Ch. 21, Laws of 1877, extended the exemption of the lands mentioned in ch. 314 and ch. 362, P. and L. Laws of 1866 (which had already expired), for the term of three years, in respect to all lands not theretofore or thereafter sold or platted, but subjected the lands affected by such exemption to the payment of taxes theretofore assessed against them. *Wisconsin Central R. R. Co. v. Lincoln County*, 57 Wis., 137. 1883.

129. — Lands which ceased to be exempt from taxation on May 11, 1876, were properly on the assessment roll for that year, and it is immaterial whether they were valued and placed on such roll before or after that date. *Ib.*

130. — When lands have been earned by a railway company under a grant, and the state and the United States have each parted with all right, title and interest therein to the company by patents regularly issued, they become relieved, *pro tanto*, of the trust implied in the grant, and subject to taxation. *Wisconsin Central R. R. Co. v. Taylor County*, 52 Wis., 37, 1891; 1 Amer. & Eng. R. R. Cases, 532.

131. — Lands held subject to taxation because they had been sold by the beneficiary,

although they had not yet been conveyed by the state. *State v. Winona and St. Peter R. R. Co.*, 21 Minn., 472. 1875.

132. — Ch. 324, Laws of 1864, in substance enacted that all lands thereafter acquired by the plaintiff, and of which the title in fee should become vested in it, pursuant to a certain act of congress and certain laws of Wisconsin, should be exempt from all taxation for ten years after the passage of the act; and that in case any such land should be sold, contracted to be sold, leased or conveyed by the company, they should immediately become subject to taxation; but that they might be mortgaged to raise funds for building the railway without being subject to taxation for the period aforesaid. By ch. 104, Laws of 1870, the time of exemption was extended for ten years as to such lands as should remain unsold by the company, upon condition that the company should complete its road within two years. By the terms of certain acts passed by the legislature in 1871, the provisions of these exempting acts, so far as they applied to lands in Trempealeau county, were repealed. Sec. 1, art. XI, of the state constitution provides that all general laws or special acts, under which corporations without banking powers are created, "may be altered or repealed by the legislature at any time after their passage." *Held*, that the repealing acts of 1871, above mentioned, are valid. *West Wisconsin R'y Co. v. Supervisors of Trempealeau County*, 35 Wis., 257. 1874.

133. — As against a demurrer, allegations in a petition that the plaintiff is the owner of certain lands, and that the same were not subject to taxation for a given year, will be deemed sufficient as statements of fact; so held in a suit to enjoin taxes upon the Osage grant. *Leavenworth, Lawrence and Gulf R. R. Co. v. Leahy*, 12 Kans., 124. 1873.

134. — *Burlington and Mo. River grant.* Under sec. 20 of the act of congress, approved July 2, 1864, providing that when "the Burlington and Missouri River R. R. Co. shall have completed twenty consecutive miles of its road, the president of the United States shall appoint three commissioners to examine and report to him in relation thereto, and if it shall appear to him that

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twenty miles of said road have been completed as required by law, then, upon certificates of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company," etc., *held*, that until such certificate was issued the company did not become the equitable owner of such lands. Therefore such land was not taxable. *White v. Burlington and Missouri River R. R. Co.*, 5 Neb., 398. 1877.

135. — Cedar Rapids and Mo. River grant. The lands selected in Sac county in pursuance of the grant to the state of Iowa, under the act of May 15, 1856, and by the state conferred conditionally upon the Cedar Rapids and Missouri River R. R. Co., had not become subject to taxation on January 1, 1867. *Cedar Rapids and Missouri River R. R. Co. v. County of Sac*, 46 Ia., 243. 1877.

136. — Lands granted to the Cedar Rapids and Missouri River R. R. Co., by ch. 37, Laws of 1860, were not, prior to their certification, taxable as belonging to the company until the company had complied with §§ 6 and 7 of said act in respect to the construction of its road. That the road had been completed such a distance west from Cedar Rapids as would earn the land in controversy, upon the basis of one hundred and twenty sections for every twenty miles, would not be sufficient. *Goodrich v. Beaman*, 37 Ia., 563. 1873.

137. — delay in issue of patent. The fact of the completion of the railroad earlier than the issuance of the patent is not evidence of fraudulent practice to prevent its issuance, for the purpose of avoiding taxation. *Iowa Falls and Sioux City R. R. Co. v. Woodbury County*, 38 Ia., 498. 1874.

138. — Parol evidence is admissible to show that a railroad company has fraudulently prevented the issuance to it of patents to lands, for the purpose of avoiding taxation. *McGregor and M. R. R. Co. v. Brown*, 39 Ia., 655. 1874.

139. — Lands granted to railroads are not taxable until the year after they are patented, when there is no evidence of any fraudulent or intentional delay in procuring the patent. *Ib.*

140. — Facts considered which were held to show that lands which were not certified to a railway company by the United States

until several years after they were earned under the grant were withheld because of conflicting claims thereto, which rendered their taxation to the company during the interval illegal. *Doe v. Iowa Railroad Land Co.*, 54 Ia., 357. 1880. See, also, *Grant v. Iowa Railroad Land Co.*, 54 Ia., 378, 1880; *Iowa Railroad Land Co. v. Fitchpatrick*, 52 Ia., 244, 1879.

141. — The condition of a land grant to a railroad was that, upon the completion of a certain number of miles, a patent should be issued by the governor; such patent was issued in July, 1871, and, in the absence of fraudulent concealment, upon the part of the railroad company, to prevent an earlier issuance of the patent, held, that the lands were not taxable for the year 1871. *Iowa Falls and Sioux City R. R. Co. v. Plymouth County*, 40 Ia., 609. 1875.

142. — Kansas grant. On the 25th of July, 1866, congress passed an act entitled "An act granting lands to the state of Kansas to aid in the construction of the Kansas and Neosho Valley R. R., and its extension to Red river." By the terms of this act, upon the certificate of the governor of Kansas that any ten consecutive miles of this railroad had been completed, patents were to issue directly to the Kansas and Neosho Valley R. R. Co., for the lands opposite such completed section, and so for each successive section. No action on the part of the state was in terms called for. The said railroad company, now the Mo. R., Ft. Scott and Gulf R. R. Co., as required, formally accepted the grant with its terms and conditions. Prior to 1870 it had complied with all the terms and conditions of the grant required to be performed by it. The state of Kansas took no action in reference to this matter until March, 1871, when the legislature passed a joint resolution formally accepting the grant. No patents had issued for certain of the lands in Bourbon county up to April 21, 1871. *Held*, that they were nevertheless subject to taxation for the year 1870. *Mo. River, Ft. Scott and Gulf R. R. Co. v. Morris*, 13 Kans., 302. 1874.

143. — Sioux City and St. Paul grant. Ch. 34, Laws of 1874, authorizing the certification to the Sioux City and St. Paul R. R. Co. of the lands held by the state in trust

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for that company, did not have the effect to pass the title until after the lands had been certified by the governor, and they were not, therefore, taxable to the company until after such action by the executive. *Sioux City and St. Paul R. R. Co. v. County of Osceola*, 50 Ia., 177. 1878.

144. Tax sale. In an action to set aside a tax sale of land embraced in a railway grant, the certificate of the secretary of the interior is admissible to show that other lands in the same section had been earned and were approved to the company before the taxes upon which the sale was made had accrued. *Chicago, Burlington and Quincy R. R. Co. v. Holdsworth*, 47 Ia., 20. 1877.

145. — The United States, by act of congress, granted certain lands, situated in Dickinson and other counties, to the Kansas Pacific R'y Co., upon certain conditions, and the company then contracted to sell a large portion thereof to the National Land Co., the land company agreeing to pay all taxes that might be legally assessed thereon. Before said conditions were complied with or fulfilled, the lands situated in Dickinson county were taxed, and no one paying the taxes, the lands were offered for sale for the taxes; and no one bidding for the lands, they were struck off to Dickinson county for the taxes. As to a portion of these lands sold to Dickinson county for the taxes, R., on June 3, 1870, purchased the tax-sale certificates, and had them duly assigned to him. He was a *bona fide* assignee of the county, having no connection whatever with either the railway company or the land company. R. afterward paid the taxes levied on the lands for the year 1870, and afterward, on January 8, 1872, sold and assigned said tax-sale certificates to L., who purchased them for and in behalf of the National Land Co. L. afterward paid the taxes levied on the lands for the years 1871 and 1872, and afterward, on December 18, 1874, assigned the tax-sale certificates to the National Land Co. All said taxes were illegal, according to a decision of the supreme court of the United States, for the reason that said lands still belonged to the United States. Afterward, when it was discovered that said taxes were illegal, and after a proper demand (Gen.

Stat., p. 1058) had been made for a return of the money paid into the county treasury by R. and L., on account of said tax-sale certificates, this action was commenced by the National Land Co. against Dickinson county, to recover said money back. *Held*, that the plaintiff could not at common law recover said money back, for the same was paid voluntarily. *Comm'rs of Dickinson County v. National Land Co.*, 23 Kans., 196. 1879.

146. Texas grant. The act of March 10, 1875, substituting for the causes and extent of forfeiture the failure to build the railway at the yearly rate of forty miles (or eighty miles in two years), and on failure a forfeiture of the land grants upon that portion of the road not so constructed, is a repeal of so much of the original act (August 5, 1870) incorporating said railroad company to the extent substituted thereby; and, upon the failure to build said road at the rate of eighty miles every two years, the defendant company forfeited the right to the land grant as to that part of the road not so built. Such forfeiture is the extent of the penalty for such failure. *State v. International and Great Northern R. R. Co.*, 57 Tex., 534. 1882.

147. — Prior to the constitution of 1869 it was the policy of the state, in making grants of land to railways, to reserve alternate sections. The grant for school purposes construed. *Galveston, Brazos, etc., R'y Co. v. Gross*, 47 Tex., 428. 1877.

148. Timber; waste. Where defendant agreed that the lands should be devoted to the payment of certain indebtedness of the railroad company to which the land had been granted by the state, and executed and delivered to the bondholders representing such indebtedness "convertible land certificates," which were made assignable, it held the equitable title as trustee, and was not liable for waste in the removal of valuable timber therefrom, unless actually received and used by it. The beneficiaries under the trust had the power to protect their own interests. *Beecher v. Chicago and Northwestern R. R. Co.*, 14 Federal Reporter, 211. 1882.

149. To a state for railway purposes. Where congress enacts "that there be and

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is hereby granted to a state, to aid in the construction of a specified railroad, every alternate section of land, designated by odd numbers," within certain limits of each side of the road, the state takes an immediate interest in land, so situate, whereto the complete title is in the United States at the date of the act, although a survey of the land and a location of the road are necessary to give precision to the title and attach it to any particular tract. Such a grant is applicable only to public land owned absolutely by the United States. No other is subject to survey and division into such sections. *Leavenworth, Lawrence and Galveston R. R. Co. v. United States*, 92 U. S., 773, 1875.

150. Waste; liability of trustee. Where lands were granted to a certain railway company in aid of the construction of its line, and upon foreclosure of a mortgage upon the railway the lands were transferred, under an arrangement, to another company, which issued certificates therefor entitling the holders to proportionate shares of the land after a certain time, the latter company was a naked trustee for the purposes named, and not liable for not preventing trespasses and waste upon the lands while so held by it. *Beecher v. Chicago and Northwestern R'y Co.*, 11 Bissell (U. S. C. C.), 246; 14 Federal Reporter, 211. 1882.

151. When grants take effect. Land grants to railroads take effect from the time that the line of the railroad is definitely fixed or located, notwithstanding the lands may not be selected till a later date. *Taboreck v. Burlington and Missouri River R. R. Co.*, 13 Federal Reporter, 108; 2 McCrary (U. S. C. C.), 407. 1881.

152. Wisconsin grant. Certain lands were granted by congress to a state to aid in the construction of railroads, and by the state were granted to a certain railroad company, which mortgaged the same, and defendant became the purchaser at the foreclosure sale. *Held*, that, the conditions upon which the land had been granted by congress not having been complied with, the title still remained in the United States. *Beecher v. Chicago and Northwestern R. R. Co.*, 14 Federal Reporter, 211. 1882.

LANDLORD AND TENANT.

1. Distress; railways as fixtures. Three railways were connected with a coal mine,—one within the mine, one within a yard attached to the colliery, and the third extending from the yard and effecting a junction with a public railway. The lessee of the mine had mortgaged it to the plaintiff, who had entered into possession. The rent being in arrear, the lessor distrained, amongst other things, the three railways. The railways were constructed in the following manner: the surface of the ground was prepared by having ballast spread upon it; sleepers were then embedded in the ballast and the ballast packed, and the rails were fastened to the sleepers by nails. In order to remove the rails they were wrenched off the sleepers by means of bars and picks; and to remove the sleepers it was necessary to loosen the ballast by means of picks, and then with levers to raise them. The removal of the sleepers made holes in the ballast. *Held*, that the railways, by their mode of annexation to the soil, became fixtures, and were not distrainable. *Turner v. Cameron*, 5 Law Reports (Queen's Bench Cases), 303. 1870.

2. Private road. A railway act imposed a penalty for the interruption of a private road, "payable to the owner thereof." *Held*, that the tenant of the farm could not recover the penalty. *Collinson v. Newcastle R'y Co.*, 1 Carrington & Kirwan, 546; 47 E. C. L., 545. 1844.

LAND SLIDES.

1. Contract. The plaintiff conveyed certain land to the defendant, "for materials," "to have and to hold . . . to the uses and purposes of said railroad, and for no other or different purpose." It was understood by the parties that a part of the land was taken as a source from which to obtain materials for other portions of the railroad. By reason of the excavation made for that purpose on such part, the other land of plaintiff was deprived of its lateral support, and slid into the excavation. *Held*, in an action brought to recover damages sustained by plaintiff by reason of such slide, that she was estopped from

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claiming the right to the lateral support by her deed, which contemplated the use made of the land by the defendant. *Ludlow v. Hudson River R. R. Co.*, 4 Hun (N. Y.), 239. 1875.

2. — **damages; covenant.** In 1859 an embankment of defendant's slid down upon the land of plaintiff's father. At that time, for a valuable consideration, the father made an agreement in writing, that if "land slides shall hereafter occur from said embankment . . . I will make no claims for damages therefor, and that I will, and that my heirs, etc., shall consider the money this day paid . . . compensation in full for all past and future damage, etc., in consequence of said embankment, and this instrument a bar to all future claim." *Held*, that an easement of this nature could be created by covenant, and that the instrument in question was a bar to a recovery for damages for slides from the embankment thereafter happening, by ordinary or casual negligence of defendant. *Van Rensselaer v. Albany and West Stockbridge R. R. Co.*, 3 Thompson & Cook (N. Y. Supreme Ct.), 620; 1 Hun, 507, 1874; affirmed, 62 N. Y., 65. 1875.

LATERAL RAILROADS.

See CERTIORARI.

1. **Appeal.** Briggs petitioned for a lateral railway and a landing of one thousand two hundred feet on Hays' land; the viewers allotted six hundred feet; Hays appealed; by permission of the court the jury allowed eight hundred and thirty-five feet. *Held*, to be error. *Hays v. Briggs*, 74 Pa. St., 373. 1873.

2. **Private switch.** A private switch from a railroad to coal lands, which is not owned by the railway company, but by individuals for their own private use, is not a public highway, within the meaning of § 12, art. 11, of the constitution, and therefore is not free to all persons for the transportation of their persons and property thereon. That section applies only to public railroads. *Kælle v. Knecht*, 99 Ill., 396. 1881.

3. **Right to construct.** The act of 1846, incorporating the Pennsylvania R. R. Co., declares that it shall be lawful for the company to make such lateral roads or branches

to such convenient points in either of the counties through which the main line may pass as the president and directors may deem advantageous and suited to promote the convenience of the inhabitants thereof and the interests of the company. The act of 1857, authorizing the sale of the public works, including the railway from the town of Columbia to the city of Philadelphia, provided that any company, already incorporated by this commonwealth, that might purchase the said railway, should possess, hold and use the same under the provisions of its act of incorporation, and any supplements thereto. The Pennsylvania R. R. Co. bought said public works in pursuance of said statute. The company commenced the construction of a branch, or lateral railway, from its main line in West Philadelphia by means of a bridge across the Schuylkill river and along Filbert street on an elevated railway to Merrick street in Philadelphia. A property owner on the line of Filbert street sought to restrain the construction of the road and applied for an injunction. *Held*, that the injunction was properly refused. *Duncan v. Pennsylvania R. R. Co.*, 94 Pa. St., 435, 1880; 7 Amer. & Eng. R. R. Cases, 1.

4. **Statute.** The acts of April 4, 1868, and April 28, 1871 (forming railway corporations), do not authorize the construction of a railway such as is contemplated by the lateral railroad laws. *Edgewood R. R. Co.'s Appeal*, 79 Pa. St., 257. 1875.

LAW OF PLACE.

1. **Common law; injury to employes.** An employe being injured in a sister state, the common law rules as expounded by the courts of that state will govern as to his rights, in the absence of any statute on the subject. *Atlanta and Charlotte R'y Co. v. Tanner*, 68 Ga., 384. 1882.

LEASE.

See ARBITRATION; CATTLE-GUARDS; ELEVATORS; EJECTMENTS; EMINENT DOMAIN; FIRES; INJURIES TO DOMESTIC ANIMALS; INJURIES TO EMPLOYES; INJUNCTION.

1. **Action for possession; equity; ejectment.** A railway was leased to a railway

Agent — Authority to Lease Railway.

company; the lessors alleging a breach of covenants by the lessees, declared the lease forfeited and took possession of the road. A bill was filed in the supreme court by the lessees to restrain the lessors from interfering with the use of the road; a preliminary injunction was awarded forbidding the lessees to use the road, etc., until the further order of the court. Then the lessees filed a cross-bill, setting out the breaches of the lease, etc., and praying for a decree to reinstate them in possession of the road; answers were filed to both bills and a master appointed to take testimony. Whilst the matter was before him, the lessors brought an ejectment for their road on the ground of the forfeiture. *Held*, that, pending the equity suit, the lessors could not institute another proceeding involving the same question. *Pittsburgh and Connellsville R. R. Co. v. Mt. Pleasant and Broad Ford R. R. Co.*, 76 Pa. St., 481. 1874.

2. Agent. A lease, under seal, executed by an agent as lessee in his individual name, and which does not purport to be executed on behalf of the principal, is not binding upon the latter, although the fact of the agency is recited therein, and although it appears by extrinsic evidence that the lessee acted as agent; the instrument can only be enforced against the party who appears upon the face of it to be the covenantor. *Kiersted v. Orange and Alexandria R. R. Co.*, 69 N. Y., 343, 1877; reversing *Same v. Same*, 3 Thompson & Cook (N. Y. Supreme Ct.), 662, and 1 Hun (N. Y.), 151, 1874; 54 Howard's Practice (N. Y.), 29, 1874; 55 ib., 51, 1877.

3. Attachment. A non-resident of this state, who is the lessee of a railroad in this state, and therefore liable to be sued as was the railroad company, is none the less liable to be proceeded against by attachment as other non-residents are. *Breed v. Mitchell*, 48 Ga., 538. 1873.

4. Authority to lease railway. A railway company cannot transfer or lease its line unless authorized by statute. *Troy and Boston R. R. Co. v. Boston, Hoosac Tunnel and Western R'y Co.*, 86 N. Y., 107, 1881; 7 Amer. & Eng. R. R. Cases, 49; *Hinckley v. Gildersleeve*, 19 Grant Ch. (Upper Canada), 212, 1872. See, also, *Attorney-General v. Niagara Falls Bridge Co.*, 20 ib., 34, 1873;

Pittsburgh and Connellsville R. R. Co. v. Bedford and Bridgeport R. R. Co., 81 Pa. St., 104, 1871; *Woodruff v. Erie R'y Co.*, 25 Hun (N. Y.), 246, 1881.

5. — A railroad corporation, organized under the general statute, has no power, without the consent of the legislature, to lease its road to an individual; and where it has so done it is responsible to the public for the manner of operating the road; as to the public, those operating it must be regarded as agents of the corporation. *Abbott v. Johnstown, Gloversville and Kingsboro R. R. Co.*, 80 N. Y., 27, 1880; 2 Amer. & Eng. R. R. Cases, 541.

6. — Without enabling legislation, a railroad company possesses no power to lease its road to a foreign corporation, and surrender its road and franchises into its control. *Archer v. Terre Haute and Indianapolis R. R. Co.*, 102 Ill., 493, 1882; 7 Amer. & Eng. R. R. Cases, 249.

7. — There being no statute in Indiana which, in terms, forbids or prohibits railroad corporations of that state from executing leases of their property, a lease made by such a corporation, and which is neither in violation of any statute nor against the public policy of the state, is valid. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Columbus, Chicago and Indiana Central R'y Co.*, 8 Bissell (U. S. C. C.), 456. 1879.

8. — One railway company has the right to lease its line for the use of another company. *Midland R'y Co. v. Great Western R'y Co.*, Law Reports, 8 Chancery Appeal Cases, 841, 1873; 7 Eng. (Moak), 408.

9. — Under the act of February 12, 1855, all railroad companies have power to make contracts and arrangements with each other for leasing or running their respective roads, or any part thereof, and a plea to an information, in the nature of a *quo warranto*, charging one company with usurping the powers and franchises granted to another, which sets up a contract between it and the other company, authorizing it to operate the road of such other company, and that it is operating the road under such contract, is a good plea. *Illinois Midland R'y Co. v. The People*, 84 Ill., 426. 1877.

10. — By virtue of Sp. Laws 1870, ch. 57, § 4, and Sp. Laws 1871, ch. 71, § 1, the Min-

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neapolis and St. Louis R'y Co. has authority to make a valid lease to another company of this state of rights which it has acquired, since the passage of said ch. 71, by condemnation of land. *Pence v. St. Paul, Minneapolis and Manitoba R'y Co.*, 28 Minn., 488. 1881.

11. — The North Carolina R. R. Co. is invested by its charter with full authority to lease its road, with power to the lessee to change the gauge thereof. *State v. Richmond and Danville R. R. Co.*, 72 N. C., 634. 1875. See *Same v. Same*, 73 ib., 527. 1875.

12. — The unauthorized lease of a railway held invalid. *Kersey Oil Co. v. Oil Creek, etc., R. R. Co.*, 12 Philadelphia, 374. 1877.

13. **Bankruptcy; mortgage.** The Boston, Hartford and Erie R. R. Co. executed a mortgage; called the Berdell mortgage, and issued bonds for certain specific purposes, under which the individual defendants were trustees, and in possession under a lease. Afterwards the N. and W. R. R. Co. was leased to the Boston, Hartford and Erie R. R. Co. Subsequently the Boston, Hartford and Erie Co. was declared bankrupt, during the existence of the N. and W. lease. *Held*, that the lease passed to the trustees under the mortgage as "after acquired" property. *Barnard v. Norwich and Worcester R. R. Co.*, 4 Clifford (U. S. C. C.), 351. 1876.

14. **Bonds secured by lease.** Leases to secure the payment of bonds can have no greater force than the bonds themselves. *McKee v. Grand Rapids, etc., R'y Co.*, 41 Mich., 274. 1879.

15. **Building; defect.** The lessor is not liable for a personal injury resulting from the manner of the use of a leased building, and not resulting from a defect in the building itself. *Edwards v. New York and Harlem R. R. Co.*, 25 Hun (N. Y.), 634. 1881.

16. **Cattle-guards.** In case of a lease of a railway track, a distinction exists as to the liability of the lessor and lessee company between those cases in which the liability arises from the omission of some duty in the construction of the road, and those which arise from negligence or the omission of some duty in the handling of trains and the management of the road. So held in case of failure to construct cattle-guards as provided by law. *St. Louis, Wichita and West-*

ern R'y Co. v. Curl, 28 Kans., 622, 1882; 11 Amer. & Eng. R. R. Cases, 458. See, also, *Cook v. Milwaukee and St. Paul R'y Co.*, 36 Wis., 45. 1874.

17. **Compensation.** Where the tenancy of a railway company was not for any definite period, the fact that the landlord commenced proceedings against it to compel it to pay for the lot, which proceedings resulted in a surrender of the possession to him, will not prevent his recovering for the use and occupation prior to the commencement of those proceedings. *Wittman v. Milwaukee, Lake Shore and Western R'y Co.*, 51 Wis., 89. 1881.

18. **Competing lines.** By ch. 444 of 1859, the Long Island R. R. Co. was authorized to take a lease of any railroad that might be connected therewith. *Held*, that under this provision of the statute, a lease might be taken of a competing road, provided that, when united, the two roads were capable of forming continuous lines. *Wallace v. Long Island R. R. Co.*, 12 Hun (N. Y.), 460. 1877.

19. **Construction.** An agreement construed between two railroad companies enabling one to pass over and use the railway stations, watering places and sidings upon and appertaining to the other, and giving the right of access to such parts of the stations and appurtenances as were necessary to the traffic on and over the other, with a covenant to give the same facilities and assistance as their own traffic of the like character should receive. *Great Northern R. R. Co. v. Eastern Counties R. R. Co.*, 9 Hare (Eng. Ch.), 306. 1851.

20. — The lease of the Atlantic and St. Lawrence Railway to the Grand Trunk R'y Co. construed. *Portland, Saco and Portsmouth R. R. Co. v. Grand Trunk R'y Co.*, 63 Me., 90. 1873.

21. — The lease of the Vermont and Canada Railroad to the Vermont Central R. R. Co. construed. *Langdon v. Vermont and Canada R. R. Co.*, 53 Vt., 228; 4 Amer. & Eng. R. R. Cases, 33, 1881; *Same v. Same*, 54 Vt., 593.

22. — The lease of the Miss. Central R. R. Co. to the Southern R. R. Association construed. *Bills v. Southern R. R. Association*, 7 Baxter (Tenn.), 595. 1874.

23. — Lease of the Portsmouth, Great

Construction of Railway by Lessee — Estoppel.

Falls and Conway Railway construed. *Eastern R. R. Co. v. Rogers*, 124 Mass., 527. 1878.

24. — Lease construed and held not to render the lessee liable for repairs. *White v. Albany R'y Co.*, 17 Hun (N. Y.), 98. 1879.

25. — contract construed not to be a lease. A contract between a party and a railroad company provided that he should furnish for the latter a specified sum of money to be expended as designated; and also, that he should be president, and should take possession of and operate the road to the best advantage, devoting the earnings to certain specified objects, operating the road in the name of the company, and being paid for his services. *Held*, that the contract did not constitute a lease, and that his individual estate was not liable upon a contract entered into by the company prior to his contract therewith. *United States Rolling Stock Co. v. Potter*, 48 Ia., 56. 1878.

26. Construction of railway by lessee. The construction of a railway by a lessee is not equivalent to a commencement of construction by the lessor, so as to preserve the corporate existence of the lessor, within the meaning of the statutes of New York. *Brooklyn, Winfield and Newtown R'y Co., In re*, 26 Hun (N. Y.), 314. 1879.

27. Contract not under seal. An incorporated railway company agreed by parol to take certain premises for a year. It occupied, and at the end of the year continued to occupy for another year, at the expiration of which period it removed its goods without any previous notice to quit, but paid rent up to the end of the following quarter. *Held*, that it was not liable in an action for use and occupation for the remaining three-quarters of a year, since it did not occupy during that period; and that no tenancy could be inferred from the payment of rent, inasmuch as it could not contract except under seal. *Finlay v. Bristol and Exeter R'y Co.*, 7 Welsby, Hurlstone & Gordon (Exchequer), 409, 1852; 9 Eng. Law & Equity, 488; 21 Law Jour. Rep., N. S. (Exch.), 117.

28. Covenant; action upon. Where the legal plaintiff had executed a lease to defendant, in consideration of which defendant had covenanted to pay certain mortgage bonds issued by the plaintiff, some of which were

held by the parties to whose use the suit was brought, *held*, in an action of covenant, that defendant had the right to demand plaintiff's authority to use the name of the legal plaintiff. *Mississippi Central R. R. Co. v. Southern R. R. Association*, 8 Philadelphia, 107. 1871. See *Same v. Same*, 11 Amer. & Eng. R. R. Cases, 576 (Tenn.).

29. Depot grounds. A railway company, leasing the right to use another company's depot, owes the same duty to all passengers on the grounds whether they are passengers on its own line or that of its lessor. *Haff v. Minneapolis and St. Louis R'y Co.*, 4 McCrary (U. S. C. C.), 622. 1882.

30. Dissolution of corporation. The lease of a railroad does not dissolve such corporation, and it may still be sued for liabilities incurred prior to such lease. *United States v. Little Miami, Columbus and Kenia R. R. Co.*, 1 Federal Reporter, 700. 1880.

31. Duty of lessee to operate railway. A lease, which bound defendant to *efficiently* work the leased line, does not bind it to work the same with *passenger* trains, provided the lessee works the line in a reasonable manner, so as to save the lessor from damage or forfeiture under its charter. *West London R'y Co. v. London and North Western R'y Co.*, 11 Common Bench, 254; 73 E. C. L., 253, 1851; *Same Case*, *ib.*, 327.

32. Elevated railways. The leases of the New York City elevated railways to the Manhattan R'y Co. examined, and their history given. The leases held valid. *Flagg v. Manhattan R'y Co.*, 20 Blatchford (U. S. C. C.), 142, 1881; 4 Amer. & Eng. R. R. Cases, 140; 10 Federal Reporter, 413.

33. Eminent domain. A company, by leasing its line, is not prevented from continuing condemnation proceedings already commenced. *Kip v. N. Y. and Harlem R. Co.*, 6 Hun (N. Y.), 24. 1875.

34. Estoppel. While a railway company organized under the General Railroad Act of New York has no express authority, under the said act, to lease its line and franchises to an individual, such a lease is neither *malum in se* nor *malum prohibitum*, nor is it void as contrary to public policy. A lessee, who has under such a lease had the possession and use of the property, is estopped

Fences — Injunction.

from questioning its validity in an action to recover the stipulated rent. *Woodruff v. Erie R'y Co.*, 98 N. Y., 609. 1888.

35. — The estoppel which thus binds the lessee also binds all who claim through or under him; and one to whom he has conveyed his interest in the demised property, and who has had the use and occupation thereof, may not question the validity of his lease. *Ib.*

36. Fences. A railroad company which has parted with the possession and control of its road under a lease containing a covenant that the lessee shall keep up the fences is not liable to one traveling upon a highway, for damages resulting from an omission of the lessee to repair a fence which was in good order at the time of the lease and surrender of possession. *Ditchett v. Spuyten Duyvil and Port Morris R. R. Co.*, 67 N. Y., 425, 1876; 15 Amer. R'y Rep., 109; reversing *Same v. Same*, 5 Hun (N. Y.), 165, 1875.

37. Forfeiture. Where a lease contains a provision that the lessee shall "not sublet, nor assign or transfer this agreement, without the written consent thereto of the superintendent" of the lessor, the lessee may either sublet or assign, with the assent of the officer named; and where, during two or three months of the term, the property was turned over to another without the assent of the lessor, by acquiescing, and failing to object for a considerable period of time, the breach of the agreement will be considered as waived by him. *Kansas City Elevator Co. v. Union Pacific R'y Co.*, 17 Federal Reporter, 200, 1881.

38. — Under such a lease, the superintendent appointed by the receiver, into whose hands the railway company, the lessor, has passed, is to be regarded as the superintendent, and his assent to a sublease will be sufficient. *Ib.*

39. — elevator; pooling contract. When a party seeks to declare a lease forfeited by an act of his own, he must point out specifically some clear act, in violation of the terms thereof, which authorizes such forfeiture; and a pooling arrangement on the part of the lessee of an elevator is not sufficient to constitute a breach of the agreement that it "will use the premises for no other purpose than a legitimate business," and will

charge only reasonable and compensatory commissions. *Kansas City Elevator Co. v. Union Pacific R'y Co.*, 17 Federal Reporter, 200. 1881.

40. Frauds; statute of. A parol lease of land, for a railway track, for five years is not valid, being within the statute of frauds. It is a mere license, and the track may be removed, and will not be regarded as a fixture. *Cayuga R'y Co. v. Niles*, 13 Hun (N. Y.), 170. 1878.

41. Free pass for life by owner of line. A complaint seeking to charge the lessee of the N. C. R. R. with damages for refusing to transport the complainant, to whom the lessor of said road had issued a free pass for life, not alleging any obligation on the part of the lessee, by contract or otherwise, to carry the complainant over the road free, *held*, to be bad on demurrer, and that the judge below was right in dismissing it. *Turner v. Richmond and Danville R. R. Co.*, 70 N. C., 1. 1874.

42. Guaranty; rent; injunction. Certain of the defendant railway corporations had made an agreement with the complainant corporation by which they had guaranteed that the I. and St. L. R. R. Co., lessee of the complainant's railway lines, should pay to the complainant a certain minimum rental. The guarantor companies were the holders of the bonds of the I. and St. L. R. R., lessee, to a large extent, and the latter company having failed, for nearly two years, to pay the rental due complainant, *held*, that the court would require the lessee to pay the minimum rental due complainant before the payment of any portion of the interest on such of its bonds as belonged to the guarantor corporations, or any other sums which might be due them, and that an injunction to that effect would be issued, and the guarantor corporations further enjoined from disposing of such bonds. *St. Louis, Alton and Terre Haute R. R. Co. v. Indianapolis and St. Louis R. R. Co.*, 9 Bissell (U. S. C. C.), 99. 1879.

43. Injunction; stockholders. A court of equity has jurisdiction, at the suit of stockholders, to restrain the corporation and its managing officers from action tending to the destruction of the franchises, from violations of the charter, from misuse and misappropriation of the corporate powers or

Injury to Employees—Mortgage.

property, and from acts prejudicial to the stockholders and amounting to a breach of the trust. So held where the officers of the corporation were about to make an illegal lease of its property. *Pond v. Vermont Valley R. R. Co.*, 12 Blatchford (U. S. C. C.), 280. 1874.

44. Injury to employees. When two railway companies occupy and use a portion of the same road as a common track, the one as owner thereof, and the other as lessee, under proper rules and regulations as to the joint use, the lessor company, in the employment of servants to operate its trains over such road, does not impliedly contract with such servants that the employees of the lessee company will observe strictly the rules adopted to secure safety in the running of trains over the common road, and will not be held liable to a servant for an injury caused by the negligence of the servants of the lessee company. *Clark v. Chicago, Burlington and Quincy R. R. Co.*, 92 Ill., 43. 1879.

45. Injury to passengers. While the lessees operate a railroad under their lease, the lessors are not liable for an injury sustained thereon by a passenger, caused by the wrongful acts of the agents or servants of the lessees toward him. Nor is there, in such case, any privity between the passenger and the lessors, as common carriers, by which they are rendered liable for such an injury. The remedy of the passenger is against the lessees alone. *Mahoney v. Atlantic and St. Lawrence R. R. Co.*, 68 Me., 68. 1873. But not so where the lessee is operating the line in the lessor's name. *Bower v. B. and S. W. R. R. Co.*, 42 Ia., 546. 1876.

46. — A railroad company, having, by lease, the right to use depot grounds and tracks of another company, owes the same duties to passengers of that company lawfully on the ground as it does to its own. *Haff v. Minneapolis and St. Louis R'y Co.*, 14 Federal Reporter, 558, 1882; *Philadelphia and Reading R. R. Co. v. Anderson*, 94 Pa. St., 351, 1880; 6 Amer. & Eng. R. R. Cases, 407.

47. Injury to persons on the track. Lessees, engaged in operating railways, are liable for damages resulting from the defective condition of their tracks. *Wasmer v. Delaware, Lackawanna and Western R.*

Co., 80 N. Y., 212; 1 Amer. & Eng. R. R. Cases, 122. 1880.

48. Joint lease; severance. Where A., liable upon a contract to B. and C. jointly, makes an agreement with B., by which B. agrees to pay, release and discharge all A.'s debts, and to indemnify him against all demands, such agreement puts an end to all real interest of B. in the claim of B. and C., and C. may maintain an action at law alone against A. The action becomes severed as to C. *Boston and Maine R. R. Co. v. Portland, Saco and Portsmouth R. R. Co.*, 119 Mass., 498. 1876.

49. Liability for torts. Although one railroad may be leased to and operated by another, by which the latter makes itself responsible for acts done on the road leased, yet neither loses its identity, and any tort committed upon the line of the one or the other should be so alleged and proved. Especially is this true where both roads are constructed through the territory of the same county. *Central R. R. Co. v. Brinson*, 64 Ga., 475, 1880; 8 Amer. & Eng. R. R. Cases, 343.

50. Liability of lessor for personal injuries. The company owning the road and franchise is liable for an injury to a passenger through the negligence of its lessees, or of another company using the road by his permission. *Peoria and Rock Island R. R. Co. v. Lane*, 83 Ill., 448. 1876.

51. Liability of lessor under damage act. Under the act of March 24, 1870 (Adj. Sess. Acts 1870, p. 91, § 2), action will lie under § 2 of the Damage Act (Wagn. Stat., 519) against the Missouri Pacific R. R. Co., for injuries occasioned by servants of the Atlantic and Pacific R. R. Co., after lease of the former by the latter road. The Atlantic and Pacific Railroad, although chartered by congress, is "a corporation of another state" within the meaning of the act of 1870. *Smith v. Pacific R. R. Co.*, 61 Mo., 17. 1875.

52. Mortgage; trustee. A trustee, after taking possession of the road and entering upon the performance of the active duties of his trust, cannot make a valid contract for the leasing of the road to another railroad corporation in which he is a stockholder and director. *Ashuelot R. R. Co. v. Elliot*, 57 N. H., 897. 1874.

Name of Lessee — Stockholder's Rights.

53. Name of lessee. A lease made to a railroad company by name is binding, though there be no corporation of that name, where it appears that at the time the road was owned by an individual who was carrying on the business of the road under the name employed in the case. *Ecker v. Chicago, Burlington and Quincy R. R. Co.*, 8 Mo. App., 223, 1880; 1 Amer. & Eng. R. R. Cases, 357.

54. Nebraska; statute. Under the statute of Nebraska, the lease of a line of railway, or arrangement to lease, executed by one railroad corporation to another, to be valid must be assented to by a vote of at least two-thirds of the stockholders of each corporation, in stockholders' meeting assembled. *Peters v. Lincoln and Northwestern R. R. Co.*, 14 Federal Reporter, 319, 1882; 4 McCrary, 692.

55. — No agreement to execute such a lease, made in advance of the construction of a railroad, can be specifically enforced, unless it is subsequently ratified by a vote of the stockholders, as provided by the statute. *Id.*

56. Of land for railway purposes. A railway company built a spur track across plaintiff's land, paid him rent for a portion of the time the land was thus occupied, and afterwards continued the occupation with his assent, until its whole road (including said spur track) passed into defendant's hands under a foreclosure sale; and defendant continued the occupation, without any notice to plaintiff, or a claim to hold adversely to him. *Held*, that the presumption is that defendant held as plaintiff's tenant. *Wittman v. Milwaukee, Lake Shore and Western R'y Co.*, 51 Wis., 89. 1881.

57. Perpetuities. The lease of a railroad for nine hundred and ninety-nine years, with an annual rent reserved from the gross earnings, which does not preclude the lessor from disposing of the fee title, nor prevent the lessee from selling or assigning the lease, nor prohibit the lessor and lessee, by uniting therein, from conveying both the fee and the leasehold interest, is not within the statute (§ 1920, Code) prohibiting perpetuities. *Todhunter v. Des Moines, Indianola and Missouri R. R. Co.*, 58 Ia., 205, 1882; 7 Amer. & Eng. R. R. Cases, 67.

58. Statute; Massachusetts. The statute of Massachusetts, in relation to leasing of railways, construed. St. 1872, ch. 180. *Peters v. Boston and Maine R. R. Co.*, 114 Mass., 127. 1873.

59. Stockholder's rights. The fact that the same persons were directors of the leasing and leased railroad, although it might entitle either corporation to do so, did not justify one or more stockholders in bringing an action to have the contract declared void. *Wallace v. Long Island R. R. Co.*, 12 Hun (N. Y.), 460. 1877.

60. — Where the language of the statute is that no lease of one railroad by another shall be perfected "until a meeting of the stockholders of each of said companies shall have been called by the directors thereof, at such time and place, and in such manner, as they shall designate, and the holders of at least two-thirds of the stock of such company represented at such meeting, either in person or by proxy, voting thereat, shall have assented thereto," the stockholders' meeting, and the vote in such meeting upon the question of assenting to the proposed lease, are matters of substance, and not of mere form; and their assent, individually obtained outside of such meeting, and in the absence of deliberation, would bind no one. *Peters v. Lincoln and Northwestern R. R. Co.*, 12 Federal Reporter, 513; 2 McCrary (U. S. C. C.), 275. 1881.

61. — If a railroad company, without any authority so to do, leases its road to another company, the lessee will only be regarded as the servant of the company owning the road, and such company will not be, by the act of leasing, discharged from its contracts or released from any of its liabilities; and a subscriber to the stock of the company owning the road, when he has paid his subscription and received his certificate of stock, will have equitable rights to be protected by the courts, and may prevent gross mismanagement of the property and misapplication of the funds of the corporation; but the mere fact of leasing, and probable or even certain loss in the earnings of the company, will constitute no defense to the payment of the subscription. *Ottawa, Oswego and Fox River Valley R. R. Co. v. Black*, 79 Ill., 262. 1875.

Subletting — *Ultra Vires*.

62. Subletting. A lease of parcels of land abutting on public streets contained no restrictions as to the use of the leased premises by the lessees, or as to their authority with reference thereto, except a covenant not to sublet the premises or any part thereof, without the written consent of the lessors, a right to re-enter being reserved in case of breach. *Held*, that the fact that, without objection from the lessees, and by their tacit permission, a railroad company is permitted to lay tracks and run trains over the adjacent half of the streets upon which the leased premises abut, and that it is expressly permitted by the lessees to lay tracks and run trains across the leased premises (outside of the streets), partly for the accommodation of the lessees, is, without something more, evidence of a license only, and not of a subletting. It does not entitle the lessors to re-enter under their lease. *Pence v. St. Paul, Minneapolis and Manitoba R'y Co.*, 28 Minn., 488. 1881.

63. Telegraph lines. As the directors of a corporation are its agents, and represent stockholders, who are often practically voiceless in behalf of their own interests, they are held to the exercise of the utmost good faith in the administration of their trust; and where a statute authorizes a telegraph company to lease or sell its franchises and property to any other telegraph company, provided the lease or transfer be approved by a three-fifths vote of its board of directors, and also by consent in writing, or by a vote at a general meeting, of three-fifths in interest of the stockholders, a lease of the property and franchises of a telegraph company is voidable at the election of the lessor, if at the time the lease was made a majority of the board of the directors of the lessor were directors of the lessee also, and the lessee owned nearly two-fifths of the stock of the lessor. *Bill v. Western Union Telegraph Co.*, 16 Federal Reporter, 14. 1888.

64. Trade fixtures. The rails and depot buildings of a railway may be regarded as trade fixtures under certain circumstances. *Northern Central R'y Co. v. Canton Co.*, 30 Md., 347. 1868.

65. Two companies owning joint lines. The Brighton Company and the South-

Western Company became jointly entitled to a line of railway, under an act of parliament made in 1847, by which this joint line was placed under the management of a joint committee. By this act it was provided that each of the two companies might use the joint line for all purposes necessary for its traffic. The South-Western Company afterwards, without parliamentary authority, entered into agreements with the Portsmouth Company, by which the South-Western Company was to have the exclusive use of the line of the Portsmouth Company, paying 18,000*l.* a year. *Held*, that the act of 1847 did not create a joint tenancy carrying with it the right of using for every kind of traffic a station appurtenant to the joint line, and that the South-Western Company had no right to use it except for what was properly traffic of that company. *Held*, also, that the agreements between the South-Western Company and the Portsmouth Company were *ultra vires* and illegal, and that the conveyance of passengers and goods under them did not constitute traffic which could be considered traffic of the South-Western Company within the meaning of the act of 1847. *Held*, therefore, that the Brighton Company was entitled to an injunction restraining the South-Western Company from using the joint station for the purposes of any traffic destined for or coming from the Portsmouth Railway or any part thereof. *London, Brighton and South Coast R'y Co. v. London and South-Western R'y Co.*, 4 De Gex & Jones, 362; 61 Eng. Ch., 862. 1859.

66. Ultra vires. A lease by a railway company of all its road, rolling stock and franchises, for which no authority is given in its charter, is *ultra vires* and void. The ordinary clause in the charter authorizing such a company to contract with other transportation companies for the mutual transfer of goods and passengers over each other's roads confers no authority to lease its road and franchises. *Thomas v. Railroad Co.*, 101 U. S., 71. 1879.

67. — The franchises and powers of a railway company are in a large measure designed to be exercised for the public good. A contract by which the company renders itself incapable of performing its duties to

Working Agreement.

the public, or attempts to absolve itself from its obligation without the consent of the state, violates its charter and is forbidden by public policy. It is, therefore, void. *Ib.*

68. — The fact that the legislature, after such a lease was made, passes a statute forbidding the directors of the company, its lessees or agents, from collecting more than a fixed amount of compensation for carrying passengers and freight, is not a ratification of the lease or an acknowledgment of its validity. *Ib.*

69. — If a lease is void for want of power to make it, the lessor cannot validate it by accepting rent. *Ogdensburgh and Lake Champlain R. R. Co. v. Vt. and Canada R. R. Co.*, 4 Hun (N. Y.), 268. 1875.

70. — Under § 152, p. 204, Statutes of Nebraska, a railroad company in that state cannot make a valid lease of its property and franchises for the term of its charter, without the same being ratified by its stockholders; but when the same have been used for a time under such void agreement, the company, or those representing it, may recover a just compensation for the use of such property during the time it is so used. *Farmers' Loan and Trust Co. v. St. Joseph and Denver City R. R. Co.*, 2 Federal Reporter, 117; 1 McCrary (U. S. C. C.), 247. 1880.

71. — An act of parliament empowered one railway company to grant, and another company to accept, a lease of a railway upon such terms as should be agreed upon, provided that the power to lease should not arise till the board of trade had certified that it had been proved to their satisfaction that half the capital of the leasing company had been raised and applied for the purpose of their acts; and it was also provided that no lease should be of any effect unless previously sanctioned by three-fifths of the shareholders of each company voting at a special meeting. *Held*, that no lease, or binding agreement for a lease, could be made before the certificate had been obtained. *Kent Coast R'y Co. v. London, Chatham and Dover R'y Co.*, Law Reports, 3 Chancery Appeal Cases, 656. 1868.

72. — Lease of Lafayette, Muncie and Bloomington R'y construed, and *held*, that the agreement was *ultra vires* and void.

Commissioners of Tippecanoe County v. Lafayette, Muncie and Bloomington R. R. Co., 50 Ind., 85, 1875; 8 Amer. R'y Rep., 324.

73. Working agreement; injunction. In 1848 the East Lincolnshire R'y Co. agreed with the defendant that a station on the defendant's line should be used equally by both companies, but should be subject to the by-laws of the defendant, and that a committee of three from each board should be appointed to arrange the working of the traffic, etc.; that the cost and maintenance of the station and the working should be borne by the two companies equally; that the defendant should afford to the East Lincolnshire R'y Co. facilities for access to the Great Grimsby docks, and that the East Lincolnshire R'y Co. should give up a piece of land to the defendant; that the defendant should have the right of running with its engines, etc., on the East Lincolnshire line between Great Grimsby and Louth, and that the East Lincolnshire R'y Co. should have the same right over the defendant's line between Great Grimsby and New Holland, paying in either case 66l. per cent. of the gross receipts to the company whose line was used; and that each company should provide station accommodation for the other at New Holland and Louth respectively for three years as therein mentioned. The said East Lincolnshire line of railway became vested in the plaintiffs as lessees thereof for nine hundred and ninety-nine years. Disputes arose between the companies, which ended in the defendant preventing the plaintiff from running its engines, etc., on the line between Great Grimsby and New Holland, and giving it a formal notice to determine the agreement. On motion, an injunction was granted to restrain the defendant from obstructing the plaintiff running its engines, etc., over that part of the defendant's line mentioned in the agreement. *Held*, that the agreement was permanent, and could not be determined without the consent of both parties, and was not a mere license revocable at the will of either. *Held*, that an agreement to grant an easement of this nature to a corporate body need not be by deeds, and might be permanent, although it was to the company only, and not to the company and its successors.

Use by Railway — To Build Railway.

Great Northern Ry Co. v. Manchester Ry Co., 10 Eng. Law & Equity, 11; 16 Jurist, 146. 1851.

LESSEES.

See INJURIES TO DOMESTIC ANIMALS; LEASE.

LEVEE.

1. Use by railway; injunction. Where a suit for injunction turns wholly upon the validity of an act of the legislature granting the defendant the exclusive right to the use of certain property, to aid in the construction and operation of its railway, which is claimed by the plaintiff as a public levee or landing, and the use of such property, in a way not materially in conflict with any use to which it is being put, is of great advantage to the defendant, an injunction restraining it from such use will be modified accordingly; and, in the consideration of the matter, weight will be given to the presumption that an act of the legislature is valid, and that the defendant is engaged in a public enterprise in which the public is interested. *Portland v. Oregonian Ry Co.*, 6 Federal Reporter, 321. 1881.

LIABILITY LIMITED BY CONTRACT.

See CARRIAGE OF LIVE STOCK; CARRIAGE OF MERCHANDISE; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS.

LIBEL.

1. Corporations. An express company is not liable for damages occasioned by a libelous letter written by its local agent at a town to a consignor, who wrote referring his consignee's letter of complaint to the company's higher officials, in whose possession the agent saw the letters. *Southern Express Co. v. Fitzner*, 59 Miss., 581. 1882.

2. Railway company. A railway company was held liable for the publication of a hand-bill, in which it was stated that the plaintiff had been dismissed from the company's service for dishonesty. The publication was made by the general manager of the company. *Tench v. Great Western Ry*

Co., 32 Upper Canada (Queen's Bench), 452, 1872; *Same v. Same*, 33 ib., 8, 1878.

3. — A count against a railway company, being a corporation aggregate, for a malicious libel is good on demurrer; for such corporation may well, in its corporate capacity, cause the publication of a defamatory statement under such circumstances as would imply malice in law sufficient to support the action. *Whitfield v. South Eastern Ry Co.*, Ellis, Blackburn & Ellis, 115; 96 E. C. L., 118. 1858.

LICENSE.

See EMINENT DOMAIN.

1. To build railway. The owner of land gave permission through her agent to a railway company to build its road over her land, but with the understanding that it should not thereby acquire any rights to the soil. *Held*, that the permission was not revoked or changed by the fact that the agent, from time to time thereafter, claimed that the company was trespassing. *Harlow v. Marquette*, *Houghton v. Ontonagon R. R. Co.*, 41 Mich., 336. 1879. Permission to construct a railway over one's land implies authority to use it afterwards. *Ib.*

2. — It seems that a parol license, given by a land owner to a railway company to occupy the land for its road, followed by the expenditure of money in the construction of the road, is not irrevocable; it simply justifies the entry, and is revocable at the pleasure of the plaintiff. *Murdock v. Prospect Park and Coney Island R. R. Co.*, 78 N. Y., 579, 1878; reversing *Same v. Same*, 10 Hun (N. Y.), 598, 1877.

3. — mortgage. Prior to default in the payment of a debt secured by a mortgage, the mortgagee has no right to forbid the mortgagor or his licensee from doing any work on the mortgaged premises which will not impair their value as security. But after default he may, and, under some circumstances, equity requires that he shall, interfere. Thus, if he knows that a railway company is building its road across the premises, under a parol license, or an unrecorded deed, given by the mortgagor prior to the default, it is his duty to notify the

Contract — Freight Charges.

company of his rights and to forbid the further prosecution of the work. If he fails to do this, and the company afterward makes expenditures upon the work, the license of the mortgagor will be held to be his license also. *Masterson v. West End Narrow Gauge R. R. Co.*, 72 Mo., 342, 1880; 4 Amer. & Eng. R. R. Cases, 439.

4. — A railway company, under an unrecorded license from the owner, surveyed, located and partly graded its road across a tract of land, and then suspended work. The owner afterward executed a mortgage, which covered the strip appropriated by the company, to a person who had no actual notice of the company's rights or of the work done. *Held*, that he was not bound by the license. *Ib.*

5. Ejectment. Where the owner of land has knowledge that a railway company has taken possession of his land, and makes no objection, but permits the company to build its line and operate its trains over the land, and exercises all the rights appertaining to a right of way for public uses for a period of ten or twelve years, he or his grantee cannot be permitted to eject the company from the land. *Prybylowicz v. Missouri River R. R. Co.*, 17 Federal Reporter, 492, 1881.

6. Use of railway; city ordinance. An ordinance requiring the stationing of flagmen and erection of bell towers at street crossings of railroads has reference to the duty required of the owners or lessees of the railroad tracks; and a failure to comply with this ordinance cannot be made the basis of a liability against a railroad company not owning or leasing the track, nor having any control over the same, but having only a license from the owner of the track to run its cars thereon under certain regulations. *Lake Shore and Michigan Southern R'y Co. v. Kaste*, 11 Bradwell (Ill.), 536, 1882.

LIEN.

See GARNISHMENT; INJUNCTION; JUDGMENT; MECHANIC'S LIEN; VENDOR AND VENDEE.

1. Contract. A railway company entered into an agreement with A. for the delivery to it, during a certain period, of a certain

quantity of coals, to be carried by it for hire, to be paid by A., and in A.'s cars, the company to have the right to detain any cars of A. on certain defaults on his part. In order to complete this agreement, A. agreed with B. to supply a portion of the quantity of coals to be sent on to the line in cars, which had been hired for a term from A. by B., but now relet for hire by him to A., for this purpose. A. having made default, the company seized and detained the cars then on the line, as being A.'s, but they were, in fact, cars sent on by B., under his agreement with A. *Held*, that the company could not retain them. *North v. Great Northern R'y Co.*, 25 E. C. L., 926; 6 Jurist (N. S.), 98, 1859.

2. Freight charges. A common carrier, by the delivery of merchandise intrusted to it for transportation, loses its lien for charges thereon. *Reineman & Co. v. C., C. and B. R. Co.*, 51 Ia., 338, 1879.

3. — When goods are sent, not according to the contract with the owner, but by some other route, there is no lien for freight money; and if the goods are withheld, under a claim of lien, an action for trover will lie for their value. *Marsh v. Union Pacific R'y Co.*, 9 Federal Reporter, 873; 3 McCrary (U. S. C. C.), 236, 1882; 6 Amer. & Eng. R. R. Cases, 359.

4. — Where goods are shipped by rail, the railway company, having obtained possession lawfully, will have the right to hold them until the freight actually due is paid or tendered, and a demand is made. If too much freight is charged, the owner should tender the proper amount before bringing replevin. The tender is too late after the suit is commenced. *Ohio and Mississippi R'y Co. v. Noe*, 77 Ill., 513, 1875.

5. — implied promise to pay charges. A carrier, having a lien for freight charges upon an entire cargo of coal, delivered a portion of it, on the order of the consignee, to a person who had purchased the whole cargo from the consignee. Subsequently, the carrier, on the arrival of the remainder of the coal, notified the purchaser that he claimed a lien on the remainder for the freight of the entire cargo, and ordered him not to disturb or unload it. The purchaser, without right, appropriated the remainder

In Cities and Towns—Notice.

of the coal to his own use. *Held*, that the fact of such taking did not, of itself, as matter of law, import a promise on the part of the purchaser to pay to the carrier the freight of the entire cargo. *New York and New England R. R. Co. v. Sanders*, 184 Mass., 58, 1888.

6. — on part of goods. A carrier of goods consigned to one person under one contract has a lien upon the whole for the legal charges on every part; and a delivery of part of the goods to the consignee does not discharge or waive that lien upon the remainder, without proof of an intention so to do, even as against the right of the consignor to stop *in transitu* the goods not delivered. *Potts v. New York and New England R. R. Co.*, 181 Mass., 455, 1881; 8 Amer. & Eng. R. R. Cases, 424. See, also, *Chicago and Northwestern R. R. Co. v. Northwestern Union Packet Co.*, 88 Ia., 377. 1874.

7. — release. A railway company delivered to E. certain goods which were consigned to him, and received from him the freight therefor. The goods were received in good faith by E., who had ordered them from the consignors. It appeared that they were sent to E., subject to the order of R., who demanded them of the company. The company then brought replevin. *Held*, that by surrendering the goods to E., the lien of the company was released, and they could not resume possession of the property, and that the action of replevin could not be maintained. *Lake Shore and Michigan Southern R'y Co. v. Ellsey*, 85 Pa. St., 288, 1877; 18 Amer. R'y Rep., 413.

8. — rules of carrier. When the law gives no lien neither party can create one without the consent or agreement of the other. Hence the consignee of goods shipped by rail is not bound by published rules and regulations of the railway company providing for a lien for demurrage, without his or the consignor's assent thereto when the contract for shipping the goods was made. Even a knowledge of such rules, without assent thereto, will not affect the shipper or consignee. *Chicago and Northwestern R'y Co. v. Jenkins*, 108 Ill., 588, 1882; 9 Amer. & Eng. R. R. Cases, 113.

9. Goods stored with a warehouseman. Where a consignee is in default in not re-

ceiving goods, and in consequence the right is conferred upon the carrier to warehouse them, if the latter deposits them with a storekeeper, subject to his lien for freight, he does not thereby forfeit his lien. In such case the keeper acts under the authority of the carrier, and the possession of the former may be regarded as that of the latter for the purpose of preserving his lien. *Western Transportation Co. v. Barber*, 56 N. Y., 544. 1874.

10. Statutory lien; personal injury cases. Section 1809 of the Code, making judgments for personal injuries prior to the liens of mortgages and trust deeds, cannot be extended to embrace claims for such injuries, even though actions therefor be pending, and the purchaser of a railroad takes it free from such claims, unless the same have been prosecuted to judgment. *Burlington, Cedar Rapids and Northern R'y Co. v. Verry*, 48 Ia., 458, 1878; *White v. Keokuk and Des Moines R. R. Co.*, 52 Ib., 97, 1879.

LIGHTING OF RAILWAYS.

1. In cities and towns; constitutional law. Ch. 82 of the Municipal Code of 1869, which authorizes city and village councils, by ordinance, to require the lighting of railways to be done by the owners of the railways, and on their failure to comply with such ordinance, authorizes the council to procure such lighting done at the expense of such owners, is not in conflict with the constitution of state. When, on default of the railway company, such lighting within such city or town is procured to be done by the council, the expense of such lighting may, by the council, be assessed or declared a lien upon any of the real estate of the railway company within the municipality. *Cincinnati, Hamilton and Dayton R. R. Co. v. Sullivan*, 82 Ohio St., 152. 1877.

LIMITATION OF LIABILITY.

[See the various other heads of this digest.]

1. Notice. A distinction exists between the effect of those notices by a carrier by which it is sought to discharge him from duties which the law has annexed to his

Abatement of Action — Amendment of Pleadings.

employment, and those designed simply to insure good faith and fair dealing on the part of his employer. In the former, notice without assent to the attempted restriction is ineffectual, while in the latter, actual notice alone will be sufficient. *Oppenheimer v. United States Express Co.*, 69 Ill., 62. 1873.

2. **Validity of contract.** It is now the admitted doctrine in America (as it has been settled beyond a reasonable doubt in England) that it is competent for a common carrier to limit his common law liability by express contract. *Mobile and Ohio R. R. Co. v. Weiner*, 49 Miss., 725. 1874.

LIMITATIONS.

See EMINENT DOMAIN; FERRIES; INDICTMENT: INJUNCTION; MORTGAGE; SUBSCRIPTIONS BY INDIVIDUALS; WATERCOURSES.

1. **Abatement of action.** Under Code of 1871, § 2163, a suit that has been brought and abated for any matter of form, or where the plaintiff has recovered a judgment which has been reversed on appeal, one year is allowed within which to bring another suit. *Memphis and Charleston R. R. Co. v. Orr*, 52 Miss., 541. 1876.

2. **Adverse possession.** If a railway company in possession of a railway and its appendages, under a deed which gives color of title, acquired in good faith, pays all taxes legally assessed thereon for seven successive years preceding the commencement of a suit in equity to divest its title to land occupied by it as a right of way, this will be a complete defense. *Lake Shore and Michigan Southern R'y Co. v. Pittsburgh, Ft. Wayne and Chicago R'y Co.*, 71 Ill., 38. 1873.

3. — Even if a deed is made from a mere volunteer, without title, it will still be good color of title under the limitation laws, and the presumption, in the absence of proof to the contrary, is that, it was acquired in good faith. *Id.*

4. — Occupancy by permission does not constitute adverse possession. *Borden v. South Side R. R. Co. of Long Island*, 5 Hun (N. Y.), 184. 1875.

5. — Where the user has been exercised by force, or by permission, or in the face of

protests and in defiance of resistance, a grant will not be presumed. *Lehigh Valley R. R. Co. v. McFarlan*, 30 N. J. Eq., 180. 1878.

6. — **footway over railway track.** A railway corporation has no power or right to grant an easement of a footway, for persons to walk along or by the side of its tracks. There can be no prescriptive right or presumption of such a grant, though the appellants and others, owning houses along the line of the appellee's railway for twenty-five years, had used a private footway, for some considerable distance over the lands of the appellee, alongside of, or between the tracks of, the road, from the houses to a public highway. *Sapp v. Northern Central R'y Co.*, 51 Md., 115. 1878.

7. **Amendment of pleadings.** When a declaration is amended, the amendment relates back to the date of the filing of the original declaration, and if it be not barred by the statute of limitations the amendment will not be barred. *South Carolina R. R. Co. v. Nix*, 68 Ga., 572. 1882.

8. — In an action upon a penal statute for an overcharge more than a year after the cause of action accrued, the plaintiff, on a demurrer to his declaration being sustained, asked and obtained leave of the court to amend his declaration, against the objections of the defendant, and the declaration was amended, and thereupon the defendant tendered to the court a plea, in substance, that the plaintiff ought not to have and maintain his action, because it did not accrue within one year before he filed his amended declaration. *Held*, that the statute of limitations only ran up to the commencement of the suit, and not to the date of the amendment. *Hart v. Baltimore and O. R. R. Co.*, 6 W. V., 336. 1878.

9. — Where an original declaration declared only upon the common law liability of a carrier for refusing to receive grain when tendered for transportation, and afterwards, under leave of court, additional counts were filed for not carrying the grain after its acceptance, and the defendant pleaded the statute of limitations, it was *held* that the defendant had the right to file such plea, and that it was error to sustain a demurrer to the plea, the additional counts introducing an entirely different cause of

Bankruptcy — Carriage of Goods.

action. *Phelps v. Illinois Central R. R. Co.*, 94 Ill., 548. 1880.

10. — For some purposes an amendment relates back to the issuance of the original summons; but this doctrine of relation is a mere fiction of law, and cannot be applied so as to affect the rights of others or defeat the defense of the statute of limitations when complete. The amendment in this case was a substitution of F. as administratrix, in lieu of F. as widow. *Flatley v. Memphis and Charleston R. R. Co.*, 9 Heiskell (Tenn.), 230. 1872.

11. — The fact that the amended declaration had an additional averment that the death of the intestate was caused "by the employment by the defendant, without proper care, of unskilful agents," does not change the cause of action. It was only a statement of an additional means by which the same wrongful act was accomplished. *Nashville, Chattanooga, etc., R'y Co. v. Foster*, 10 Lea (Tenn.), 351, 1882; 11 Amer. & Eng. R. R. Cases, 180.

12. — A declaration charging a railway company, as a common carrier, for loss of goods shipped over its line and destroyed by fire while in its depot awaiting delivery to a connecting line, cannot be amended, after the cause of action has become barred by the statute of limitations, so as to charge the company for negligence as warehousemen. *People v. Judge of Kalamazoo Circuit*, 35 Mich., 227, 1876; 15 Amer. R'y Rep., 349.

13. — The original complaint alleged that, by reason of injuries inflicted upon the plaintiff's son, the plaintiff had been compelled to pay certain sums of money for surgical attention, amounting in the aggregate to \$369. The complaint, more than four years after the cause of action accrued, was amended so as to allege that the plaintiff paid a portion of the said amount and incurred liability for the balance prior to the beginning of the suit. *Held*, the cause of action to recover the sum for which the plaintiff had become liable, but which he had not paid, was barred by the statute of limitations. *Meeks v. Southern Pacific R. R. Co.*, 61 Cal., 149. 1882.

14. — Where a count in trover, and another in trespass *vi et armis*, were added by

way of amendment to an action on the case against a common carrier for negligence in the performance of his duty as such carrier, and more than four years had elapsed from the conversion before the filing of the amendment, the plea of the statute of limitations is a good plea in bar to the counts in trover and trespass. *Palmer v. Southern Express Co.*, 52 Ga., 240. 1874.

15. — In a suit by a widow in Georgia against a railroad company for the killing of her husband in Alabama, the declaration cannot be amended after the lapse of one year from the alleged killing, for the reason that the statute law of Alabama limits the right to recover damages therefor to one year from the time of the death, and gives the right of action to the personal representatives of the deceased. *Selma, Rome and Dalton R. R. Co. v. Lacey*, 49 Ga., 106. 1873.

16. **Bankruptcy.** The provisions in the bankrupt act limiting the time in which suits can be brought by or against an assignee in bankruptcy have no application to suits pending at the time of the bankruptcy and wherein the assignee is substituted as party plaintiff. *Jenkins v. Chicago and Northwestern R'y Co.*, 6 Bradwell (Ill.), 192. 1880.

17. **Burden of proof.** Where issue is joined on a plea of the statute of limitations, the burden of proof is on the plaintiff to show that the cause of action accrued within the period of limitations. *Prigmore v. East Tenn., Va. and Ga. R. R. Co.*, 1 Lea (Tenn.), 204. 1878.

18. **Carriage of goods.** The statute of limitations does not begin to run in favor of a common carrier from the delivery of goods to be carried, but from the time when a cause of action accrues to the owner. So, although goods were shipped more than five years before suit brought by the owner to recover for their loss by fire, but were destroyed within five years before suit, it was held that the cause of action was not barred. *Merchants' Despatch Co. v. Topping*, 89 Ill., 65. 1878.

19. — An action against a railway company for damages for a breach of a contract to transport freight was held to be barred in five years from the time of the inception of

 Charter of Corporation — Eminent Domain.

the cause of action. *Cobb v. Ill. Central R. R. Co.*, 38 Ia., 601. 1874.

20. — delay. In an action for damages for unreasonable delay in the carriage of merchandise, where a portion of such delay occurred more than six years prior to the date of the writ, and continued so that a portion of the delay was within the six years, *held*, that, whatever damage was occasioned by such delay as occurred more than six years before the commencement of the suit, was barred, but such damage as was occasioned by inexcusable delay within that time was recoverable. *Jones v. Grand Trunk R'y Co.*, 74 Me., 356. 1882.

21. Charter of corporation. The clause in the charter of the defendant exempting it from suit after the lapse of a year from the accrual of the cause of action was not repealed by the re-enactment in the Revision of the act relating to the limitation of actions. It is not necessary, on constitutional grounds, that the title of the charter of a railroad company, which charter contains a clause limiting the time for bringing suits against it, should refer to such provision. *Vail v. Easton and Amboy R. R. Co.*, 44 N. J. Law, 237. 1882.

22. Consolidation of railways. The statute of limitations held to bar a suit in equity to set aside and annul the consolidation of certain railway companies. *Commissioners of Leavenworth County v. Chicago, Rock Island and Pacific R'y Co.*, 18 Federal Reporter, 209. 1883.

23. Conversion. The statute of limitations will not begin to run in an action for conversion of goods shipped by a carrier until the owner of the goods has knowledge of the facts, or until a reasonable time for obtaining such knowledge has elapsed. *Houston and Texas Central R'y Co. v. Adams*, 49 Tex., 748. 1878.

24. — The mere fact that a railroad company, located in Georgia, sent iron to which another company claimed title, beyond the state, without any fraudulent practices or concealment on the part of the former, debarring or deterring the other from its action, does not disable such first mentioned company from asserting a title by prescription to the iron when sued for it in an action of trover by the other. *South Western R.*

Co. v. Atlantic and Gulf R. R. Co., 53 Ga., 401. 1874.

25. Conveyance; warranty. Suit based upon a warranty in a deed in relation to the quantity of land conveyed must, in Kentucky, be brought within five years of the date of the discovery of the error. *Biggs v. Lexington and Big Sandy R. R. Co.*, 79 Ky., 470. 1881.

26. Deed. The court refused to cancel a deed that had been of record for over forty years. *Jones v. Ga. R. R. Co.*, 62 Ga., 718. 1879.

27. Division line. Parties will not be bound by an intervening fence as a boundary dividing their lands where they claim only to the extent of their paper title, whatever that may be, and the fence is suffered to remain simply as a matter of convenience. *West v. St. Louis, Kansas City and Northern R'y Co.*, 59 Mo., 510. 1875.

28. Easement; public. No easement will arise by prescription as against the state. *Kirschner v. Western and Atlantic R. R. Co.*, 67 Ga., 760, 1881; *Glaze v. Same*, *ib.*, 761, 1881.

29. Ejectment; Georgia. The statute of limitations of Georgia, in cases of fraud in title, construed. *Ross v. Central R. R. and Banking Co.*, 53 Ga., 371, 1874; *Same v. Same*, 59 *ib.*, 299, 1877.

30. Eminent domain. The charter of a railway company provided that, in the absence of contract, it should be presumed that the land on which the line was built had been granted to the company unless the land owners made application for an assessment of damages within ten years thereafter, saving the rights of *femes covert* and infants until two years after the removal of their disabilities. The company, in 1854, built its road on land which had been devised to a *feme covert* executrix and her heirs in trust for her married sister for life, and after her death "to the issue which she may leave living at the time of her death." The executrix and her husband qualified in 1850; the husband died in 1869, and the executrix still survives as his widow. The married sister died in 1880, and soon thereafter her surviving issue brought action against the company to recover compensation for the land so appropriated. *Held*, that the legal estate being

Equity — Fraud.

in the executrix and her husband for more than two years after the road was built, and then in the executrix, as trustee, for more than two years after she became discover, with contingent remainders to the children, the action was barred by the terms of the charter. *Waring v. Cheraw and Darlington R. R. Co.*, 16 So. Car., 416. 1881.

31. — Proceedings to obtain compensation for right of way, instituted in 1859, and then suspended, without assessment made, cannot operate to prevent the bar of the statute of limitations from running against such claim, or from defeating action brought eleven years afterwards for the same purpose, unless a continuance of the former action can be shown. *Ib.*

32. Equity. Under the facts in this case a claim set up by preferred stockholders was held to be stale. *Sullivan v. Portland and Kennebec R. R. Co.*, 94 U. S., 806, 1876; 16 Amer. R'y Rep., 181.

33. Estate of decedent. A stock subscription must be filed as a claim against a decedent's estate within the statutory time or it will be barred. *Cincinnati, Richmond and Ft. Wayne R. R. Co. v. Heaston*, 43 Ind., 172. 1873.

34. Foreign corporation. A foreign corporation cannot plead the statute of limitations in a personal action. *State v. Central Pacific R. R. Co.*, 10 Nev., 47, 1875; *Kirby v. Lake Shore and Michigan Southern R. R. Co.*, 14 Federal Reporter, 261, 1882.

35. — A foreign corporation sued in New York cannot avail itself of the statute of limitations, although it has, for the time specified in the statute, before the commencement of the action, continually operated a railroad in that state, and has property and officers therein. *Boardman v. Lake Shore and Michigan Southern R'y Co.*, 84 N. Y., 157, 1881; 4 Amer. & Eng. R. R. Cases, 265; *Tioga R. R. Co. v. Blossburg and Corning R. R. Co.*, 20 Wallace, 137, 1878; 10 Amer. R'y Rep., 81.

36. — A foreign corporation that by the laws of a state within which it comes on business can sue and be sued, is not a *non-resident* in the sense that would prevent it from setting up the statute of limitations as a defense in an action against it; and § 2533 of the Code of Iowa, that provides that "the

time during which a defendant is a non-resident of the state shall not be included in computing the period of limitation," has no reference to such a case. *McCabe v. Illinois Central R. R. Co.*, 13 Federal Reporter, 827, 1882; 4 McCrary, 492. See, also, with like effect, *Pennsylvania Co. v. Sloan*, 1 Bradwell (Ill.), 364, 1878; *Hess v. Central R. R. and Banking Co.*, 66 Ala., 472, 1880.

37. Forfeiture; resumption. Where a grant of land and connected franchises is made to a corporation for the construction of a railroad by a statute, which provides for their forfeiture upon failure to perform the work within a prescribed time, the forfeiture may be declared by legislative act without judicial proceedings to ascertain and determine the failure of the grantee. Any public assertion by legislative act of the ownership of the state after the default of the grantee — such as an act resuming control of the road and franchises, and appropriating them to particular uses, or granting them to another corporation to perform the work — is equally effective and operative. *Farnsworth v. Minnesota and Pacific R. R. Co.*, 92 U. S., 49. 1875.

38. Fraud. The procuring of the settlement of an existing cause of action by fraud upon the officers of a corporation is not the fraudulent concealment of a cause of action. R. S., ch. 81, § 92. *Penobscot R. R. Co. v. Mayo*, 10 Amer. R'y Rep., 107; 65 Me., 566, 1876. See *Same v. Same*, 67 ib., 470. 1878.

39. — In an action against a railway employe for fraud in inspecting wood, it is not necessary to plead the circumstances under which the fraud was discovered. *Kansas Pacific R'y Co. v. McCormick*, 20 Kans., 107. 1878. The action accrues at date of discovery. *Board of Commissioners of Leavenworth County v. Chicago, Rock Island and Pacific R'y Co.*, 12 Amer. & Eng. R. R. Cases (U. S. C. C.), 354. 1888.

40. — A., pursuant to his contract, surrendered to a railroad company coupons attached to some of its bonds, whereof he was the holder, and took in exchange therefor certificates of preferred stock. The road, with its franchises, was subsequently sold by the trustees of the internal improvement fund of Florida, to pay the bonds, whereof those which he held constituted a part.

Forcible Entry and Detainer — Injuries Causing Death.

Eight years after the sale he brought this suit to rescind the contract upon the ground of fraud, all the particulars of which were as well known to him when the sale was made as at any subsequent time. *Held*, that his right to relief was barred by his laches and by the statute of limitations. *Coddington v. Railroad Co.*, 103 U. S., 409. 1880.

41. Forcible entry and detainer. Three years' possession will bar an action of forcible entry and detainer. *Hannibal and St. Joseph R. R. Co. v. Hill*, 60 Mo., 281. 1875.

42. Injury to domestic animals. Although the first section of the act approved February 3, 1877, entitled "An act to define and regulate the responsibility of railroads for damages to live stock or cattle of any kind" (Code, § 1710), has been held unconstitutional, because it attempts to impose upon railroad corporations an absolute liability for stock or cattle killed or injured, without any inquiry into the question of negligence or other fault, yet the provision contained in § 2 of said act, which declares that "all claims for damages shall be barred unless complaint is made within six months" from the time of the injury (Code, § 1711), may well stand without any connection with § 1; and being an enactment of later date than the statute which imposed a limitation of sixty days (§ 1701), it is the statutory bar to actions against railroad companies for injuries to stock. *South and North Alabama R. R. Co. v. Morris*, 65 Ala., 193. 1880.

43. Insolvency. Where a corporation conveyed all its assets, except its corporate franchise, to another corporation, and the latter assumed all the grantor's debts and took possession of the assets, and subsequently a creditor of the grantor, whose demand had accrued before such conveyance was executed, and was not yet barred by the statute of limitations, brought suit at law against the grantor, recovered judgment, and had an execution issued, which was returned *nulla bona*, and promptly after return was made, but more than ten years after the original demand accrued, instituted proceedings in equity against his judgment creditor and its said grantee to force the latter to pay his demand, *held*, that the claim was neither barred by laches nor the statute of limita-

tions. *Fogg v. St. Louis, Hannibal and Keokuk R. R. Co.*, 17 Federal Reporter, 871. 1883.

44. Municipal bonds; coupons. The statute of limitations of Wisconsin applies to the coupons of a municipal bond, whether they be detached from it or not, and begins to run from the time they respectively mature. *Koshkonong v. Burton*, 104 U. S., 668, 1881; 7 Amer. & Eng. R. R. Cases, 203.

45. — Detached, unsealed coupons are subject to the same limitation as the sealed bonds from which they have been removed. *Kershaw v. Town of Hancock*, 18 Blatchford (U. S. C. C.), 383. 1880.

46. Non-suit. An involuntary non-suit is where the plaintiff neglects to file his declaration or to appear when called for trial of the case, or where he gives no evidence upon which a jury can find a verdict in his favor. In such case a new action may be brought within one year. *Holmes v. Chicago and Alton R. R. Co.*, 94 Ill., 439. 1880. Where a widow has instituted suit for damages for killing of her husband, within the time allowed by statute, but has suffered non-suit, she may begin anew, although more than six months have elapsed since the killing. *Shepard v. St. Louis, Iron Mountain and Southern R'y Co.*, 3 Mo. App., 550. 1877.

47. Injuries causing death. The statute of limitations is the same, whether the injured party survives for a time or dies instantly. *Fowlkes v. N. and D. R. R. Co.*, 5 Baxter (Tenn.), 663, 1875; *Fowlkes v. Nashville and Decatur R. R. Co.*, 9 Heiskell (Tenn.), 829. 1872.

48. — The time elapsing between the death of the person injured and the granting of letters of administration should not be deducted from the limitation. *Greene v. N. Y. Central and Hudson River R. R. Co.*, 48 N. Y. Superior Ct., 433, 1882; 2 N. Y. Civil Procedure Reports, 427, 1882.

49. — Actions for injuries from negligence, etc., causing death, will not lie unless brought within two years from the death of the person injured, under the statutes of Wisconsin. *George v. Chicago, Milwaukee and St. Paul R'y Co.*, 51 Wis., 603. 1881.

50. — A foreign corporation, sued in New York for a personal injury causing death, the injury having been received in Connecti-

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cut, may plead the New York statute of limitations. *Londrigan v. New York and New Haven R. R. Co.*, 12 Abbot's New Cases (N. Y.), 273. 1882.

51. Injury to passenger. The liability of a railroad company for damages for an injury done to a passenger by collision of its cars accrues when the collision occurs, and the action must be brought within two years from such time. The fact that the injured person does not recover for a long time does not extend the time for bringing the action. *Piller v. Southern Pacific R. R. Co.*, 52 Cal., 42. 1877.

52. — An action for injury to a passenger held to be a cause of action *ex contractu*. *Kansas Pacific R'y Co. v. Kunkel*, 17 Kans., 145. 1876.

53. Overcharges. The liability imposed by the statute upon railway companies for extortion and unjust discrimination, giving treble damages, is a statutory penalty, and actions therefor must be brought within two years next after the cause of action accrued, or they will be barred by the statute of limitations. *St. Louis, Alton and Terre Haute R. R. Co. v. Hill*, 11 Bradwell (Ill.), 248, 1882; *Herriman v. Burlington, Cedar Rapids and Northern R'y Co.*, 57 Ia., 187, 1881; 9 Amer. & Eng. R. R. Cases, 339.

54. — The essential idea of "forfeiture" is a loss of property by way of punishment, and as used in the statute it indicates something more than compensation; and where so much of the claim as embraces a statute penalty is barred, the whole will be barred; for the same provisions of the statute of limitations must be applied to the entire claim. *Herriman v. Burlington, Cedar Rapids and Northern R'y Co.*, 57 Ia., 187; 9 Amer. & Eng. R. R. Cases, 339. 1881.

55. Parol promise; suspension of statute. The promise of officers of a railway company to pay for land occupied and used by the company for a right of way, within the period of limitation, is not an admission of title in the premises, so as to prevent the running of the limitation of twenty years. *James v. Indianapolis and St. Louis R. R. Co.*, 91 Ill., 554. 1879.

56. Patents. A suit for infringement must be brought within six years after the expiration of the patent. *Sayles v. Lake*

Shore and Mich. Southern R'y Co., 9 Federal Reporter, 515. 1879. See, also, *Sayles v. Dubuque and Sioux City R. R. Co.*, ib., 516. 1881.

57. Penal statutes; killing stock. The statute (R. S. 1879, § 809), allowing double damages to the owner for stock killed on a railroad, is penal; and three years is the time limited for the commencement of actions thereunder. This limitation is absolute, and is not extended by improper acts of the defendant preventing the commencement of the action. *Revelle v. St. Louis, Iron Mountain and Southern R'y Co.*, 74 Mo., 438. 1881.

58. Personal injuries — Alabama. A claim for damages against a railway company, on account of personal injuries, is not within the statute requiring claims for the damages to be presented or sued on within sixty days after they accrue (Code, § 1701), but is governed by the general statute of limitations of one year (§ 3231). *Mobile and Montgomery R'y Co. v. Crenshaw*, 65 Ala., 566, 1880; 8 Amer. & Eng. R. R. Cases, 340.

59. — The limitation of sixty days, within which claims for damages against railway companies must be presented or sued on (Rev. Code, § 1401), does not apply to injuries to the person; as to such claims, the statutory limitation of an action (Rev. Code, § 2905) is one year. *Nicholson v. Mobile and Montgomery R. R. Co.*, 49 Ala., 205. 1873.

60. — Illinois. The change in the Illinois statute in 1872 was prospective only. *Dickson v. Chicago, Burlington and Quincy R. R. Co.*, 77 Ill., 331. 1875.

61. — Iowa. An action against a railway company to recover for injuries sustained by the negligence of co-employees is, though founded on a contract between the plaintiff and the company, deemed an action for injuries to the person, within the meaning of § 2740 of the Revision, and barred in two years from the time the cause of action accrued. *Nord v. Burlington and Missouri River R. R. Co.*, 37 Ia., 498. 1873.

62. — New York. Plaintiff was injured by reason of defendant's negligence in April, 1877. She commenced this action to recover damages in January, 1880. Held, that the statute of limitations was not a bar, as the case was governed by the three years' limitation prescribed by the Code of Civil

Pleading — Possession of Railway.

Procedure (§ 383, subd. 5); not by the one-year rule previously existing. *Watson v. Forty-Second Street and Grand Street Ferry R. R. Co.*, 93 N. Y., 522, 1883; *Watson v. Forty-Second Street R. R. Co.*, 48 N. Y. Superior Ct., 44, 1881.

63. — Texas. The limitation of one year, placed by statute upon actions for injuries to the person of another, as assault, battery, wounding or imprisonment, applies to actions for injuries from accidents on railroads also, the classes above named being examples merely, and not intended to restrict the operation of the statute. *Tobin v. Houston and Texas Central R'y Co.*, 56 Tex., 641, 1882; 8 Amer. & Eng. R. R. Cases, 477.

64. — Utah. An action by a passenger against a carrier to recover damages for injuries received through the negligence of such carrier, not having been specially provided for in the limitation act, is embraced under the general provision of § 20, and must be commenced within four years after the cause of action shall have accrued. *Thomas v. Union Pacific R. R. Co.*, 1 Utah, 235, 1875.

65. Pleading. Where the statute of limitations is relied upon as a defense, it must be pleaded. The objection cannot be taken by demurrer. *Green v. North Carolina R. R. Co.*, 73 N. C., 524, 1875.

66. — The notice of the statute of limitations held sufficient. *Railroad Co. v. Conk*, 11 Heiskell (Tenn.), 575, 1872. As to notice, see *Jeffersonville, etc., R. R. Co. v. Oyler*, 60 Ind., 383, 1878. See *Same v. Same*, 82 Ind., 394, 1882; 5 Amer. & Eng. R. R. Cases, 397.

67. Possession by railway company. The continued occupation of land by the railway company for a right of way for its road for over twenty years, with acts of ownership during that period, will constitute a bar to a recovery by the former owner. But where such possession is not taken and held under color of title, it will extend only to the portion actually occupied, and not apply to any portion of such right of way as may have been occupied within twenty years by the original owner. *James v. Indianapolis and St. Louis R. R. Co.*, 91 Ill., 554, 1879.

68. — Without a deed a railway location can never become legal except on payment

or waiver of the damages, or by prescription. In no other way can the company acquire legal, permanent possession. *Perkins v. Maine Central R. R. Co.*, 72 Me., 95, 1881.

69. — While the lapse of six years from the time an action accrued for land damage might, unexplained, constitute a waiver of damage, yet, where the circumstances show that there has been no such waiver, and no title acquired by prescription, simple lapse of time would not bar the land owner's right to bring suit for an obstruction which was a continuing trespass, though there would be a limitation of damages to the period of six years, immediately preceding the date of the writ. *Ib.* See, also, *Toledo, Peoria and Warsaw R. R. Co. v. Darst*, 61 Ill., 231, 1871; 12 Amer. R'y Rep., 448.

70. Possession of railway. Where a railway company has been in the actual, visible and exclusive possession of land for a right of way for twenty years, it is not essential to the bar of the statute of limitations, in ejectment against the company, that its officers should have made oral declarations of claim of title, but it will be sufficient if the proof shows that the company has so acted with reference to the property as to clearly indicate that it claimed title. *James v. Indianapolis and St. Louis R. R. Co.*, 91 Ill., 554, 1879.

71. — In 1871 a railroad was constructed across the land of P., in Allen county. Ties were put down and iron rails spiked to them, but the road was never used. On January 27, 1874, P. commenced an action in the district court of Allen county against the railroad for damages, for appropriating his land to its purposes. Judgment was obtained November 23, 1874, and the iron rails in controversy were sold on an execution to P. Thereafter, and prior to May 1, 1875, P. loosened the rails from the railroad ties and placed them in piles upon his own land, and continued in possession of them, under claim of ownership, till February 23, 1878. The judgment of November 23, 1874, is alleged to be void for want of service. Held, that, conceding the judgment to be a nullity, yet P., on February 23, 1874, was entitled to the rails, as the title to them had passed to him by virtue of the statute of limitations. *Carter v. Pratt*, 23 Kans., 613, 1880.

Public Lands — Trespass.

72. Public lands. A certificate of entry obtained in good faith, upon the payment of the entrance money, from an officer having the right to make sales of public land, is sufficient color of title in connection with the adverse possession of a part of a tract of land, in the name of the whole, to vest the title to the whole tract in the purchaser, under the statute of limitations. *Hannibal and St. Joseph R. R. Co. v. Clark*, 68 Mo., 371. 1878.

73. Second action. Under the Code of New York a new action may be brought within one year after reversal of a cause by the court of appeals. *Wooster v. Forty-second St. and Grand St. Ferry R. R. Co.*, 71 N. Y., 471, 1877; *Memphis and Charleston R. R. Co. v. Pillow*, 9 Heiskell (Tenn.), 248, 1872.

74. — Held, that plaintiff, having dismissed its suit, could not, within six months, renew it and avoid the bar of the statute of limitations. *Macon and Augusta R. R. Co. v. Bass*, 52 Ga., 18. 1874.

75. — The record showing that by the pleadings an issue to the jury was formed upon the question whether the present action was not barred by the statute limiting the time in which to commence actions after reversal, and there being sufficient evidence upon that point to support the verdict, it will not be disturbed. *Chisholm v. Chicago and Northwestern Ry Co.*, 2 Bradwell (Ill.), 174. 1878.

76. Sold-out company. The payment of all debts of a corporation, sold out under execution, may be presumed from lapse of time. *Galveston, Harrisburg and San Antonio R. R. Co. v. Butler*, 56 Tex., 506, 1882; 9 Amer. & Eng. R. R. Cases, 552.

77. Stock and stockholders. The property of a corporation is a trust fund for the benefit of the stockholders in the hands of a corporate body, which is the trustee; but capital stock in the corporation in the hands of its owner, who has paid for it, is neither a trust fund, nor is its owner a trustee, and statutes of repose run to protect such owner in his right to such property. *Taylor v. South and North Alabama R. R. Co.*, 13 Federal Reporter, 152. 1892.

78. — A subscriber of stock in the Pacific R. R. Co., in the year 1859, had paid up all

calls, including \$70 which had been paid to an agent of the company who died without transmitting the sum. In 1870 the company declared the stock forfeited by reason of the non-payment of the \$70. In *mandamus* to compel the issue of stock, the company set up the statute of limitations. *Held*, that the statute did not run in favor of the defendant till the stock was declared forfeited. *Rice v. Pacific R. R. Co.*, 55 Mo., 146. 1874.

79. Streets; use of railway The grant of a joint and mutual use of a highway to a railway company with the public cannot be set up, under the limitation law of 1839, as a bar, as the use in such case by the corporation is not adverse. *Pittsburgh, Fort Wayne and Chicago R. R. Co. v. Reich*, 101 Ill., 157. 1881. See, also, *Bould v. New Orleans, Mobile and Texas R. R. Co.*, 55 Ala., 480. 1876.

80. — Where a street is occupied by a railway, without the consent of an abutting land owner, and without any offer of compensation, and is so occupied for fifteen years, the corporation cannot avail itself of a provision in its charter limiting an action to two years where the land owner has "refused to relinquish possession or to accept a fair compensation therefor." Such limitation will be construed strictly. *Terre Haute and Indianapolis R. R. Co. v. Scott*, 74 Ind., 29, 1881; 8 Amer. & Eng. R. R. Cases, 208.

81. — change of grade in street. A railway company, in laying its track in a public street, in pursuance of authority from the proper officers of the municipal corporation, necessarily lengthened a bridge across such street, and extended the approaches to the bridge along the street in which it was situated, by which means the grade was raised in front of A.'s residence, to her injury. A.'s premises did not abut upon the street in which the track was laid, but were near thereto. *Held*, that the case is governed by § 12 of the general act of 1852, relating to corporations, as amended in 1857 (54 Ohio L., 133), and hence the action was barred in two years from the completion of the work. *Columbus, Springfield and Cincinnati R. R. Co. v. Mowatt*, 35 Ohio St., 284. 1880.

82. Trespass. Where A. enters upon the land of B. and digs a ditch thereon, there is a direct invasion of the rights of B., a com-

Breach of Contract of Location — Mistake.

pleted trespass, and the cause of action for all injuries resulting therefrom commences to run at the time of the trespass. And the fact that A. does not re-enter B.'s land, and fill up the ditch, does not make him a continuous wrong-doer and liable to repeated actions as long as the ditch remains unfilled. *Kansas Pacific R'y Co. v. Muhlman*, 17 Kans., 224, 1876; 9 Amer. R'y Rep., 428.

83. Vermont. The statute of limitations of Vermont construed. *Poland v. Grand Trunk R. R. Co.*, 47 Vt., 73. 1874.

84. Watercourses. Defendant built its road-bed so as to obstruct the flow of water from an upper proprietor, but abandoned it, and it was cut through, and the water passed off. Afterwards it built another bed obstructing the flow, for which suit was brought. *Held*, that the statute of limitations commenced at the completion of the last and not the first obstruction. *Little Rock and Ft. Smith R'y Co. v. Chapman*, 39 Ark., 463. 1882.

LIVE STOCK.

See CARRIAGE OF LIVE STOCK; INJURIES TO DOMESTIC ANIMALS.

LOCATION.

See EMINENT DOMAIN.

1. Breach of contract of location. The court charged that, "in estimating damages in actions of this nature, such consequential, remote and contingent sources of injury as the frightening of horses, danger from fire, and the like, are in themselves too remote for damages; but if these things depreciate the value of the property, the depreciated value may be assessed." *Held*, that the last part of the instruction in italics is erroneous. *Hutchinson v. Chicago and Northwestern R'y Co.*, 41 Wis., 541. 1877. Evidence was held competent to show that the mill had caught fire from sparks from a passing engine. *Ib.*

2. City limits. A railway company, as a general rule, may select its own route, fix its terminal points, and lay out its road and acquire the right of way and other property necessary for the construction of its road on any and every part of its line, whether

within city limits or without them, according to its own discretion. The lines selected may, without the assent of the city, cross streets, and the company may, without such assent, acquire the right of way and construct its road on every part of such line, except the parts to be constructed upon or across streets. *Chicago and Western Indiana R. R. Co. v. Dunbar*, 100 Ill., 110, 1881; 5 Amer. & Eng. R. R. Cases, 253.

3. — A railway company authorized by its charter to construct its line from a city to another point may construct its road from any point within said city. *Western Pennsylvania R. R. Co.'s Appeal*, 99 Pa. St., 155, 1881; 4 Amer. & Eng. R. R. Cases, 191.

4. Conflicting claims. Under the act of April 4, 1868, when a railway company has ascertained and located where its road shall be, it is not competent for another company to step in and take its route, agree with the owners and occupy the land. The selection and location of route secures the title of the first company to that route, which it may carry to completion without dispossession by another. *Titusville, etc., R. R. Co. v. Warren and Venango R. R. Co.*, 12 Philadelphia, 642. 1872.

5. Insufficient location. Under the Gen. Stats., ch. 63, §§ 17, 18, authorizing railway companies to lay out their roads exceeding five rods in width, and requiring the location of the road to be filed with the county commissioners, defining the courses, distances and boundaries in each county, a location which does not state the width of the land taken or the boundaries of the location, nor refer to a map of the land placed on file, is invalid. *Housatonic R. R. Co. v. Lee and Hudson R. R. Co.*, 118 Mass., 391. 1875.

6. Lands Clauses Consolidation Act. The instrument by which a surveyor is appointed under § 35 of the Lands Clauses Consolidation Act need not specify either the lands which the surveyor is to value or the course of the railway. *Poynder v. Great Northern R. R. Co.*, 16 Simons (Eng. Ch.), 3. 1847.

7. Mistake; contract; reformation. A., the owner of a tract of land over which a railway company was about to locate its line, made a contract with G., the attorney and agent of the company authorized to settle land damages, by which the location over

Mountain Gorges — Terminus.

A.'s land was to be twenty feet in width, and not to include within it certain buildings. This contract was reported to the managing officers and agents of the company, and was ratified by them. At a meeting of the directors, a plan and location were exhibited, showing a location five rods wide, and G. stated that he had agreed with various owners of land to have the location of less width, and was directed by the president, in the presence of the directors, to make the necessary changes. G. thereupon made several changes in the plan and written location, but, by inadvertence, accident and mistake, did not alter the plan and location to conform to the contract made with A., but left the location five rods wide, which included portions of his buildings. The plan and location were then adopted by vote of the directors as the location of the railway, and were duly filed. *Held*, on a bill in equity brought by A. against the company to have the location reformed, so as to correspond with the agreement, that there was no evidence that either G. or the managing officers had any authority from the company to make such a contract, or that the president and directors had notice or knowledge of the same, or of the fact that G. inadvertently omitted to alter the location over A.'s land; and that the bill must be dismissed. *Central Mills Co. v. New York and New England R. R. Co.*, 127 Mass., 587. 1879.

8. Mountain gorges. The location of railways in mountain gorges, on the public domain, is subject to § 2 of the act of congress, approved March 8, 1875, relating to the use of cañons, passes and defiles by railway companies, which provides that no company which locates its line through such place shall prevent any other company from the use and occupancy of the same cañon, pass or defile for the purpose of its road, in common with the road first located, or the crossing of other railroads at grade. *Denver and Rio Grande R'y Co. v. Denver, South Park and Pacific R. R. Co.*, 17 Federal Reporter, 867. 1883.

9. — The company having prior right of way may enjoin intrusion thereon by another company, until facts are shown making it necessary for the second company to come upon the right of way. Suit for in-

junction being brought, such necessity may be shown, and the right to enter upon and use such right of way may be enforced on cross-bill. The rights of the parties will be settled upon evidence by final decree, and not in a preliminary way upon motion. *Ib.*

10. Priority of right. A statute which authorizes the construction of a railway between certain *termini*, without describing its course and direction, but leaving that to be determined by the corporation as provided by the general laws, does not *prima facie* confer power to lay out the road over land already devoted to, and within the recorded location of; another railway. *Housatonic R. R. Co. v. Lee and Hudson R. R. Co.*, 118 Mass., 391. 1875.

11. Route; power of directors. The directors of the New York, Lackawanna and Western R. R. Co. have the power, under the charter of the corporation, to change the location of the line of the railway. *New York, Lackawanna and Western R. R. Co., In re*, 88 N. Y., 279, 1882; 10 Amer. & Eng. R. R. Cases, 118.

12. Statutory location. A railway company was by special act authorized to construct its road between two points, and over certain streets and roads therein named. *Held*, that this constituted a practical location of its route by the legislature, and dispensed with the notice of the location of its route and of the filing of the map required by the General Railroad Act. *Coney Island and Brooklyn R. R. Co., In re*, 12 Hun (N. Y.), 451. 1877.

13. — The statutes of Massachusetts construed. *Boston and Maine R. R. Co. v. Lowell and Lawrence R. R. Co.*, 124 Mass., 368. 1878.

14. Terminus. A railway company obtained from the councils of the city from which it was to construct its road a grant of a right of way along a river bank to a certain street. It formally accepted the grant, constructed its line along the bank to said street, and subsequently bought a lot upon said street on the opposite side of an avenue running along the river from that on which its tracks were constructed. The greater part of this lot it allowed to be used as a lumber yard. It fitted up, however, an old frame house standing thereon as a passenger

Registered Bonds — Rates — Act of Agent or Employee.

station and erected a small shed for freight. Most of its freight business in the city was done elsewhere, and but a single track connected the shed with the main line. *Held*, that the power reposed in the company to locate and establish a terminus had not been exhausted, and that it was clearly competent for it subsequently to establish a terminus at another point within the city limits. *Western Pennsylvania R. R. Co.'s Appeal*, 99 Pa. St., 155, 1881; 4 Amer. & Eng. R. R. Cases, 191.

15. — A railway company is authorized by the act of April 4, 1868, § 9 (Pamph. L., 64), to construct a branch line from its terminus as well as from any other point on the main line of its road. Even, therefore, if the company had definitely fixed its terminus, it would have been fully authorized by the terms of the said act in continuing its road along the river bank. *Id.*

LOSS OF BAGGAGE.

See BAGGAGE.

LOSS OF GOODS.

See CARRIAGE OF MERCHANDISE.

LOST BONDS.

1. Registered bonds. The owner of registered mortgage bonds that have been destroyed by fire may compel the railway company to pay the interest and issue duplicate bonds, upon giving proper indemnity to the company. *Rogers v. Chicago and Northwestern R'y Co.*, 6 Abbott's New Cases (N. Y.), 253. 1878.

MACHINERY.

See CARRIAGE OF MERCHANDISE; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS.

MAILS.

1. Rates. The provisions of the act of July 12, 1876, c. 179 (19 Stat., 78), touching a reduction of rates for railway service, do

not apply to a contract then in force which provided for transporting the mails for a term of years. *Chicago, Milwaukee and St. Paul R'y Co. v. United States*, 104 U. S., 687, 1881; 10 Amer. & Eng. R. R. Cases, 621. See, also, *Chicago and Northwestern R'y Co. v. United States*, 104 U. S., 680, 1881; 9 Amer. & Eng. R. R. Cases, 48.

2. — A railway company is bound to carry a mail carrier with his bags, not exceeding ordinary baggage weight, by ordinary trains and at ordinary rates, and is not entitled to obstruct the delivery and receiving of the bags at intermediate stations. Ordinary parcel rates cannot be claimed on the bags. *Lord Advocate v. Edinburgh, etc., R'y Co.*, 13 Scotch Session Cases (2d series), 907. 1851.

3. — A railway company is not bound to carry a mail guard with bags at the same rate as an ordinary passenger; and before the postmaster-general can compel a railway company to carry such mail bags, a privity must exist between them by the execution of a special contract. *Regina v. Irish South Eastern R'y Co.*, 1 Irish Common Law, 29. 1850.

MALICIOUS PROSECUTION.

1. Act of agent or employee. An agent acting under an authority to control and supervise the lands of a corporation cannot institute against parties a criminal prosecution for larceny or other offense against the criminal laws, committed in reference to the property in his custody as agent, and so bind his principal in damages for a malicious prosecution, although it be shown that the prosecution was without probable cause and was malicious. *Pressley v. Mobile, etc., R. R. Co.*, 15 Federal Reporter, 199, 1882; 11 Amer. & Eng. R. R. Cases, 227.

2. — If an agent, while acting within the range of his employment, do an act injurious to another, either through negligence, wantonness or intention, then, for such abuse of the authority conferred upon him or implied in his appointment, the master or employer is responsible in damages to the person thus injured; but if the agent go beyond the range of his employment or duties, and of his own will do an unlawful act injurious to

Arrest of Engine-Driver — Corporate Liability.

another, the agent is liable, but the master or employer is not. *Ib.*

3. — An agent of a railway company, having and exercising supervision over the lands of the company and in charge of such lands, making leases, collecting rents and stumpage, and negotiating sales of the lands for the company, who invokes the criminal law by bringing a charge of grand larceny against a party for spoliation of the timber lands of the company, is not in so doing acting within the scope of his agency or in the course of his employment, and the company is therefore not to be held responsible for such actions done maliciously by him. *Ib.*

4. — A clerk in the service of a railway company, whose duty it was to issue tickets to passengers and receive the money, and keep it in a till under his charge, has no implied authority from the company to give into custody a person whom he suspects has attempted to rob the till, after the attempt has ceased, as such arrest could not be necessary for the protection of the company's property. And the company is therefore not liable for the act of the clerk. *Allen v. London and South Western R'y Co.*, Law Reports, 6 Queen's Bench Cases, 65. 1870.

5. — A foreman porter in the service of a railway company, who, in the absence of the station-master, is in charge of a station, has no implied authority to give in charge a person whom he suspects to be stealing the company's property; and, if he gives in charge on such suspicion an innocent person, the company is not liable. *Edwards v. London and North Western R'y Co.*, Law Reports, 5 Common Pleas Cases, 445. 1870.

6. — Where the employes of a railway company, engaged in running a train, saw obstructions upon the track, and at the same time plaintiff running from the place of the obstructions, and stopped the train, pursued and captured plaintiff, and took him to a point where, an examination having been held, sufficient evidence to detain him was not discovered, and he was returned to his home without expense to himself, it was held that, in the absence of any other authority from the company than the mere relation of employer and employe, the company was not liable for the act. *Porter v.*

Chicago, Rock Island and Pacific R. R. Co., 41 Ia., 358. 1875.

7. **Arrest of engine-driver; damages to railway company.** An action may be sustained by a master against one maliciously causing the arrest of his employes, when no legal cause of action existed against the servants, and the arrest was for the sole purpose of injuring the master; and maliciously causing the arrest of a railway company's engine-driver while running a train of cars, to delay the train and thereby damage the company, is actionable. And, *held*, on demurrer, that it was not necessary to aver what became of the defendant's suit against the servant, if the pleadings admit that it was malicious, false and hopeless. *St. Johnsbury and Lake Champlain R. R. Co. v. Hunt*, 55 Vt., 570. 1883.

8. **Corporate liability.** The prosecution of criminal offenders is one of the objects and privileges of a railroad corporation, and it can be held accountable for any malicious prosecution. *Ricord v. Central Pacific R. Co.*, 15 Nev., 167, 1880; 2 Amer. & Eng. R. R. Cases, 394; *Stevens v. Midland Counties R'y Co.*, 10 Hurlstone & Gordon (Exchequer), 352, 1854; *Miller v. Burlington and Missouri River R. R. Co.*, 8 Neb., 219, 1879; 20 Amer. R'y Rep., 96.

9. — An action for a malicious prosecution will lie against a railway company. *Edwards v. Midland R'y Co.*, Law Reports, 6 Queen's Bench Division, 287, 1880; 29 Eng. (Moak.), 621; 1 Amer. & Eng. R. R. Cases, 571. And the employment of policemen by a company to protect its property is an act within the scope of the incorporation of the company. *Ib.* See, also, *Corbett v. Sullivan*, 54 Vt., 619. 1882.

10. — To show that a criminal prosecution was instituted by authority of the corporation it is not necessary to produce a resolution of its board of directors. It is sufficient to show that its legal advisers, acting in conjunction with such of its servants and agents as have knowledge of the facts, instituted the proper proceedings. *Ricord v. Central Pacific R. R. Co.*, 15 Nev., 167, 1880; 2 Amer. & Eng. R. R. Cases, 394.

11. — A railway company is not liable for a malicious prosecution, instituted by its agents, against one of its officers, in the

Debtors — Passengers.

name of the state, for alleged embezzlement of its funds; there being no pretense that any power was given the company to engage in such prosecutions or that they came within the scope of its general powers or purposes. *Gillett v. Missouri Valley R. R. Co.*, 55 Mo., 315. 1874.

12. Debtors. Where the assignee of a claim, in favor of a railway company, sold the claim in the name of the company, and caused the arrest of the debtor, *held*, that the company was not liable for malicious prosecution. *Park v. Toledo, Canada Southern and Detroit R. R. Co.*, 41 Mich., 352. 1879.

13. Passengers. Trespass lies against a corporation aggregate for an assault committed by its servant authorized by it to do the act. But where the servant of a railway company took the plaintiff, a passenger upon the company's line, into custody for an alleged breach of one of the company's by-laws, and carried him before a magistrate, and the attorney of the company attended before the magistrate to conduct the charge, *held*, that this was no evidence that the company ratified the act of its servant. *Eastern Counties R'y Co. v. Broom*, 6 Welsby, Hurlstone & Gordon (Exchequer), 314; 2 Eng. Law & Equity, 406; 6 Eng. R. R. & Canal Cases, 743. 1851.

14. — The plaintiff came to a station of the defendant's railway when a passenger train was about to start, and, having entered the compartment of the ticket office where the clerk was then issuing tickets, he approached the ticket press and asked for a ticket, but did not get or pay for one. A person outside the office called the plaintiff out as the train was about to leave the platform, and, as the plaintiff was leaving the ticket office, the ticket-clerk, erroneously believing that he had seen a ticket in the plaintiff's hand, detained him, asked him for the ticket and searched him, and subsequently charged the plaintiff, in the presence of the station-master, with having stolen a ticket, whereupon the plaintiff was also searched by the station-master. In an action brought by the plaintiff against the railway company for assault and false imprisonment, *held*, affirming the decision of the court of queen's bench, that there was evidence of

the defendant's liability for the acts of the ticket-clerk and station-master, and that the judge was right at the trial in refusing to direct a verdict for the defendant on the ground that there was no evidence that it committed or authorized the trespass proved. *Van den Eynde v. Ulster R'y Co.*, 5 Irish Reports (Common Law), 328. 1871.

15. — The plaintiff was a passenger by the defendant's railway with a return ticket from M. to N. On reaching E., a station short of N., he got out, but was informed that he must pay an additional fare of 2d. This he refused to do. He was thereupon given into custody by the inspector of the defendant's station upon the charge of refusing to give up his ticket, or pay his fare, and thereby defrauding the defendant. This charge was dismissed. The plaintiff having brought an action of trespass and false imprisonment, *held*, that, as the defendant was empowered, under s. 104 of the above act, to arrest persons committing frauds under s. 103, and as the inspector was defendant's representative at E., it must be presumed, in the absence of evidence to the contrary, that the inspector had authority from the defendant to arrest persons supposed to be guilty of committing offenses against that section, and that the defendant was liable for his mistake. *Moore v. Metropolitan R'y Co.*, Law Reports, 8 Queen's Bench Cases, 36; 4 Eng. (Moak), 203. 1872.

16. — failure to pay. A by-law of a railway company, duly sanctioned by the board of trade, declared that "each passenger not producing or delivering up his ticket will be required to pay the fare from the place whence the train originally started; or, in default of payment thereof, shall forfeit a sum not exceeding 40s." *Held*, that although this specific act was not mentioned in § 109 of the 8 and 9 Vict., c. 20, it came within the scope of the authority given by § 108 of that act, authorizing railway companies to make by-laws "for regulating the traveling upon the railway;" and that the arrest of a passenger who refused to show or give up his ticket at a station, and whose name and residence were unknown, was warranted by § 154 of the above statute. *Barry v. Midland Great Western R'y Co.*, 17 Irish Common Law, 103. 1865.

Passengers.

Reversed upon appeal, and held that the arrest was not warranted under the law. *Same v. Same*, 1 Irish Reports (Common Law), 180, 1867.

17. — *failure to surrender ticket.* A special act authorized the L. and C. R'y Co. to make by-laws and impose penalties and forfeitures for their enforcement. The company made a by-law providing that any passenger who should not surrender his ticket upon leaving the company's premises should pay fare from the station from which the train originally started. *Held*, that this was not a by-law imposing a penalty or forfeiture, and that the arrest of a passenger in such a case was not authorized. *Chilton v. London and Croydon R'y Co.*, 16 Meeson & Welsby (Exchequer), 212, 1847; 5 Eng. R. & Canal Cases, 4.

18. — *lost ticket.* A passenger who has been arrested and lodged in prison by the employes of a railway company for traveling without a ticket, when his ticket, in fact, has been accidentally lost, may recover damages for the wrong. *Lynch v. Metropolitan Elevated R'y Co.*, 90 N. Y., 77; 12 Amer. & Eng. R. R. Cases, 119, 1882; *Lynch v. Metropolitan Elevated R'y Co.*, 24 Hun (N. Y.), 506, 1881. See, also, *Goff v. Great Northern R'y Co.*, 8 Ellis & Ellis, 672; 107 E. C. L., 671, 1861; *Lynch v. Metropolitan Elevated R'y Co.*, 90 N. Y., 77, 1882.

19. — *pleading.* In an action for damages on account of the wrongful arrest of a passenger on its train caused by the conductor, it was alleged that the conductor was "acting within the scope of his authority." *Held*, it was competent to prove that in the performance of the act the conductor was acting within the sphere of his authority as conferred by the company, or under its instructions. *Galveston, Harrisburg and San Antonio R'y Co. v. Donahoe*, 56 Tex., 162, 1882; 9 Amer. & Eng. R. R. Cases, 287.

20. — *pleading; damages.* At the trial of an action of contract for a breach of the agreement of a railway company to carry the plaintiff as a passenger on its line from S. to N., it appeared that he bought a ticket at S. which entitled him to be carried to N.; that the defendant's conductor refused to receive the ticket, and, when the train arrived at an intermediate station, the con-

ductor, who was a railway police officer, arrested the plaintiff for evading his fare, and delivered him into the custody of two police officers, who detained him during the night in the place provided for arrested persons. *Held*, that the detention of the plaintiff during the night, his discomforts in the place of detention, illness produced by the dampness of the cell in which he was confined, and the indignities which he suffered at the hands of the police officers, were not elements of damage which he could recover in this action. *Murdock v. Boston and Albany R. R. Co.*, 138 Mass., 15, 1882; 6 Amer. & Eng. R. R. Cases, 406.

21. — *ratification of act of employe.* The plaintiff, being desirous of going by an excursion train from Monks Ferry (the defendant's station) to Bangor and back, inquired of the clerk at the former station by what train he could return; the clerk informed him that his ticket would be available by the evening train from Bangor; the plaintiff accordingly obtained an excursion ticket, and returned by the train mentioned by the clerk. On arriving at the platform near to the Chester station a railway servant, who had charge of the train, upon receiving the plaintiff's ticket told him that he had come by the wrong train, and that he must pay 2s. 6d. more. This the plaintiff refused to pay, and he was thereupon taken into custody by a railway servant, under the direction of a superintendent; but, after having been a short time in custody, he paid the money under protest, and was released. It appeared that the Chester station was occupied by the defendant's company, and by several other railway companies; but one of the witnesses stated that he believed the person who took the plaintiff into custody to be one of the servants of the defendant. The plaintiff's attorney having written to the secretary of the defendant for compensation, received a written answer from him, requesting that he might be furnished with the date of the transaction, and promising to make the necessary inquiries. The secretary also stated that it was an awkward business, and that the blame would fall upon the clerk at the station who had given the false information; and he also offered to repay to the plaintiff the sum of 2s. 6d. he had been

Injury to Passengers — Appeal.

compelled to pay. *Held*, in an action against the defendant for the arrest, that the circumstances of the case did not afford any evidence that the arrest had been made by any authority, either express or implied, given by the company, or that it had ratified the act. *Roe v. Birkenhead R'y Co.*, 7 Welsby, Hurlstone & Gordon (Exchequer), 36, 1851; 6 Eng. R. R. & Canal Cases, 795; 7 Eng. Law & Equity, 546; 21 Law Journal Rep., N. S. (Exch.), 9.

22. **Probable cause.** In an action to recover damages for a malicious prosecution, the want of probable cause must be affirmatively established by the plaintiff. *Ganea v. Southern Pacific R. R. Co.*, 51 Cal., 140. 1875.

23. — If the plaintiff, in such action, proves that he was held to bail by the examining magistrate, he establishes, *prima facie*, the existence of probable cause; and the fact that the grand jury subsequently ignores the charge does not, in California, afford evidence of want of probable cause which overcomes the effect of the order holding the plaintiff to bail. *Ib.*

24. — Where the facts adduced upon the investigation of an action for a personal injury tended to show that the injury was not caused by a collision as alleged, and the defendant laid all of said facts before a solicitor and took his advice, and thereupon commenced a criminal proceeding for conspiracy, and such proceeding was found by the jury to be honest, *held*, that the defendant was not liable for malicious prosecution. *Abrath v. North Eastern R'y Co.*, Law Reports, 11 Queen's Bench Division, 440. 1813.

25. — *Held*, under the facts in the case, that the defendant had probable cause for charging the plaintiff with appropriating fares. *Hewett v. New Orleans and Carrollton R. R. Co.*, 28 La. An., 685. 1876.

26. **Tickets; sales of.** In an action for malicious prosecution on a charge of selling a fraudulent railroad ticket, the defendant may introduce evidence of his having had knowledge, anterior to the charge, of the sale of fraudulent tickets by the plaintiff on other occasions. *Thelin v. Baltimore and Ohio R. R. Co.*, 59 Md., 539. 1882.

27. — An officer of a railroad company, having reasonable grounds for supposing a

person had in his possession fraudulent tickets of the company, is justified in proceeding by search warrant to ascertain that fact, and the failure to find such tickets does not show that he had not sufficient ground to justify him in instituting the search. *Ib.*

MALPRACTICE.

1. **Injury to passengers.** A railway company having assumed to furnish a surgeon for passengers injured thereby, its duty to the plaintiff is discharged when it provides a surgeon possessing only ordinary skill; and for any damage caused the plaintiff by the neglect of such surgeon, the surgeon, and not the defendant, would be responsible. *Secord v. St. Paul, Minneapolis and Milwaukee R'y Co.*, 18 Federal Reporter, 221. 1883.

MANDAMUS.

See BRIDGES; ELEVATORS; STRIKES; SUBSCRIPTIONS BY CITIES AND TOWNS; SUBSCRIPTIONS BY COUNTIES.

1. **Adequate legal remedy.** This court will not award a *mandamus* when full relief can be had by appeal, writ of error, or otherwise. *Ex parte South and North Alabama R. R. Co.*, 65 Ala., 599. 1880.

2. **Appeal.** One who has obtained an extension of time within which to comply with peremptory *mandamus* cannot thereafter appeal from the order directing that the *mandamus* issue. *People ex rel. v. Rochester and State Line R. R. Co.*, 15 Hun (N. Y.), 188. 1878.

3. — *Mandamus* will not lie to compel a justice of the peace to grant an appeal. *Chicago, Rock Island and Pacific R. R. Co. v. Franks*, 55 Mo., 325. 1874.

4. — **proceedings on reversal.** When a cause is reversed by the supreme court, on the ground that a writ of *mandamus* should have been awarded in the court below, and the circuit court, without any new testimony being heard, awards the writ in conformity with the opinion of the supreme court, such judgment of the circuit court will not be reviewed. *Chicago and Alton R. R. Co. v. The People*, 72 Ill., 82. 1874.

Appellate Courts — Construction of Railway.

5. Appellate courts. This court will not by *mandamus* revise the action of inferior courts, acting within the scope of their authority, touching any matter about which they must exercise their judicial discretion. This principle applied to the mandate of the supreme court in relation to the occupancy of the Grand Cañon of the Arkansas in Colorado. *Ex parte Railway Co.*, 101 U. S., 711. 1879.

6. Bill of exceptions. The return of a judge to a writ of *mandamus*, to require him to sign a bill of exceptions, construed. *State ex rel. v. Northwestern Union R'y Co.*, 47 Wis., 436. 1879.

7. Bridge. Where, upon certain conditions, a special act required a railway company to pay damages for decrease in tolls of a neighboring bridge, it was held that an action of debt lay against the company; and that *mandamus* was not a more effectual remedy and ought not to be granted. *Regina v. Hull and Selby R. R. Co.*, 6 Adolphus & Ellis (N. S.), 70; 51 E. C. L., 68. 1844.

8. Common carriers. *Mandamus* will not lie against a common carrier to compel it to carry freight. Such act is a private wrong, for which an action at law will afford a complete remedy. *People v. N. Y., Lake Erie and Western R. R. Co.*, 2 N. Y. Civil Procedure Reports, 82, 1882; *People ex rel. v. New York, Lake Erie and Western R. R. Co.*, 22 Hun (N. Y.), 533, 1880.

9. Construction of railway. On an application for a *mandamus* against a railway company, by a land owner, over whose land the line was authorized to be made, but to whom no notice had been given by the company requiring his land, to complete the line and to purchase the necessary land for that purpose, held, that it was no answer to the rule, that the prescribed period for the compulsory purchase of the necessary land had nearly expired, if there was still a period during which the company might take the requisite initiatory steps. *Regina v. York, Newcastle and Berwick R'y Co.*, 6 Eng. R. R. & Canal Cases, 648, 1851; *Queen v. York R'y Co.*, 16 Adolphus & Ellis (N. S.), 886; 71 E. C. L., 886, 1851. See *Queen v. Lancashire and Yorkshire R'y Co.*, 71 E. C. L., 904. 1851.

10. — That compliance is impracticable is

a good return to a writ in such a case. *Queen v. London and North Western R'y Co.*, 16 Adolphus & Ellis (N. S.), 864; 71 E. C. L., 868, 1851; *Queen v. York and North Midland R'y Co.*, 1 Ellis & Blackburn, 178; 72 E. C. L., 177, 1852. See *Queen v. Lancashire and Yorkshire R'y Co.*, ib., 228. 1852.

11. — The following cases hold a *mandamus* proper in such case: *Regina v. Lancashire and Yorkshire R'y Co.*, 16 Eng. Law & Equity, 327; 1 Ellis & Blackburn, 228; 17 Jurist, 62; 72 E. C. L., 228, 1852; *Regina v. Great Western R'y Co.*, 16 Eng. Law & Equity, 341; 1 Ellis & Blackburn, 253; 17 Jurist, 85; 22 Law Jour. Rep. (N. S., Q. B.), 65; 72 E. C. L., 253, 1852; *Queen v. Great Western R'y Co.*, 18 Eng. Law & Equity, 364; 22 Law Jour. Rep. (N. S., Q. B.), 263; 1 Ellis & Blackburn, 874; 72 E. C. L., 874, 1852.

12. — *Mandamus* lies to compel the entire completion, at the instance of a landholder whose land has been required, or is prejudiced by the non-completion. *Regina v. York and North Midland R'y Co.*, 16 Eng. Law & Equity, 299; 1 Ellis & Blackburn, 178; 17 Jurist, 35; 22 Law Jour. Rep. (N. S., Q. B.), 41; 72 Eng. Com. Law, 178, 1852. But the contrary doctrine held and case reversed in the exchequer chamber. *York and North Midland R'y Co. v. Regina*, 18 Eng. Law & Equity, 199; 22 Law Jour. Rep. (N. S., Q. B.), 225; 17 Jurist, 690, 1853; *York and North Midland R'y Co. v. Queen*, 1 Ellis & Blackburn, 858; 72 E. C. L., 856, 1853; *Great Western R'y Co. v. Queen*, 1 Ellis & Blackburn, 874; 72 E. C. L., 872, 1853; reversing *Queen v. Great Western R'y Co.*, 1 Ellis & Blackburn, 253; 72 E. C. L., 252, 1852.

13. — A motion for *mandamus* to a railway company to carry out its line, which it is alleged it is leaving incomplete by laches, may be grounded on a demand made by a shareholder in the company itself. *Queen v. Ambergate R'y Co.*, 17 Adolphus & Ellis (N. S.), 362; 79 E. C. L., 361. 1851. See *Same v. Same*, 18 Eng. Law & Equity, 222; 17 Jurist, 668; 1 Ellis & Blackburn, 372; 72 E. C. L., 371; 22 Law Jour. Rep. (N. S., Q. B.), 191. 1853.

14. — A *mandamus* will compel a railway company to build its line in accordance with the terms of the special act of incorpora-

Contract — Fences and Cattle-Guards.

tion. But the *mandamus* will not be held sufficient if it does not appear that the company has abandoned its design or that it is not proceeding with convenient speed. *Regina v. Eastern Counties R'y Co.*, 10 Adolphus & Ellis, 531; 37 E. C. L., 287. 1839.

15. — Where certain works, authorized by a railway act (6 and 7 Will. 4, c. 36) to be done in a particular manner, and in a specified time, have been completed by the company in a manner which is objected to, in order to obtain a *mandamus* to enforce the performance in the way required by the act, it should distinctly appear that a specific complaint has been made to the company, since the completion of the work, and a distinct demand of what the party moving desires to enforce, and a refusal, in effect, by the company. Expressions of disapprobation while the works are proceeding, though proper to be made, do not relieve such party from the necessity of specifically demanding a proper compliance with the statute after the works are done, as without it he might be supposed to have waived his objection. *Regina v. Bristol and Exeter R'y Co.*, 3 Eng. R. R. & Canal Cases, 433. 1843.

16. — branch line. A railway company cannot be compelled by *mandamus* to purchase land to make a branch railway, where the compulsory powers of the company to purchase the necessary land expired before the writ issued, though the company had, a month before the expiration of the powers, been required by the land owners so to do. *Regina v. London and North Western R'y Co.*, 6 Eng. R. R. & Canal Cases, 634. 1851.

17. — restoration of railway. Where a railway was made under the authority of an act of parliament, by which the proprietors were incorporated, and by which it was provided that the public should have the beneficial enjoyment of the same, the company having afterward taken up the railway, held, that a *mandamus* might issue to compel the company to reinstate and lay down again the railway. *Rex v. Severn and Wye R'y Co.*, 1 Eng. R. R. & Canal Cases, 541 (Appendix). 1839.

18. Contract. A contract with a corporation will not be enforced by *mandamus*. *State ex rel. v. Paterson and Newark R. R.*

Co., 10 Amer. & Eng. R. R. Cases, 334 (N. J.). 1882.

19. Depot; maintenance. Where, upon a proceeding by *mandamus* to compel a railway company to resume its use of a station which it had abandoned, the question was whether the place in question was a station within the statute applicable to the case, it was held that it was a question of mixed law and fact, and that a decision by the court below, that upon certain facts found the place was a station, could be reviewed in the supreme court. *State v. New Haven and Northampton Co.*, 41 Conn., 134, 1874; 6 Amer. R'y Rep., 84.

20. Eminent domain. It not being the duty of a railway corporation, after having obtained possession of land for its track, and in the use of it, to institute proceedings to condemn it, *mandamus* is not a proper remedy for the owner to compel the institution of such proceedings. *Smith v. Chicago and Alton R. R. Co.*, 67 Ill., 191. 1873.

21. — A rule *nisi* having been obtained for a *mandamus* to a railway company to summon a jury to assess compensation for damage under its act, the following agreement was entered into by its agent and the claimant: "We do hereby agree to accept of the company, in discharge of our claim against it for injury, etc., the sum of 425*l.*, and 8*l.* per week for the future, as long as the present damages continue. (Signed) W. E., T. E." This was also signed by the agent of the company. Upon this agreement the proceedings for the *mandamus* were discontinued. The company paid the 425*l.*, and also the 8*l.* per week for several weeks, and then ceased, whereupon an application was made for a *mandamus* to compel them to pay the money according to the agreement, or to summon a jury, to assess compensation, or to revive the former rule. Held, that, as the agreement was not under the seal of the company, it could not be enforced by action; and the court, therefore, granted the *mandamus*. *Regina v. Bristol and Exeter R'y Co.*, 3 Eng. R. R. & Canal Cases, 777. 1845.

22. Fences and cattle-guards. Where a railway company fails to construct fences and cattle-guards, as required by statute, a writ of *mandamus* may properly be issued,

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compelling it to construct and maintain the same. *People ex rel. v. Rochester and State Line R'y Co.*, 14 Hun (N. Y.), 371, 1878; *People ex rel. v. Rochester and State Line R. R. Co.*, 76 N. Y., 294, 1879.

23. Highways. While a railway company has a discretion as to the manner of performing the duty, imposed upon it by the General Railroad Act (subd. 5, § 28, ch. 140, Laws of 1850), of restoring a highway across or along which its road has been constructed, the discretion is a ministerial one; the act of restoration must be done; as to this there is no discretion. If it elects a manner which proves ineffectual, and yet it claims to have performed its duty, and the aid of the court is invoked by the commissioners of highways to compel, by *mandamus*, the performance, the court has power to and should point out in the writ in what the corporation has failed and to direct particularly what must be done so that it may not fail again. *People ex rel. v. Dutchess and Columbia R. R. Co.*, 58 N. Y., 152, 1874; 7 Amer. R'y Rep., 10.

24. — A *mandamus* suggesting that a railway crossed a certain public highway, not on a level, by means of a cutting, along which the line of railway was laid down, and that the said highway was thereby cut through and destroyed, and rendered impassable, and that a reasonable time had elapsed for the company to cause the highway to be carried over the railway by a bridge, commanded it to cause the said highway to be carried over the railway by means of a bridge, in conformity with the regulations of the Railways Clauses Consolidation Act, 1845. *Held*, that the *mandamus* was bad; for that the act gave the company, by s. 46, the option of carrying, by means of a bridge, either the road over the railway, or the railway over the road; and that there was nothing stated on the record which showed that such option was at an end. *South Eastern R'y Co. v. Queen*, 17 Adolphus & Ellis (N. S.), 485; 79 E. C. L., 485. 1852.

25. Insolvency. Where a railway company had failed to erect a wall as required by its charter, and the party for whose benefit the requirement was made did not institute any proceeding for about five years, and in the interval the corporation became in-

solvent, *held*, that the insolvency did not authorize the relator to proceed by *mandamus*. The relator had an adequate legal remedy. That such remedy would be unavailing by reason of the insolvency of the corporation did not change the rule. *State v. Paterson, Newark and New York R. R. Co.*, 43 N. J. Law, 505, 1881; 9 Amer. & Eng. R. R. Cases, 134.

26. — An order was issued by the board of trade, under the seventh section of the Railways Clauses Act, 1863 (26 and 27 Vict., c. 92), directing a railway company to make a bridge for the purpose of carrying a turnpike road over its line instead of crossing the same on the level. Previously to the making of this order, the company had exhausted all its powers of raising money in making the line, and the undertaking proving a failure, it had leased its line in perpetuity to another company, and such lease was confirmed by a special act of parliament. The lessees took all the profits of the line, paying a portion of the interest due to the company's debenture stockholders. The company consequently had no funds for the construction of the bridge. On an application for a *mandamus* to compel the company to comply with the order of the board of trade, the above facts being shown, the court discharged the rule for the *mandamus*. *Bristol and North Somerset R'y Co., In re*, Law Reports, 3 Queen's Bench Division, 10, 1877; 28 Eng. (Moak), 2.

27. Judge of court a stockholder. A *mandamus* will not issue to compel a judge to hear a case where he has held himself disqualified from hearing it. The wife of the judge was related to some of the stockholders of a railway company, and the company was a party to the action. *State ex rel. v. Van Ness*, 15 Fla., 317. 1875.

28. Judgment. *Mandamus* does not lie to review the discretion of a court in refusing to reopen a judgment that an affidavit of non-execution may be supplied. *Chicago and Northeastern R. R. Co. v. Genesee Circuit Judge*, 40 Mich., 168. 1879.

29. Municipal bonds and taxes. In case of non-payment of county bonds a *mandamus* will, by the laws of Alabama, lie against the county court to compel the assessment and levy of the necessary taxes,

Operation of Railways—Practice.

but the holder who resorts to the courts of the United States must there reduce the bonds or the coupons to judgment, before he is entitled to that remedy. *County of Greene v. Daniel*, 102 U. S., 187, 1880; 3 Amer. & Eng. R. R. Cases, 105.

30. — A judgment creditor of a county, who has received a warrant on the treasurer which is refused payment, may have a *mandamus* to enforce the collection of a tax to pay such judgment, and is not bound to wait and take his turn among other warrant-holders. *United States ex rel. v. County Court of Vernon County*, 3 Dillon (U. S. C. C.), 281, 1875; *United States v. Lincoln County*, 5 Dillon (U. S. C. C.), 184, 1879. See, also, *Same v. Buchanan County*, *ib.*, 285, 1878.

31. — When the legislature has given a municipal corporation the right to levy taxes to pay debts, any court, having jurisdiction to enforce the payment of a debt, may, by *mandamus*, compel the corporate authorities to levy a tax in conformity with the mode prescribed and to the extent of the power conferred by law; but beyond this no court can go. *State ex rel. v. Rainey*, 7 Amer. & Eng. R. R. Cases (Mo.), 183; 74 Mo., 229. 1881.

32. — *intervention*. In an action of *mandamus* to compel an officer to do certain acts necessary to the levy of a tax voted in aid of a railroad a tax-payer cannot intervene. *Harwood v. Quinby*, 44 Ia., 385, 1876.

33. — *issuance of bonds*. The writ of *mandamus* will not be allowed to compel a corporation to issue its bonds to one of its creditors in order to obtain the benefit of a mortgage security, where the creditor's right to such security is doubtful and the property sought to be affected has passed into the hands of third parties as purchasers. The remedy in such case should be by a suit in equity against the parties whose interest it is sought to affect. *Ham v. Toledo, Wabash and Western R'y Co.*, 29 Ohio St., 174. 1876.

34. — *levy and collection of tax*. *Mandamus* will not lie to compel the board of supervisors to levy a tax voted to aid in the construction of a railroad. When the tax is voted and certified no further levy is re-

quired. *C. D. and M. R. R. Co. v. Olmstead*, 46 Ia., 316. 1877.

35. — Nor will it lie to compel the county treasurer to collect such tax, until the tax lists shall have been placed in his hands, and he shall then refuse or neglect to collect it. *Ib.*

36. — The county commissioners having levied a tax to pay county bonds, a *mandamus* will not issue against them to compel the collection of the tax. *Rowland, Ex parte*, 104 U. S., 604; 5 Amer. & Eng. R. R. Cases, 208. 1881.

37. — The duty of a town collector to pay over the money collected by him to pay municipal bonds may be enforced by *mandamus*; and it is not a ground for refusing the writ that he has, by his voluntary and wrongful act in paying over the money to the supervisor of the town, subjected himself to loss, or made the performance of his duty difficult or inconvenient. *People ex rel. v. Brown*, 55 N. Y., 180. 1873.

38. — *res adjudicata*. Where judgment has been duly obtained in Missouri against a county upon coupons detached from its bonds, no defense which questions their validity can be pleaded to a *mandamus* commanding the county court to pay the judgment from moneys in the treasury, or raise the means therefor by the levy of a special tax. *Ralls County Court v. United States*, 105 U. S., 733. 1881.

39. *Operation of railways*. A railway company's charter is a contract with the public, and a provision requiring a company to operate its line with at least a daily train, unless prevented by unavoidable cause, may be enforced by *mandamus*. The fact that the operation will not be profitable is not such unavoidable cause as will serve as an excuse. *New Brunswick and Canada R'y Co., In re*, 1 Pugsley & Burbridge (New Brunswick), 667. 1878.

40. — The writ of *mandamus* lies to compel a railway company to perform the public duties imposed upon it by its charter. *Railroad Commissioners v. Portland and Oxford Central R. R. Co.*, 63 Me., 269. 1874.

41. *Practice*. Questions of practice in actions of *mandamus* determined. *People ex rel. v. New York Central and Hudson River R. R. Co.*, 30 Hun (N. Y.), 78. 1883.

• Assignment.

42. — Where an action of *mandamus* was brought in the name of the state of Kansas, on the relation of a railway company, and the state had no interest in the result of the action, and the railway company was the real party in interest, and the defendant moved that the action should be dismissed because it was not brought in the name of the real party in interest, *held*, that the motion should be sustained. *State ex rel. v. Commissioners Jefferson Co.*, 11 Kans., 66. 1873.

43. Refusal to carry goods. The neglect or refusal of a railway corporation to receive and transport freight tendered to it by citizens of this state is a private wrong, for which the citizen is entitled to recover, in an action at law, such damages as he has sustained. It is not such a public wrong as will authorize the issuing of the writ of *mandamus*. *People v. New York, Lake Erie and Western R'y Co.*, 63 Howard's Practice (N. Y.), 291. 1882.

44. Service. A writ of alternative *mandamus*, directed to the Pennsylvania R. R. Co., commanding the company to construct certain bridges over its railroad, or show cause, was served on the superintendent of the New Jersey division of the company's railroads. *Held*, that the writ was not properly served, and the service was set aside. *State ex rel. v. Pennsylvania R. R. Co.*, 41 N. J. Law, 250. 1879. Service upon a mere financial officer of the company is not sufficient. *State ex rel. v. Pennsylvania R. R. Co.*, 42 N. J. Law, 490. 1880.

45. Statute of limitations; railroad aid tax. *Mandamus* to compel the county treasurer to enter upon the tax books tax voted in aid of a railway in 1868, but which was not certified up by the township trustees until 1876, would not be barred by the statute before three years after such certificate was made. Whether or not the statute of limitations would, at any time, operate to bar such a proceeding, query? *Harwood v. Brownell*, 48 Ia., 657. 1878.

46. Stock books; speculation. A *mandamus* will not issue to compel a corporation to exhibit its stock books, where the books are desired for mere speculative purposes. *People ex rel. v. Northern Pacific R'y Co.*, 18 Federal Reporter, 471. 1883.

47. To compel signing of city warrant. Where it appears that work authorized by law to be done at the expense of a municipal corporation has been done, such as improving a street, and the corporation is to collect the expense from the tax-payers, and all the requirements of the law have been complied with,—the money to be paid on the part of the city has been collected and paid into the city treasury; the city auditor has certified to the justice of the claimant's demand therefor; and the comptroller has drawn his warrant in the claimant's favor,—a peremptory *mandamus* will issue to compel the mayor to sign the warrant. *People ex rel. v. Havemeyer*, 16 Abbott's Practice (N. S., N. Y.), 219; 4 Thompson & Cook (N. Y. Supreme Ct.), 365; 47 Howard's Practice (N. Y.), 494. 874.

48. Violation of writ; penalty. The directors of a railroad corporation, created by the laws of New York, are not public officers, or a public body or board, within the meaning of the statute imposing penalties for violation of a writ of *mandamus*. *People ex rel. v. Rochester and State Line R. R. Co.*, 76 N. Y., 294. 1879.

49. Writ of error. Under the rules of the common law the granting of a peremptory *mandamus* was a mere award of the court and not a formal judgment; and no writ of error lay from such an award. *New Haven and Northampton Co. v. The State*, 44 Conn., 376. 1877.

MASTER AND SERVANT.

See EMPLOYEES; FIRES; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS.

MECHANIC'S LIEN.

See CONSTRUCTION OF RAILWAYS.

1. Assignment. Although a laborer upon a railroad has a lien by statute for the sum due him, it is not assignable at law, and, even if assignable, it would not entitle the holder of the same to assign the lien. *Cairo and Vincennes R. R. Co. v. Fackney*, 78 Ill., 116. 1875.

Bridges — Jurisdiction.

2. — A statutory right of action against a corporation for labor and materials follows the assignment of the claim. *Chicago and Northeastern R. R. Co. v. Sturgis*, 44 Mich., 538, 1880.

3. Bridges. A mechanic's lien does not, under the statutes of Kentucky, attach to railway bridges and like structures. *Graham v. Mt. Sterling Coalroad Co.*, 14 Bush (Ky.), 425, 1878.

4. Collateral security. Where a contract for work upon a railway contained a clause reciting that "all the money for the work hereinbefore specified should be paid by the citizens of Delaware county," it was held that this did not constitute the contractor the holder of collateral security, so as to prevent him from acquiring a mechanic's lien upon the road. *Delaware R. R. Construction Co. v. Davenport and St. Paul R'y Co.*, 46 Ia., 406, 1877. See, also, *Removal Cases*; *Meyer v. Construction Co.*; *Construction Co. v. Meyer*; *Railroad Co. v. Meyer*, 100 U. S., 457, 1879; 21 Amer. R'y Rep., 465.

5. Constitutional law. The lien given to laborers by the act concerning corporations (Rev., p. 188, § 63) cannot be extended so as to impair the obligation of contracts or lien of duly recorded incumbrances antecedent to the act. * *Coe v. New Jersey Midland R'y Co.*, 31 N. J. Eq., 105, 1879.

6. Contractors. Though contractors may be mechanics, yet this fact does not entitle them to the benefit of the provisions of the act of 1863, if the work is done by them as contractors, through the labor of others employed by them for that purpose. *Savannah and Charleston R. R. Co. v. Callahan*, 49 Ga., 506, 1873. See, also, *Savannah, Griffin, etc., R. R. Co. v. Alexander*, 56 Ga., 68, 1876.

7. Contractor's debts. A party who, at the request of a railway company, takes up its certificates of indebtedness given to its laborers and others for the boarding of hands, is not entitled to any lien under the statute against the company or its property. *Cairo and Vincennes R. R. Co. v. Fackney*, 78 Ill., 116, 1875.

8. Costs. On an offer for a judgment in an action to foreclose a mechanic's lien, the defendant will be entitled to recover costs unless the plaintiff recovers a judgment for more than such offer. *Lumbard v. Syra-*

cuse, Binghamton and N. Y. R. R. Co., 62 N. Y., 290, 1875.

9. Depots. The statute giving mechanics a lien upon buildings applies to buildings of a railway company. *Botsford v. New Haven, Middletown and Willimantic R. R. Co.*, 41 Conn., 454, 1874.

10. Evidence. In an action to foreclose a mechanic's lien, held, that the notice of lien filed in the county clerk's office could not be proved by a certified copy thereof from such office; and that the certificate of the county clerk, stating when it was filed, was not proper evidence of that fact. *Sampson v. Buffalo, New York and Philadelphia R. R. Co.*, 4 Thompson & Cook (N. Y. Supreme Ct.), 600, 1874.

11. — Time checks, issued by a subcontractor to laborers, are inadmissible in evidence against objection in an action for a labor debt. They are mere hearsay. *Chicago and Northeastern R. R. Co. v. Sturgis*, 44 Mich., 533, 1880.

12. — Cause reversed on the evidence. *Illinois Western Extension R'y Co. v. Gay*, 7 Bradwell (Ill.), 404, 1880.

13. Filing account. Failure of the clerk of the circuit court to forward to the secretary of state a copy of an account, filed for a mechanic's lien against a railroad, as required by § 3203, Revised Statutes, will not defeat the lien. *St. Louis Bridge and Construction Co. v. Memphis, Carthage and North Western R. R. Co.*, 72 Mo., 664, 1880.

14. Intervention. An intervening defendant in a proceeding for a mechanic's lien, who fails to show any title or interest in the property sought to be affected, has no such standing in court as will enable him to call in question a decree establishing the lien. *Lake Shore and Michigan Southern R. R. Co. v. McMillan*, 84 Ill., 208, 1876.

15. Jurisdiction. A justice of the peace has no jurisdiction to enforce a mechanic's lien against a railway. *Cranston v. Union Trust Co.*, 75 Mo., 29, 1881; 11 Amer. & Eng. R. R. Cases, 633.

16. — venue. Where the subcontractor was entitled to a mechanic's lien for work done in the construction of a railway, it was held that, if the contractors had entered into an agreement by which they became personally liable to pay his claim, such con-

Kansas Statute — Laborers.

tract was one in relation to the construction of a railway under § 2583, Code; and that the contractors were not entitled to a change of venue to the county of their residence. *Vaughn v. Smith*, 58 Ia., 553, 1882; 7 Amer. & Eng. R. R. Cases, 82.

17. **Kansas statute.** Laborers and mechanics employed by a subcontractor in the building of a railroad are within the protection of § 35, ch. 84, Comp. Laws of 1879, and if the company fails to take the bond required by such section, may maintain their action against it. *Mann v. Corrigan*, 28 Kans., 194, 1882.

18. — One who is in the employ of a contractor with a railroad company simply as time-keeper and superintendent is not a laborer in the sense in which that term is used in ch. 136, Laws of 1872, and cannot recover of the railroad company the amount due him therefor by the contractor, notwithstanding the company failed to take the bond required by that statute. *Missouri, Kansas and Texas R'y Co. v. Baker*, 14 Kans., 563, 1875.

19. — The statute applies not merely when a railway company is engaged in the construction of its first and main track, but also wherever it is enlarging its road by the addition of side-tracks. *Missouri, Kansas and Texas R'y Co. v. Brown*, 14 Kans., 557, 1875.

20. — The railway company is the proper obligee in the bond provided for in ch. 136, Laws of 1872, to protect laborers, mechanics and others in the construction of railways. A bond given in pursuance of said chapter, which contains all the conditions provided therein, is not vitiated by an additional stipulation to save the company harmless from all trouble, damage, costs, suits, judgments, etc. The liability created by said chapter is purely statutory, and a party seeking to enforce that liability must show all the facts required by the statute. *Atchison, Topeka and Santa Fe R. R. Co. v. Cuthbert*, 14 Kans., 212, 1875.

21. — A railway company failing to take the bond required by the statute is liable not merely to the laborers personally, but to any persons to whom they transfer their claims. *Missouri, Kansas and Texas R'y Co. v. Brown*, 14 Kans., 557, 1875.

22. — Ch. 45 of the Laws of 1865, which purported to authorize mechanics' liens upon railroads, was repealed by the general statutes, known as the Revision of 1868. *Burgess v. Memphis, Carthage and Northwestern R. R. Co.*, 18 Kans., 53, 1877; 15 Amer. R'y Rep., 181.

23. **Laborers.** The corporation act contains the following language: "In case of the insolvency of any corporation, the laborers in the employ thereof shall have a lien upon the assets thereof for the amount of wages due to them respectively, which shall be paid prior to any other debt or debts of said company, and the word 'laborers' shall be construed to include all persons doing labor or service of whatever character, for or as workmen or employees, in the regular employ of such corporation." *Held*, that the laborers in the employ of a corporation at the time of its insolvency have a lien upon the assets thereof for the whole amount of wages due to them respectively, no matter how long before the date of insolvency the wages may have accrued. But that persons holding such claims, who are not in the employ of the company at the time of its insolvency, have no lien upon the property. *Delaware, Lackawanna and Western R. R. Co. v. Oxford Iron Co.*, 33 N. J. Eq., 192, 1880; 1 Amer. & Eng. R. R. Cases, 205.

24. — A laborer may sue for work done by his team, where no right arises from its service to any other person. *Chicago and Northeastern R. R. Co. v. Sturgis*, 44 Mich., 538, 1880.

25. — A day laborer is entitled to a mechanic's lien upon a railway for his wages. *Mornan v. Carroll*, 35 Ia., 22; 5 Amer. R'y Rep., 193, 1872. The lien of mechanics and laborers operating a railway is not lost by taking a promissory note for the same. *Poland v. Lamoille Valley R. R. Co.*, 52 Vt., 144, 1879; 4 Amer. & Eng. R. R. Cases, 408.

26. — The lien given by § 1981 of the Code to mechanics, upon property manufactured or repaired by them, does not attach in favor of a workman who is hired by another to do the work. In such a case the possession and the lien is in the master or contractor. A laborer in a brick-yard cannot claim a lien against the brick that are

Limitations — Mortgage.

manufactured there. *Quillian v. Central R. R. and Banking Co.*, 52 Ga., 374. 1874.

27. — Under § 10, ch. 119 of 1872, as amended by § 1, ch. 246 of 1873, the relation of a railway company to a person employed by its contractor to perform work in the construction of its road is that of a guarantor (upon certain conditions specified in the statute) of payment for such work by such contractor; and the employe's action against the company, as one "growing out of contract," may be brought in justice's court, for an amount not exceeding the justice's jurisdiction. *Redmond v. Galena and Southern Wisconsin R'y Co.*, 39 Wis., 426, 1876; 13 Amer. R'y Rep., 400.

28. — The term "contractor," in that act, includes subcontractors in the second degree, as well as those who contract directly with the company. *Id.*

29. — As the statute peremptorily requires the action to be brought within fifty days after the labor is performed, it is immaterial whether at the commencement of the action there is anything yet due from the company to its contractor, or not. *Id.*

30. — engineer. A fund was by law required to be paid to the "laborers" upon a railway. *Held*, that members of a corps of engineers were not included. *Peck v. Rusk*, 10 Amer. & Eng. R. R. Cases, 642 (Wis.), 1892. See, also, *Pennsylvania and Delaware R. R. Co. v. Leuffer*, 84 Pa. St., 168. 1877. *Contra*, *Leuffer v. Pa. and Del. R. R. Co.*, 11 Philadelphia, 548. 1876.

31. Limitations. Under the act of 1861, relating to liens on railroads, no one is entitled to a lien unless his contract was directly with the railroad company, and he commences proceedings to enforce it within three months after an action accrues to him. *Arbuckle v. Illinois Midland R'y Co.*, 81 Ill., 429. 1876.

32. — Suit must be brought on a contractor's lien within twelve months from the date of its record. The mere filing of a declaration, unless followed by proper service upon the defendant, is not the commencement of suit. *Cherry v. North and South R. R. Co.*, 65 Ga., 633, 1880; 11 Amer. & Eng. R. R. Cases, 636.

33. Merger. When the holder of a mechanic's lien acquires the legal title to the

property upon which it rests with the intention that the lien should not be merged therein, the intention of the lienholder will prevail, as against junior incumbrancers. *Delaware R. R. Construction Co. v. Davenport and St. Paul R'y Co.*, 46 Ia., 406. 1877.

34. Missouri lien law. Prior to the act of March 21, 1873 (Acts 1873, p. 58), a strip of land granted to a railroad company for a right of way could not be subjected to a mechanic's lien. It was not the design of the mechanic's lien law to allow a railroad to be sold out in detached parcels. *Schulenburg v. Memphis, Carthage and Northwestern R. R. Co.*, 67 Mo., 442. 1878.

35. Mortgage. Under the laws of Iowa, a mechanic's lien for work done under a contract takes precedence of all incumbrances put on the property by mortgage or otherwise, after the work was commenced. *Removal Cases; Meyer v. Construction Co.; Construction Co. v. Meyer; Railroad Co. v. Meyer*, 100 U. S., 457, 1879; 21 Amer. R'y Rep., 465; *Taylor v. Burlington, Cedar Rapids and Minnesota R'y Co.*, 4 Dillon (U. S. C. C.), 570, 1877.

36. — A mechanic's lien for ties attaches from the commencement of the building, and takes precedence over a mortgage executed after that time, although the particular work for which the lien is claimed was not commenced until after the execution of the mortgage. *Neilson v. Iowa Eastern R'y Co.*, 44 Ia., 71. 1876.

37. — Where a contractor performs labor and furnishes materials upon a section or division of a railroad in Iowa then in the process of construction, and there was a pre-existing and duly recorded mortgage executed by the company on its entire line of road to secure its bonds, *held*, that on filing his claim within the time, and in the mode, prescribed by the statute, he has, as against the mortgagees, a paramount lien upon the entire road. *Brooks v. Railway Co.*, 101 U. S., 448, 1879; *Meyer v. Hornby*, *ib.*, 728, 1879.

38. — The Burlington, Cedar Rapids and Minnesota R'y Co. failed to pay the interest on its bonds November 1, 1873. The bondholders funded the interest coupons upon the bonds for the term of eighteen months, until May 1, 1878, and continued the railway company in possession and operation

Mortgage.

of the road until May 19, 1875, when proceedings for foreclosure were instituted, and the road was placed in the hands of a receiver, a decree of foreclosure being subsequently entered. The road was sold thereunder and purchased by the bondholders, who conveyed it to the Burlington, Cedar Rapids and Northern R'y Co., which has since operated it. In September, 1874, the plaintiff furnished material for and constructed certain fence for the company, for which he presented a bill, which has been on file in the office of the auditor since September 25, 1874, and on that date the company gave plaintiff a note for the amount, the said note being entered on the bills-payable book of the company. On November 28, 1876, the plaintiff filed his mechanic's lien. *Held*, that the lien not being filed until after the lapse of more than ninety days, and the purchasers of the road having acted in good faith, the lien could not be enforced. *Bear v. Burlington, Cedar Rapids and Minn. R'y Co.*, 48 Ia., 619. 1878.

39. — The lien of a mechanic for repairs upon a completed railway is not paramount and superior to the lien of a mortgage executed after the commencement and before the completion of the road. *Ib.*

40. — Nor will the lien of the mechanic, upon the particular work performed by him, take precedence of the mortgage, when the improvements he has made constitute an integral part of the road. *Ib.*

41. — Work having been done by a contractor, and the railway company, without his knowledge or assent, having afterwards made a mortgage upon which proceedings were had which resulted in a sheriff's sale, it was held that, although the purchaser at this sale had no notice of the contractor's claim, the mortgage and the judicial sale under it were void, so far as regarded the paramount lien of the contractor. *Shamokin Valley and Pottsville R. R. Co. v. Malone*, 85 Pa. St., 25. 1877.

42. — A depot building, as against a mechanic's lien, is property connected with the line of the railroad, and regarded as part of the mortgaged premises, under a prior mortgage. *Coe v. New Jersey Midland R'y Co.*, 31 N. J. Eq., 105. 1879.

43. — Under the joint resolution of the

legislature of Pennsylvania, passed January 21, 1843, and which declares that "it shall not be lawful for any company incorporated by the laws of the commonwealth and empowered to construct any railroad, canal, or other public internal improvement, while the debts thereof, incurred by the said company to contractors, laborers and workmen employed in the construction or repair of said improvements remain unpaid, to execute a general or partial mortgage, or other transfer of the real or personal estate of the said company, so as to defeat, postpone, endanger or delay their said creditors, without the written consent of said creditors first had and obtained, and that any such mortgage or transfer shall be deemed fraudulent, null and void, as against any such contractors, etc., as aforesaid," an unpaid contractor, laborer or workman, employed in the construction of a railroad in Pennsylvania, has a lien of indefinite duration on such road, which lien has precedence over every right that can be acquired by or under any mortgage made after the debt to the contractor was incurred. *Fox v. Seal*, 22 Wallace, 424. 1874.

44. — Contract construed under the Kansas statutes and priority of liens determined. *Seitz v. Union Pacific R'y Co.*, 16 Kans., 188. 1876.

45. — Claims of contractors and laborers for labor performed in the construction of a railroad, subsequent to the execution of a mortgage on the road, to secure its bonds, will not be allowed, except as postponed to the bondholders, notwithstanding the work was performed and a mechanic's or laborer's lien filed in the proper court before the registration of the mortgage in the state where the labor is performed and the lien filed. *Tommey v. Spartanburg and Asheville R. R. Co.*, 7 Federal Reporter, 429. 1881.

46. — A land owner agreed with a railway company that he would give the land for a depot and station upon the line, if the company would erect a building for the purpose upon the land. The company agreed to do so, and employed the petitioner to do the mason work thereon. He began work November 23, 1870, and finished January 17, 1871, and immediately thereafter filed a certificate of his lien. The company began to

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use the place as a station immediately after making the contract with the land owner and before the building was commenced, taking and delivering passengers and freight there, and continued such use until the building was completed. No conveyance of the land was ever made by the owner. The company had previously, in May and June, 1869, made two mortgages of the entire franchise and property of the railway, the mortgages providing in express terms that they were also to cover all lands and buildings that might afterwards be acquired by or belong to the company. *Held*, upon a petition to foreclose the lien, that even if the mortgages could legally embrace after-acquired property, which the court did not decide, yet the equitable title to the land in question did not vest in the company until the condition on which it received the land was performed, by the completion of the building, and that therefore the lien of the petitioner took precedence of the mortgage incumbrance. *Botsford v. New Haven, Middletown and Williamantic R. R. Co.*, 41 Conn., 454, 1874; 7 Amer. R'y Rep., 153.

47. — The plaintiff, a contractor, did work on a railway in 1857 and 1858. Under authority granted in 1857 the company mortgaged its road, etc., in 1859; in 1860 the plaintiff brought suit; in 1866 the road was sold under the mortgage, and in 1867 conveyed to the purchasers, who, in the same year, conveyed to defendant. In 1870 the plaintiff obtained judgment. On a *scire facias* on the judgment under the acts of January 21, 1843, and April 4, 1862, *held*, that the mortgage was invalid as against the plaintiff, and the defendant, as purchaser under the mortgage, was liable for the judgment. *Tyrone and Clearfield R'y Co. v. Jones*, 79 Pa. St., 60. 1875.

48. — Contractors having a claim against a railway company which, by the act of January 21, 1843 (P. L., 467), is paramount to the lien of a subsequent mortgage, and who are made parties defendant to a bill of foreclosure of the mortgage, are bound by a decree entered against them *pro confesso* in the foreclosure proceedings, by virtue of which the road and franchises of the company are ordered to be sold discharged of all liens, and cannot, therefore, long after-

wards, assert their claims as against the purchaser at said sale. *Woods v. Pittsburgh, Cincinnati and St. Louis R'y Co.*, 3 Amer. & Eng. R. R. Cases (Pa.), 525. 1882.

49. Notice. Furnishing materials creates incipient lien, but to perfect it a general contractor must, in conformity with the Code of 1873, ch. 115, §§ 3 to 11 inclusive, within the prescribed time, file in the county court of the county in which is situated the property on which the lien is sought to be secured, and in the clerk's office of the chancery court of Richmond City, where the property is in said city, a true account of the work done, or materials furnished, sworn to by the claimant or his agent, with a statement attached, signifying his intention to claim the benefit of the lien, and setting forth a description of the property on which he claims a lien, which is so to be recorded by the clerk. *Boston v. Chesapeake and Ohio R. R. Co.*, 12 Amer. & Eng. R. R. Cases (Va.), 263. 1882.

50. — If a lien is given on the property of a railway company in its entirety, it can only be secured by filing the account in the proper clerk's office of every county or corporation through which the road passes. *Ib.*

51. — A mechanic's lien attaches at the commencement of his work, and the time for notice expires ninety days from the date of the conclusion of the work. *Delaware R. R. Construction Co. v. Davenport and St. Paul R'y Co.*, 46 Ia., 406. 1877.

52. — The station agents of a foreign railway company operating a railroad in Missouri are the representatives of the company in such a sense that service of notice upon them, of claims for work and labor done or materials furnished upon the road, is service upon the company within the meaning of the statute providing the mode of obtaining and enforcing liens against railroads. *R. S.* 1879, §§ 3200 to 3216. *Morgan v. Chicago and Alton R. R. Co.*, 76 Mo., 161. 1882.

53. — Where, in a suit to foreclose a mortgage, brought against a railway company, third parties intervene and seek to enforce a claim for materials furnished or used in the construction of the roadway, against the earnings of the road in the hands of the receiver, and without claiming a mechanic's lien, the purchaser at the foreclosure sale is

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not bound to look beyond what appears upon the face of the record, and anticipate a future claim for a mechanic's lien in case the earnings of the road should not satisfy the claim of intervenors. *Hale v. Burlington, Cedar Rapids and Northern R'y Co.*, 13 Federal Reporter, 203; 2 McCrary (U. S. C. C.), 558. 1881.

54. — One Robertson entered into a contract with the defendant to construct forty-seven miles of its road, and thereafter entered into a contract with one McGraw, by which the latter agreed to construct a portion thereof. Subsequently, McGraw having failed to pay his laborers and others who had furnished materials, the latter filed notices as provided by ch. 402 of the Laws of 1854, as amended by ch. 529 of 1870, and to foreclose these an action was brought against the company and McGraw. At the time the notices were filed nothing was due to McGraw. *Held*, that as nothing was due to him at the time the notices were filed, the company was not liable to pay the amounts therein set forth. That to render the company liable, it must also be shown that it was, at the time of the filing of the notices, indebted to Robertson on its contract with him. *Sampson v. Buffalo, New York and Philadelphia R'y Co.*, 13 Hun (N. Y.), 280. 1878.

55. — The filing of a statement of account required to be filed with the clerk by a subcontractor within thirty days, to establish his lien, or, if he claims a lien upon a railway, within sixty days from the last day of the month in which the work was done, does not entitle the subcontractor to his lien unless he shall, within the proper time, give written notice of the filing thereof to the owner, or his agent or trustee. Any other than the written notice contemplated by the statute will not avail. *Lounsbury v. Iowa, Minn. and North Pacific R. R. Co.*, 49 Ia., 255. 1878.

56. — The provision of § 787, Revised Statutes of 1879, requiring subcontractors, laborers, etc., to give notice within twenty days after the performance of the labor or delivery of the material for which claim is made against a railway company, does not relate to the enforcement of a lien, but the establishment of a personal liability against

the company. *Morgan v. Chicago and Alton R. R. Co.*, 76 Mo., 181. 1882.

57. Ohio statute. Section 1 of the act of 1877 (74 Ohio L., 163), which authorizes a mechanic's lien on "any house, mill, manufactory, or other building, appurtenance, fixture, bridge, or other structure," and on the interest of the owner of the same, "in the lot of land on which the same shall stand or be removed to," for labor performed, or machinery or materials furnished by the contractor, "for erecting, altering, repairing or removing" the same, does not authorize such a lien upon a railroad. *Rutherford v. Cincinnati and Portsmouth R. R. Co.*, 35 Ohio St., 559. 1880.

58. Ownership. A suit against a railway company for labor is to fix it with a liability resulting from its ownership of the road, and will not admit of the theory that defendant is merely an agent of the owner. *Chicago and Northeastern R. R. Co. v. Sturgis*, 44 Mich., 538. 1880.

59. Part of a railway. Under the act of March 21, 1873, a lien for labor or material cannot be fixed upon a part only of the road-bed of a public railway. The lien must be upon the whole. *Knapp v. St. Louis, Kansas City and Northern R'y Co.*, 6 Mo. App., 205. 1878.

60. Pleading. In a suit against an express company and others, to recover damages for arrest and imprisonment, an allegation in the complaint that the injury was caused "at the instigation and procurement" of such company is sufficient on demurrer, and, without a motion to make specific, evidence is admissible tending to show the truth thereof. *American Express Co. v. Patterson*, 73 Ind., 480. 1881.

61. — A complaint, to warrant a judgment *in rem* on a mechanic's lien, must show that the account was filed in the clerk's office within ninety days, and a full compliance with the statute in other respects. *Arkansas Central R. R. Co. v. McKay*, 30 Ark., 682. 1875.

62. Proceedings. Where the right of plaintiffs to recover from the railway company upon the several claims for labor, which are the basis of the suit, depends upon two facts: 1. That the person through whom plaintiffs claim performed the labor

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for the company, under a contract with the contractor or subcontractor; and 2. That they have never been paid for their labor,—*held*, that both the contractor and subcontractor are necessary parties, unless the claims sued on have been established as against them by a suit prior to the institution of the suit to foreclose the lien given by the statute; and a judgment rendered against a railway company in the absence of proper parties will not be permitted to stand. *Austin and Northwestern R. R. Co. v. Montgomery*, 12 Amer. & Eng. R. R. Cases (Tex.), 258. 1883.

63. — Certain work was done by plaintiff's assignors in July and August, 1881, for a railway company; the notice required by § 2131 of the Code, of the filing of a claim for a lien, was given October 31, 1881; but, prior to the giving of the notice, the company had paid in full for the work, after its completion, in accordance with the contract. Plaintiff brought suit to enforce the lien against the company, and to obtain judgment against the assignors. *Held*, that the lien could not be enforced against the company, and that, as the evidence was not sufficient to show a valid assignment to plaintiff, judgment could not be rendered against the contractor. *Nash v. Chicago, Milwaukee and St. Paul Ry Co.*, 12 Amer. & Eng. R. R. Cases (Ia.), 261. 1883.

64. **Railway situated in two states.** There is nothing in the act in relation to mechanics' liens on railroads (R. S., § 3200) restricting the right to a lien to those who perform work or furnish materials within the limits of Missouri. If part of a railroad lies within and part without the state, a lien may be enforced against that part within the state, although the work was done or materials furnished on the part without. *St. Louis Bridge and Construction Co. v. Memphis, Carthage and Northwestern R. R. Co.*, 72 Mo., 664. 1880.

65. **Receiver.** The plaintiff filed a statement for a mechanic's lien upon a railway; subsequently an action was brought against the company by certain creditors, in which a receiver was appointed to take charge of the property, and afterward, in the same action, certain indebtedness created by the receiver was declared a first lien upon the

road, which was sold in payment thereof. *Held*, that the plaintiff was not represented in his character as a lienholder by the receiver, and that, not having been made a party to the action at any time, his lien was not divested by the sale. *Snow v. Winslow*, 54 Ia., 200. 1880.

66. — The receiver having been authorized by the court to build a considerable extension of the road, and in payment therefor to issue certificates which should be a first lien upon the entire line, it was held that, in the absence of a showing of some peculiar exigency which rendered the extension necessary to protect the rights of the parties in interest, the lien of the plaintiff would not be displaced by the indebtedness so created. *Ib.*

67. **Retention of possession of railway not allowed.** When the period for completing a line of railway under a contract had elapsed, and where it appeared from the admissions of parties, the certificate of the board of trade, and the interlocutor of the arbiter named in the contract, that the line was ready for public traffic, *held*, that the contractors were not entitled to retain possession of the line, or to prevent the opening of it, although certain operations under the contract still remained to be executed, and certain claims alleged by them to be due under the contract were still unpaid. *Castle Douglas and Dumfries Ry Co. v. Lee*, 22 Scotch Session Cases (2d series), 18. 1859.

68. **Rolling stock.** The rolling stock of a railroad does not constitute a part of its real estate, and a mechanic's lien upon the railroad would not embrace such property. *Neilson v. Iowa Eastern R. R. Co.*, 51 Ia., 184, 1879; *ib.*, 714, 1879.

69. **Sale of railway; whole road must be sold.** Under the act of March 21, 1873, embodied in §§ 3200–3216 of the Revised Statutes of 1879, a lien for labor and materials cannot be enforced against that portion or section of a railroad only for which they were furnished. The lien is against the whole road, and the whole must be sold. It is otherwise, however, as to the rolling stock and other movable property. While all of these are subject to the lien, only so much of them need be sold as may be necessary to satisfy the judgment. *Knapp v. St. Louis*,

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Kansas City and Northern R'y Co., 74 Mo., 374, 1881; 7 Amer. & Eng. R. R. Cases, 394; *Cranston v. Union Trust Co.*, 75 ib., 29, 1881.

70. Section. But one mechanic's lien can be acquired on a section of a railroad to be graded under an entire contract; and the contractor cannot, because payments are due from time to time, file successive liens as payments fall due. *Cox v. Western Pacific R. R. Co.*, 47 Cal., 87. 1873.

71. — A contract to grade a section of a railroad is an entire contract, and a provision in it for payments from time to time as the work progresses does not make it severable. *Ib.*

72. Statute not retroactive. The act of April 3, 1872, which gives subcontractors a lien upon railroads for labor and materials furnished, relates only to labor and materials furnished after its passage, and gives no right to a lien for labor and materials furnished before its passage. *Arbuckle v. Illinois Midland R'y Co.*, '81 Ill., 429. 1876.

73. Stockholder's liability. A city having subscribed to the stock of a railway company under the act of May 4, 1869 (1 R. S. 1876, p. 299), is bound by the same liability which, under § 38 of the act for the incorporation of railroad companies (1 R. S. 1876, p. 712), attaches to an ordinary stockholder in such company for labor done in the construction of its road. *Shipley v. City of Terre Haute*, 74 Ind., 297, 1881; 4 Amer. & Eng. R. R. Cases, 345.

74. — Section 38 of the act of May 4, 1869, for the incorporation of railway companies, is constitutional, its provisions being matter properly connected with the subject of the title of such act, within the meaning of § 19, art. 4, of the constitution. It is lawful to thus hold stockholders liable for labor in construction of the railway. *Ib.*

75. Street railways. The act of March 27, 1873, giving a lien to contractors and others upon the road-bed, etc., of railroads in Missouri, applies to horse railroads laid over the streets of cities, as well as to railroads used for steam carriage between distant points. *St. Louis Bolt and Iron Co. v. Donahoe*, 3 Mo. App., 559. 1877.

76. Subcontractors. The statute giving a lien on railways, like the mechanic's lien law, does not extend beyond subcontract-

ors. One furnishing materials to a subcontractor has no lien against the railroad company or its property. *Cairo and St. Louis R. R. Co. v. Watson*, 85 Ill., 531, 1877; *Smith Bridge Co. v. Louisville, New Albany and St. Louis Air Line R'y Co.*, 72 Ill., 503, 1874.

77. — A subcontractor furnishing materials or labor in the construction of a railroad is not entitled to a lien on the railroad, unless he complies with the statute in regard to giving notice to the railroad company. Where the petition to enforce the lien only shows the filing of a notice with the circuit clerk, without averring that the president and secretary of the company did not reside in the county, or could not be found in the county, it is fatally defective, as failing to show a right to the lien. *Cairo and St. Louis R. R. Co. v. Cauble*, 85 Ill., 555. 1877.

78. — In a proceeding by a subcontractor to obtain a lien under the statute against a railroad company for work and materials furnished according to an agreement with the original contractor, it must appear that all the steps required by the statute have been taken. *Cairo and St. Louis R. R. Co. v. Cauble*, 4 Bradwell (Ill.), 133. 1879.

79. — Where, under the contract with the principal contractor, payment is to be made before the completion of the railway, payment before the road is completed will cut off the lien of a subcontractor, if made without notice. *Rowland v. Centreville, etc., R. R. Co.*, 11 Amer. & Eng. R. R. Cases, 47 (Ia.). 1883.

80. Settlement. The requirement of the statute, that the written settlement with the subcontractor shall be given to the owner and contractor by the laborer claiming a lien, is sufficiently complied with by filing the settlement with the clerk within the thirty days allowed for filing the lien. *Bundy v. Keokuk and Des Moines R. R. Co.*, 49 Ia., 207. 1878.

81. — A laborer employed by a subcontractor for building a railroad cannot enforce a lien upon the road for the amount due him, if the contractor has fully paid the subcontractor the amount due under his contract, though the railroad company is indebted to the contractor in a sum exceeding the amount of the claim of the laborer

Settlement.

against the subcontractor. *Utter v. Crane*, 37 Ia., 631. 1873.

82. — A subcontractor, between whom and the contractor a settlement had been made and the balance ascertained, filed within the required time in the clerk's office of the proper court his claim in due form against the contractor and the company, and in a suit whereto they were all parties, judgment establishing his lien on the road was rendered. In a foreclosure suit subsequently brought against the company and him, the mortgagees objected to the validity of his lien because he had not also presented to the company that settlement certified by the contractor to be just. *Held*, that the objection was not well taken. *Brooks v. Railway Co.*, 101 U. S., 443. 1879.

83. — A corporation is not liable for labor to persons hired by a contractor or subcontractor except so far as it is indebted to the latter. *Bottomley v. Port Huron and Northwestern R'y Co.*, 44 Mich., 542. 1880.

84. — Contractors and subcontractors are not "laborers" within the meaning of the statute giving a right of action for labor debts. *Chicago and Northeastern R. R. Co. v. Sturgis*, 44 Mich., 538. 1880.

85. — The mechanic's lien law as amended March 30, 1875 (72 O. L., 166), does not provide a remedy in favor of a creditor of a subcontractor against funds in the hands of the owner of the building, due or to become due to the original contractor. *Stephens v. United R. R.'s Stock Yards Co.*, 29 Ohio St., 227. 1876.

86. — Under the act of March 31, 1874, entitled "An act to secure pay to persons performing labor and furnishing materials in constructing railroads" (71 Ohio L., 51), a substantial compliance with the conditions of the statute providing for the service of written notice upon the owner of the road is essential to create any obligation on the part of such owner toward the person performing labor or furnishing materials, under a contractor or subcontractor, or to give to such person any right of action against such owner. *Railway Co. v. Cronin*, 38 Ohio St., 122. 1882.

87. — Under the provisions of the act for the better security of mechanics, etc., in the county of Onondaga (ch. 366, Laws of 1864, as

amended by ch. 788, Laws of 1866), one who has furnished materials or performed labor upon a building in said county, under a contract with a subcontractor for a portion of the work, can acquire no lien therefor against the owner by filing notice after the contractor has paid the subcontractor for the work done under the subcontract according to its terms, although the owner is indebted to the contractor upon the contract for the whole work, after the completion of the building, to an amount sufficient to satisfy such demand. *Lumbard v. Syracuse, Binghamton and New York R. R. Co.*, 55 N. Y., 491. 1874.

88. — It is only to the extent of what is due or to become due to the subcontractor upon his contract that the lien can attach; and if the subcontractor fails to perform his contract, so that nothing becomes due thereon, or is paid in full according to its terms, there can be no lien. *Id.*

89. — The St. of 1873, ch. 353, giving a right of action against the owner of a railway to "any person to whom a debt is due for labor performed, or for materials furnished and actually used in constructing any railway, by virtue of an agreement with the owner thereof, or with any person having authority from or rightfully acting for such owner in procuring or furnishing such labor or materials," applies to a person performing labor under a contract with a subcontractor. *Hart v. Boston, Revere Beach and Lynn R. R. Co.*, 121 Mass., 510. 1877.

90. — A railway company made a contract with a person to do certain work on its line. He contracted with G. to furnish the gravel. G. contracted with D. to fill the cars at a gravel-pit, and D. hired L. to assist in the work under his contract. After L. had done some work, D. abandoned his contract with G., and G. a few days afterward continued D.'s work and employed L. upon it. *Held*, that L. could not maintain an action against the corporation, under the St. of 1873, ch. 353, for the amount due him from D., without filing a statement of his claim within thirty days after he ceased to perform labor for D., and that it was not enough to file a certificate within thirty days after he ceased to perform labor for G., describing the labor as performed for D. and G. *Lyon v. New*

Agency — Authority to Employ.

York and New England R. R. Co., 127 Mass., 101. 1879.

91. — Under the St. of 1873, ch. 353, § 1, a person to whom a debt is due for labor done in building a railway, by virtue of an agreement with a contractor whose contract with the owner of the railway was made before the passage of the statute, has no right of action against such owner, although the labor was performed after the statute took effect. *Parker v. Massachusetts R. R. Co.*, 115 Mass., 580. 1874.

92. — Where the workman's contract is not with the owner, but with a subcontractor, the building cannot be bound by this contract for more than the reasonable value of the work done and materials furnished, and the lien-claim filed must set out the items, though the contract is for a gross sum. *Kling v. R'y Construction Co.*, 7 Mo. App., 410. 1879.

93. Temporary structures. Materials furnished for temporary structures, such as temporary trestle work only, and never incorporated in the permanent work, are not proper subjects, under the statute, for a lien upon the completed road-bed. *Knapp v. St. Louis, Kansas City and Northern R'y Co.*, 6 Mo. App., 205. 1878.

94. Texas. Neither the constitution or statutes of Texas give a mechanic's lien for work or materials furnished in building a railway. *Tyler Tap R. R. Co. v. Driscoll*, 52 Tex., 13. 1879. See, also, *Central and Montgomery R. R. Co. v. Henning*, 52 ib., 466. 1880. The lien given by the act of February 18, 1879, was not retroactive. *Central and Montgomery R. R. Co. v. Henning*, 52 ib., 466. 1880.

95. Ties. One who contracts to furnish five thousand ties for a railway is not a contractor and preferred creditor under the joint resolution of 1843 of the general assembly. *Hart's Appeal*, 11 Amer. & Eng. R. R. Cases (Pa.), 615.

96. Uncompleted road. A lien for materials furnished for the construction of a railroad embraces only the completed portion of the road, but the fact that the road, as projected when the materials were furnished, was not fully completed will not defeat the lien. *Neilson v. Iowa Eastern R. R. Co.*, 51 Ia., 184, 1879; ib., 714, 1879.

MEDICAL SERVICES.

See CONTRACT; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS.

1. Agency. The fact that a physician in the service of a railway company is authorized to buy medicines on the credit of the company does not imply a power to bind the company by a contract for board, lodging, attendance and nursing of a person injured on the company's road. *Mayberry v. Chicago, Rock Island and Pacific R'y Co.*, 11 Amer. & Eng. R. R. Cases, 29, 1882; 75 Mo., 492.

2. Authority to employ. A railway yard-master whose business is to have charge of the yard, make up trains in the yard, and who has a right to employ men for all purposes required in the yard and to do his part of the business, and to discharge them, to employ brakemen for himself and also for the road trains, and whose authority consists in employing men in his department, has no authority, by virtue of his office alone, to bind the company employing him, for the services of a surgeon to attend one of the men under him in the service of the company, who had been run over and injured by the company's cars. *Marquette and Ontonagon R. R. Co. v. Taft*, 28 Mich., 289, 1873; 12 Amer. R'y Rep., 279.

3. — No recovery can be had against a railway company for drugs furnished to a person who has been hurt by the company's locomotive, on the order of a division superintendent of the road, without proof that he was authorized to give the order. The courts cannot take judicial notice of the duties of such an officer. *Brown v. Missouri, Kansas and Texas R'y Co.*, 87 Mo., 122. 1877. See, also, *Mayberry v. Chicago, Rock Island and Pacific R. R. Co.*, 75 ib., 492. 1882.

4. — The employment of an agent for a particular purpose gives only the authority necessary for the agency under ordinary circumstances. Therefore, as it is not incident to the employment of a railway guard or station master, to enter into a contract with a surgeon to attend a passenger accidentally injured on a railway, the railway company is not liable for services so rendered by a surgeon under such a contract.

Contract — Evidence.

Cox v. Midland R'y Co., 5 Eng. R. R. & Canal Cases, 583, 1849; 3 Welsby, Hurlstone & Gordon (Exchequer), 268, 1848.

5. **Contract.** The plaintiff, a physician, was, at the instance and request of certain parties wounded by a railway accident, attending them, when the president of the company (though not in the presence of the physician) told the wounded persons to employ whatever physician they chose, and the company would pay the bills. This was conveyed to the plaintiff; but he testified that he attended the wounded until their recovery, in pursuance of the original calling. *Held*, in an action against the company upon contract for services performed, that there was no mutuality of contract by consent between them, and no liability attached to the company for the services performed by the plaintiff to the persons who employed him. *Canney v. South Pacific Coast R. R. Co.*, 12 Amer. & Eng. R. R. Cases (Cal.), 310. 1883.

6. **Custom.** The mere act or habit of a railroad company, in paying for medical services rendered to employees injured in its service, does not necessarily establish a custom of such business; before it can have that effect, it must be shown to have been so generally known, and so well settled, as to raise the presumption that the services were rendered in reference to it. *Mobile and Montgomery R. R. Co. v. Jay*, 61 Ala., 247. 1878.

7. **Evidence.** In an action by a surgeon, against a railway company, for treating an employe injured while in the service of the company, it is proper to prove by parol the fact of the injury to the employe, and that the station agent notified the superintendent of that fact by telegram. *Cairo and St. Louis R. R. Co. v. Mahoney*, 82 Ill., 73. 1876.

8. — Although the agent may not have express authority to make the employment, yet slight acts of ratification by the company will authorize a jury in finding the employment was the act of the company. *Id.*

9. — Sufficiency of the evidence determined. *Atchison and Neb. R. R. Co. v. Jones*, 9 Neb., 67, 1879; *Cooper v. New York Central and Hudson River R. R. Co.*, 6 Hun (N. Y.), 276, 1875.

10. — In an action brought by a physician

and surgeon to recover for the value of his professional services in attending upon persons wounded in a railroad collision, and placed in a private hospital, evidence on behalf of the defendant, of the usual and customary charge in this state for all necessary medical and other attendance upon patients in hospitals received for treatment for wounds, is irrelevant. *Trenor v. Central Pacific R. R. Co.*, 50 Cal., 232. 1875.

11. — **correspondence.** In an action against a railroad company for medical services rendered to one of its servants, who was injured while in its employment and service, a letter from the president of the company, addressed to the plaintiff's attorney, purporting to be a reply to a letter received from him, which is not produced, and referring to plaintiff's account, is *prima facie* irrelevant and inadmissible when without date, and offered without any evidence identifying the account. *Mobile and Montgomery R'y Co. v. Jay*, 65 Ala., 113. 1880.

12. — **ratification by silence.** A master-mechanic of a railroad company for a particular division of the company's road employed a physician and surgeon to attend an employe of the company, who was injured while in the performance of his duties as such employe, and when under the immediate order of said master-mechanic, and said master-mechanic stated that he would see that the company paid for said physician's services. The physician performed said services, looking to the company for his pay, and giving to it the credit (although he only charged upon his books against the employe). While he was so performing his services, he made out a bill for the same against the company and inclosed it in a letter, which stated his said employment by said master-mechanic, and asked that the company pay the bill, and sent the letter and bill to the assistant superintendent of the company for said division, but neither the division superintendent nor the company ever paid any attention to said bill or letter. *Held*, that these facts are sufficient to uphold a finding by the jury that the division superintendent ratified the employment of the physician by said master-mechanic. *Pacific R. R. Co. v. Thomas*, 19 Kans., 256. 1877.

Change in Charter of Railway — Drainage of Railway Over Mines.

13. — It will be presumed that the general superintendent of a railroad company has the authority to employ a physician and surgeon to attend an employe of the company who has been injured while in the company's employ. *Ib.*

14. **Telegraphic order of superintendent.** A telegraphic order from a railway superintendent to a subordinate, directing the employment of a physician and to make an injured employe comfortable, is sufficient to authorize a valid contract against the company for board and surgical attendance. *Atchison and Nebraska R. R. Co. v. Reecher*, 24 Kaus., 228, 1880; 1 Amer. & Eng. R. R. Cases, 343.

MINES.

See EMINENT DOMAIN; MECHANIC'S LIEN.

1. **Change in charter of railway.** In 1835, the L. R'y Co., constituted under an act which excepted mines from land purchased, and allowed the land owners to work them, provided they did no damage to the railway, bought land for its railway. In 1836, the Y. R'y Co. was constituted under an act containing provisions as to mines similar to those of the Railways Clauses Act. Afterwards the Y. Company purchased the L. Railway under the powers of an act of 1844, which provided, by s. 4, that on completion of the purchase, the L. Railway Act should be repealed, provided the repeal should not affect anything done under the act, but that all acts done under it should remain as valid as if there had been no repeal. The ninth section provided that all the provisions of the Y. Railway Act, so far as they were not repealed, altered, or otherwise provided for by the act of 1844, or by any statute, should apply to the L. Railway. *Held*, that the provisions as to mines in the Y. Railway Act were not, by the act of 1844, made applicable to the L. Railway, so as to give the owners of the mines, under the lands purchased by the L. Company, a right to work them to the injury of the railway if the Y. R'y Co. did not choose to purchase them, but that the unqualified right to support, which was incident to the grant of the lands for the purposes of the railway, remained unaffected. *North East-*

ern R'y Co. v. Crosland, 4 De Gex. Fisher & Jones, 550; 65 Eng. Ch., 549. 1862.

2. **Contract with railway; covenant to remove track.** Where a railway company has the right of way over mining lands, and covenants with the owner thereof that upon notice it will change its location, or permit the coal underneath the way to be mined, a tenant of such owner — the terms of whose lease give him the right to mine all the coal in the land demised — may sue in the name of the landlord for breach of such covenant. *Mine Hill, etc., R. R. Co. v. Lippincott*, 86 Pa. St., 468. 1878.

3. — The removal of the railway to another location on the same land, in such a case, was a matter of contract and involved no exercise of the power of eminent domain, and is not within the decisions holding that the power of location, when once exercised, is exhausted, and the company was therefore liable in damages for the breach of its covenant. *Ib.*

4. **Conveyance; clay.** The word "mines" in the 77th section of the Railways Clauses Act, 1845, includes minerals whether got by underground or by open workings; and therefore a bed of clay, on which the railway had been made, was a mine excepted out of the conveyance of the land to the railway company, and might, unless the company were willing to make compensation to the land owner, be dug and worked by him. *Midland R'y Co. v. Haunchwood Brick and Tile Co.*, Law Reports, 20 Chancery Division, 552, 1882; 6 Amer. & Eng. R. R. Cases, 535.

5. **Drainage of railway over mines.** By the Railways Clauses Consolidation Act, 1845, c. 20, s. 68, the company shall make and maintain, "for the accommodation of the owners and occupiers of lands adjoining the railway," among other works, "all necessary arches, tunnels, culverts, drains, etc., either over or under, or by the sides of, the railway, of such dimensions as will be sufficient at all times to convey the water as clearly from the lands lying near, or affected by, the railway as before the making of the railway, or as nearly so as may be; and such works shall be made from time to time as the railway works proceed." By s. 69: "If any difference arise respecting the kind or

Injunction — Subjacent Support of Railway.

number of any such accommodation works, or the dimensions or sufficiency thereof, or respecting the maintaining thereof, the same shall be determined by two justices," etc. The owners of mines extending under a railway which had been made by a railway company under the powers of its act (3 W. 4, c. 34), which contained similar provisions with the 8 and 9 Vict., c. 20, gave notice to the company, in 1854, of their intention to work the mine under the line of the railway, and the company declined or neglected to purchase. At this point the line of railway was in a deep cutting, and the company had made drains upon the lines for the purpose of carrying off the water which fell upon the railway, and ran from the sides of the cutting. The working of the mine had caused the land on which the railway was constructed to sink, so that the company was compelled to fill up such sinkings in order to preserve the level of the railway, and thereby the drains had become, in some places, choked up, and the water percolated through the broken strata, and through the cinders used by the company for filling up the sinkings, and so passed into the mines. *Held*, that these drains were not accommodation works within secs. 68 and 69 of 8 and 9 Vict., c. 20. *Queen v. Fisher*, 3 Best & Smith, 191; 113 E. C. L., 189. 1862. See, also, *Bagnall v. London and North Western R'y Co.*, 7 Hurlstone & Norman (Exchequer), 423, 1861; *Same v. Same*, 1 Hurlstone & Coltman (Exchequer), 544, 1862.

6. Injunction. A railway company was empowered by its special act to take lands, but the minerals were to be reserved to the vendor, who was to be at liberty to work them, causing no damage or obstruction to the railway, and by another clause of the act it was provided that, on working up to within twenty yards of any masonry or building of the company, the owner of the minerals might require the company to purchase the minerals within that range, or, on its neglect to do so, might work them in the usual and ordinary way, doing no avoidable damage. The company, in 1837, purchased land from the defendant under its compulsory powers, for the purpose of erecting a bridge, which was accordingly built and completed in 1838. On the lessee of the minerals from

the vendor notifying the company of his intention to renew the working of the minerals, which had been abandoned since 1791, *held*, a proper case for granting an injunction,—as to land within twenty yards, against working so as to cause damage until the conditions of the act had been satisfied; and as to other workings beneath or adjoining the company's land, against working so as to affect the stability of the bridge, or the railway or other works of the company. *North Eastern R'y Co. v. Elliott*, 2 De Gex, Fisher & Jones, 423; 63 Eng. Ch., 423. 1860.

7. Subjacent support of railway. A railway company holding a conveyance of right of way is entitled to the subjacent and lateral support necessary to support its railway. *Caledonian R'y Co. v. Belhaven*, 40 Eng. Law & Equity, 1. 1857.

8. — A railway company is not entitled to compel a mine owner, whose mine has been long flooded, to permit the water to remain in the mine as a support to the land. *North Eastern R'y Co. v. Elliott*, 1 Johnson & Heming, Eng. Ch., 145. 1860.

9. — When a party having knowledge of the possession and use of the land by a railroad company afterwards takes a lease of the coal beneath, he cannot require the company to remove the track, and his only remedy, if he has any, must be under the statute for damages. *Philadelphia and Reading R. R. Co. v. Lawrence*, 10 Philadelphia, 604. 1873.

10. — A vendor of land having sold it under an act of parliament for the particular purposes of a railway, cannot afterwards work the minerals under the surface (though they have been expressly reserved to him, either by his grant or by the provisions of the company's own act) in such a manner as to prejudice the use of the land for the purposes for which it has been purchased. The common law right to adjacent support from the vendor's land attaches upon such a sale even beyond the limits of the purchased land. *Elliott v. North Eastern R'y Co.*, 10 House of Lords Cases, 333. 1863.

11. — In granting injunction to prevent the working of mines so as to occasion the removal of adjacent support to land purchased by a railway company for the purpose of a railway, the court below allowed the mine owner to drain a shaft which, by the ac-

Next Friend — Contract — Power to Execute Mortgages.

cidental overflowing of a neighboring river, had, for years before and since the purchase, been filled with water. From this perpendicular shaft ran, horizontally, several passages or spaces which had been filled with water from the same cause. The injunction forbade mining works which might injure the railway, but allowed the shaft to be drained. The house of lords, adopting the opinion of the court below that the overflowing of the shaft was an accident which the railway company was not entitled to expect would forever be allowed to exist without correction, varied the decree below by adding to the permission to drain the shaft that of draining the horizontal passages or spaces. *Ib.*

12. Tramway; injury to employes.

Where a company is both a railway and a mining company it cannot be compelled to answer as the proprietor of a railroad, under § 1, ch. 57, General Statutes, for the injury caused by negligence in its mining operations. But the company, as a mining company, may be liable, under § 3 of said ch. 57, for punitive damages, for the loss or destruction of life, by the wilful neglect of the company, its agents or servants, in the management of a tramway, etc., attached to its coal mines. *Claxton v. Lexington and Big Sandy R. R. Co.*, 13 Bush (Ky.), 636. 1878.

13. — Using inferior machinery, and failing to use reasonable precautions to provide against accidents, might authorize the jury to find against the company as for wilful neglect. *Ib.*

MINOR.

See PARENT AND CHILD.

1. Next friend. The attorneys of the next friend of a minor, by dismissing the suit of the minor, will not thereby estop the minor from bringing suit again upon the same cause. *Chicago, Rock Island and Pacific R. Co. v. Kennedy*, 70 Ill., 350. 1873.

MONOPOLIES.

See CHARTER; EMINENT DOMAIN; ELEVATORS; EXPRESS COMPANIES; GRANTS; RATES.

1. Contract; public policy. A contract by which one railway company agrees with

another upon a division of territory and traffic between them, and that one will not "do any through business to and from Trinidad, or to and from New Mexico, via Trinidad or El Moro," amounts to an express renunciation of a duty of transportation enjoined by the state, and is therefore void. *Denver and New Orleans R. R. Co. v. Atchison, Topeka and Santa Fe R. R. Co.*, 15 Federal Reporter, 650, 1883; 9 Amer. & Eng. R. R. Cases, 374.

2. — A contract by which two railway companies agree to exchange their traffic, and not to "connect with or take business from or give business to any railroad" which may be constructed in Colorado or New Mexico after the date of the agreement, is against public policy and void. *Ib.*

MORTGAGE.

See CONSOLIDATION; CONSTITUTIONAL LAW; CONVEYANCE; COSTS; EMINENT DOMAIN; EQUITY OF REDEMPTION; EXECUTIONS; INCOME BONDS; INJUNCTIONS; MANDAMUS; PLEDGE; REDEMPTION; SET-OFF; SPECIFIC PERFORMANCE; WRIT OF ERROR.

- I. POWER TO EXECUTE MORTGAGES.
- II. FORM AND CONSTRUCTION.
- III. FUTURE ACQUISITIONS OF PROPERTY.
- IV. CHATTELS.
- V. ASSIGNMENT AND NEGOTIABILITY OF BONDS AND MORTGAGES.
- VI. COUPONS AND INTEREST.
- VII. RECORDS, NOTES AND PRIORITY.
- VIII. GUARANTY.
- IX. COLLATERAL SECURITY.
- X. FORECLOSURE.
- XI. SALES.
- XII. REDEMPTIONS.
- XIII. TRUSTEES.
- XIV. RECEIVER.
- XV. INJUNCTION.
- XVI. LEASE.
- XVII. GENERAL MATTERS.

I. POWER TO EXECUTE MORTGAGES.

1. Attorney's fee. The authority given by the directors of a corporation to the president and secretary to execute a mortgage upon the company's property does not empower them to include a provision for at-

Power to Execute Mortgages.

torney's fees in case of suit upon the mortgage. *Pacific Rolling Mill Co. v. Dayton, etc., R. R. Co.*, 7 Sawyer (U. S. C. C.), 61, 1881; *Pacific Rolling Mill v. Dayton, Sheridan and Grande Ronde R'y Co.*, 5 Federal Reporter, 852, 1881.

2. Authority. Where the general management and control of the property, business and affairs of a corporation were vested in the board of directors and president; and the corporation was by charter authorized to issue and sell bonds and execute a mortgage to secure the same; and the charter required the concurrence of the stockholders to authorize the consolidation with another company,—*held*, that the board of directors and president had the power, without the concurrence of the stockholders, to authorize the issue of bonds and the execution of a mortgage upon the property of the company to secure them. *Hodder v. Kentucky and Great Eastern R'y Co.*, 7 Federal Reporter, 793, 1881. A mortgage thus made will not cover property afterwards acquired by consolidation with another company. *Ib.*

3. — Under a statute requiring the concurrence of the holders of two-thirds of the stock of a corporation to mortgaging the corporate property for a loan of money, to be expressed at a meeting of the stockholders called by the directors for that purpose, a meeting of the directors, who are the only stockholders except one, at which all assent to the proposition, is in effect a meeting of the stockholders, and the act of the directors that of the stockholders. The requirement of the concurrence of the holders of two-thirds of the stock is intended for the protection of the stockholder, and is a matter in which the public have no interest. *Thomas v. Citizens' Horse R'y Co.*, 104 Ill., 462, 1882; 11 Amer. & Eng. R. R. Cases, 806.

4. — The act of April 8, 1861, does not authorize the issue by a railroad company of bonds otherwise than for a new, adequate, valuable consideration, increasing the available funds of the corporation. *Kemble v. Wilmington and Northern R. R. Co.*, 13 Philadelphia, 469, 1878.

5. — A railway corporation, unless restrained by statute, has the implied power to borrow money to construct its road, and to secure the debt thus created by mortgage

on its property. *Savannah and Memphis R. R. Co. et al. v. Lancaster*, 62 Ala., 555, 1878; *Comm'rs of Craven Co. v. Atlantic and North Carolina R. R. Co.*, 77 N. C., 289, 1877; *Kelly v. Ala. and Cincinnati R. R. Co.*, 58 Ala., 489, 1877; 21 Amer. R'y Rep., 188.

6. — *Southern R. R. Co.* Power of the Southern R. R. Co. to execute a mortgage determined. *McAllister v. Plant*, 54 Miss., 106, 1876.

7. — Authority to make a mortgage implies power to make it with the usual conditions embraced in similar conveyances. *Savannah and Memphis R. R. Co. et al. v. Lancaster*, 62 Ala., 555, 1878.

8. Bonds; terms of; validity. Bonds of the railway company are not void, because under authority to issue them at "a rate of interest not exceeding eight per cent. per annum, and having not more than thirty years to run," the company issued bonds with interest payable semi-annually, and contracted that, in default of the prompt payment of the interest, the principal sum might be treated as due and payable. *Newport and Cincinnati Bridge Co. v. Douglass*, 12 Bush (Ky.), 673, 1877; 18 Amer. R'y Rep., 221.

9. Constitutional law. The legislature has the constitutional power to authorize a corporation created by it to borrow money by mortgaging its property and franchises, or by issuing preferred stock and pledging its revenues for the payment of the dividends thereon, where such course is necessary to carry into effect the object for which the corporation was created. *Covington v. Covington and Cincinnati Bridge Co.*, 10 Bush (Ky.), 69, 1878.

10. Estoppel. Where a trust deed has been executed with legal formalities, and the bonds issued and sold in the open market and the proceeds paid to the company, the company is estopped from disavowing and repudiating the conveyance. *Harrison v. Annapolis and Elk Ridge R. R. Co.*, 50 Md., 490, 1878; *Tyrell v. Cairo and St. Louis R. R. Co.*, 7 Mo. App., 294, 1879; *Singer v. St. Louis, Kansas City and Northern R. R. Co.*, 6 ib., 427, 1879; *Thomas v. Citizens' Horse R'y Co.*, 104 Ill., 462, 1882; 11 Amer. & Eng. R. R. Cases, 306.

11. Franchise. No corporation can mortgage its franchises without clear legislative

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authority to do so. And authority to a railroad company to mortgage its "road, income and other property," does not authorize a mortgage of its franchises. *Pullan v. Cincinnati and Chicago R. R. Co.*, 4 Bissell (U. S. C. C.), 35. 1865. See, also, *Randolph v. Wilmington and Reading R. R. Co.*, 11 Philadelphia (U. S. C. C.), 502. 1876.

12. Legalizing act. Where a railroad company has made a mortgage or sale of its corporate franchise, without authority in its charter, the same may be ratified and rendered valid by subsequent legislative enactment. The right to object to such transfer is one affecting the public alone, which the legislature may waive by a subsequent act. *Hatcher v. Toledo, Wabash and Western R. R. Co.*, 62 Ill., 477, 1872; 6 Amer. R'y Rep., 405.

13. Part of railway. A mortgage upon a part of a railway for iron not yet laid down, held not *ultra vires*. *Bickford v. Grand Junction R'y Co.*, 1 Canada Supreme Court Reports, 696, 1877; reversing *Same v. Same*, 23 Grant Ch. (Upper Canada), 302, 1873.

14. Place of execution. A mortgage may be executed in Ohio, although the corporation is organized under the laws of Kentucky and although the property is situated in Kentucky. *Hodder v. Ky. and Great Eastern R'y Co.*, 7 Federal Reporter, 793. 1881.

15. Statute authorizing mortgage. Where an act of the legislature authorizing a railroad corporation to give a mortgage evidently contemplates a mortgage of all the estate of the company, it will be held, unless the contrary appear, that the mortgage given under the authority was intended to and did convey the estate to the full extent contemplated or authorized by the act. *Coe v. New Jersey Midland R'y Co.*, 31 N. J. Eq., 105. 1879.

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16. Abandoned line. A portion of the route on which the railroad company had done some grading, but which was afterwards abandoned for another route on which the road was built, did not pass by the trust deed, but reverted to the owners of the soil.

Meyer v. Johnston, 53 Ala., 237, 1875; 9 Amer. R'y Rep., 451.

17. Bonds. Under the legislation of Florida the Florida Central R. R. Co. had the power to execute a bond, which was to be a mortgage, without the execution of an additional mortgage to secure it. *State v. Florida Central R. R. Co.*, 15 Fla., 690. 1876.

18. — The bonds of a railway company, dated October 1, 1871, were held to be embraced in a deed of mortgage, dated October 25, 1871, the bonds being in other respects clearly described in the deed, and there being nothing in the terms of the deed inconsistent with the fact that they had been before executed. In the same case it was held, also, that if any doubt or ambiguity could arise on this subject, it was removed by parol evidence that no other bonds were executed or issued by the company except those dated on October 1, 1871. *Buller v. Rahm*, 46 Md., 541, 1877; 18 Amer. R'y Rep., 86.

19. Branch line. A mortgage was made of a railroad, as then made or to be made. A later mortgage was created, under authority of a subsequent act of assembly, of a branch or extension of the original road. The special act provided that the later mortgage must be exclusive of the branch. Held, that the sale under the original mortgage must be exclusive of the branch line. *Randolph v. Wilmington and Reading R. R. Co.*, 11 Philadelphia (U. S. C. C.), 502. 1876.

20. Construction. The mortgage of the Louisville Valley R. R., the Montpelier and St. Johnsbury R. R., and the Essex County R. R., construed. *Poland v. Lamoille Valley R. R. Co.*, 52 Vt., 144, 1879; 4 Amer. & Eng. R. R. Cases, 408.

21. — In a contract between the trustee of a mortgage and certain creditors of a railroad company, held, that the property levied upon was not included in the mortgage. *Millard v. Burley*, 13 Neb., 259. 1882.

22. Coupons; money advanced to pay interest. Interest coupons received by one who has advanced the money with which they were taken up under an agreement that they were to be delivered to him uncanceled, as security for the advances, as against a railway corporation, are valid securities in

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the hands of the holder, and a mortgage upon the corporate property, given to pay the bonds, may be enforced for his benefit. *Union Trust Co. v. Monticello and Port Jervis R'y Co.*, 61 N. Y., 311. 1875.

23. Description. A mortgage executed by a railway company upon its then and thereafter to be acquired "property" contains a specific description of the different kinds of such property. *Held*, that certain municipal bonds, issued to aid in building the road, which are not embraced by such description, do not pass by the use of the general word property. *Smith v. McCullough*, 104 U. S., 25, 1881; 3 Amer. & Eng. R. R. Cases, 159.

24. — The charter of a railway company empowered it to construct and operate a line between the cities of Mobile and New Orleans, and to acquire and hold such real property "as may be necessary and convenient for the construction, maintenance and management of the railroad," and also to acquire "any steamboats, piers, wharves, and the appurtenances thereunto belonging, that the directors may deem necessary, etc., to own, use and manage in connection with said railroad." In deeds of trust, executed by the corporation, the words of conveyance were qualified by clauses like the following: "The lands occupied by said railroad, or hereafter acquired, owned and occupied, . . . including all depots, etc., now owned and occupied, or hereafter acquired in connection with said portion of said railroad situate upon or lying within the limits of said cities or upon or adjacent to said portion of said railroad, and the route and line thereof." In another mortgage or deed of trust, the conveyance was qualified as follows: "All depots, station-houses, wharves and warehouses now owned and occupied, or hereafter to be acquired, and used in connection with its said railroad, together with all steamboats, and personal property used, or hereafter to be used, exclusively for the constructing, maintaining, operating or conducting the business of its said railroad." *Held*, that the mortgage covered property useful and necessary in the operation of the railway. But property bought of a steamship line to stifle competition was not necessary and not included in the mortgage.

Morgan and Raynor v. Donovan, 58 Ala., 241, 1877; 21 Amer. R'y Rep., 109.

25. — A mortgage of an "undertaking" does not include the land of a railway company. *Doe v. St. Helens and Runcorn Gap R'y Co.*, 2 Eng. R. R. & Canal Cases, 756. 1841.

26. — A railway mortgage conveying the "said undertaking, and all and singular the rates, tolls and other sums arising," was held not to convey the land to the mortgagee. *Doe dem. Myatt v. St. Helen's R'y Co.*, 2 Adolphus & Ellis (N. S.), 364; 42 E. C. L., 715. 1841.

27. Earnings. Where the governing body of the corporation, in a resolution authorizing an issue of bonds to raise money, provide for the execution of a deed of trust to secure the same, on its right of way, road-bed, etc., "and on all the real and personal property now and hereafter belonging to the company,"—this necessarily includes the earnings and profits, and authorizes a trust deed conveying the tolls, freights, rents, incomes, etc. *Kelly v. Ala. and Cincinnati R. R. Co.*, 58 Ala., 489, 1877; 21 Amer. R'y Rep., 139.

28. Execution. Where a conveyance or deed purports on its face to be the deed of the corporation, and recites that it has caused its corporate seal to be thereto affixed, and its president to sign the same, and the deed is properly witnessed or acknowledged, this is a sufficient execution; and the validity of the deed is not impaired by the fact that the president signed the deed in his own name with the word "president" added, or that the secretary likewise signed his own name to it in the same way. *Savannah and Memphis R. R. Co. et al. v. Lancaster*, 62 Ala., 555. 1878.

29. Fixtures. Certain machinery used for making nails, *held*, to be fixtures and included in a mortgage. *Delaware, Lackawanna and Western R. R. Co. v. Oxford Iron Co.*, 33 N. J. Eq., 452. 1883.

30. Franchise. The franchise which a railroad company in this state transfers by its mortgage is not its franchise to exist as a corporation, but only such of its franchises or privileges as will enable the grantee to have the same use and beneficial enjoyment of the property which the com-

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pany itself had; especially is this the case when the charter merely authorizes the company to mortgage "its means, property and effects," without express mention of franchises. *Meyer v. Johnston*, 53 Ala., 237, 1875; 9 Amer. R'y Rep., 454.

31. Possession. A conveyance to secure bonds, providing for an entry, foreclosure and sale, in case of non-payment, is in substance a mortgage under the laws of California. Until default the mortgagor retains the right of possession. *Southern Pacific R. R. Co. v. Doyle*, 8 Sawyer (U. S. C. C.), 60, 1882. The right of action against trespassers is in the mortgagor. *Ib.*

32. Rights of bondholders. A mortgage made to secure the payment of certain bonds is made for the benefit of the bondholders only, and no one can have an interest in the mortgage except as a bondholder. *Rice v. Southern Pa. Iron and R. R. Co.*, 9 Philadelphia, 294. 1873.

33. Sinking fund. The provisions of a mortgage in relation to a sinking fund construed. *Wilds v. St. Louis, Alton and Terre Haute R. R. Co.*, 64 Howard's Practice (N. Y.), 418. 1882.

34. Surplus lands. A railway company may give a specific charge on the moneys to arise from the sale of its surplus lands for a debt due to the contractors who have constructed the works. *Gardner v. London, Chatham and Dover R'y Co.*, Law Reports, 2 Chancery Appeal Cases, 201. 1866.

35. Trust deed. The trust deed upon the Annapolis and Elk Ridge Railroad, held, not to be a technical mortgage. *Harrison v. Annapolis and Elk Ridge R. R. Co.*, 50 Md., 490. 1878.

36. Unfinished railway. Where a railway company, executing a mortgage upon its road as contemplated, has no legal title to any of the right of way, but only contracts for a small portion thereof, to be conveyed upon conditions which it never performs, or has agreed to perform, and a new company is organized which builds the road and acquires the legal title to most of the right of way and is equitably entitled to the balance, no decree of foreclosure can be sustained under the mortgage, as against the new company, for the sale of its property. The mortgage creditors of such original

company have no rights superior to the company itself. In such case the original company has no such interest or title in the road as can be subjected to sale under the mortgage. *Chicago, Danville and Vincennes R'y Co. v. Loewenthal*, 93 Ill., 433. 1879.

37. Words of inheritance. A railroad mortgage made to trustees without words of inheritance, but empowering the trustees, on default, to sell the mortgaged premises, and to convey to the purchaser "all the estate, right, property and interest, and to the same extent as the railroad company had therein at the date of the mortgage," etc., will be rectified so as to convey a fee. The court may direct the trustees to convey all their title to the purchaser at the foreclosure sale in aid of the execution. *Coe v. New Jersey Midland R'y Co.*, 31 N. J. Eq., 105. 1879. See *Randolph v. N. J. West Line R. R. Co.*, 28 ib., 49. 1877.

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38. Branch roads. When a mortgage is given by a railroad company on its franchises and on its roads to be thereafter built, and a branch road not in contemplation at the date of such incumbrance is afterwards laid and built, such branch road will pass under such mortgage, subject to the burdens put upon it by the company in the course and as incidents of its acquisition. *Coe v. Delaware, Lackawanna and Western R. R. Co.*, 34 N. J. Eq., 266, 1831; 4 Amer. & Eng. R. R. Cases, 513.

39. Charter. Where a railway company is, by its charter, authorized to borrow money and mortgage the whole or any part of its road, property or income then existing, or thereafter to be acquired, the company may not only mortgage its present property and rights, but such as it may thereafter acquire, and such after-acquired property will be subject to be sold on foreclosure; and this seems to be the rule independent of the authority given by the charter. *City of Quincy v. Chicago, Burlington and Quincy R. R. Co.*, 94 Ill., 537. 1880.

40. Construction. Mortgage construed, and held not to cover after-acquired property not necessary for the use of the rail-

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way. *Boston and New York Air Line R. R. Co. v. Coffin*, 12 Amer. & Eng. R. R. Cases (Conn.), 375. 1883.

41. — The same principles of construction apply to a mortgage upon future acquisitions of property by a corporation that would apply to a like instrument, executed by an individual. *Mississippi Valley Co. v. Chicago, St. Louis and New Orleans R. R. Co.*, 58 Miss., 896, 1881; 2 Amer. & Eng. R. R. Cases, 414.

42. Income. Notwithstanding the general rule that the mortgagor, until some action by the mortgagee, is entitled to the earnings and profits of the mortgaged property, it is competent for the parties to agree in the mortgage that such future earnings and profits shall be held in equity by the mortgagee; and under such a contract, such income, whenever received, is operated upon by the mortgage, and the party receiving it holds it in trust for whoever is in equity entitled to it. *Pullan v. Cincinnati and Chicago Air Line R. R. Co.*, 5 Bissell (U. S. C. C.), 237. 1873.

43. — A mortgage upon a railway and its subsequently acquired property is a lien upon its net earnings. *Addison v. Lewis*, 75 Va., 701, 1881; 9 Amer. & Eng. R. R. Cases, 702. See, also, *Tompkins v. Little Rock and Ft. Smith R'y Co.*, 15 Federal Reporter, 6. 1882.

44. — Mortgages construed, and held that the income, while the property was in possession of the mortgagors, was subject to garnishment for the debts of the mortgagors. *DeGraff v. Thompson*, 24 Minn., 452. 1878.

45. — A mortgage by a railway company of "all its right, title and interest in and to all and singular its property, real and personal, of whatever nature and description, now possessed or to be hereafter acquired, including all its rights, privileges, franchises and easements," cannot be regarded, at law, as including money earned by the road in carrying freight for an express company under a contract entered into by the express company with the railway company after the mortgage was made. *Emerson v. European and North American R'y Co.*, 67 Me., 337. 1877.

46. Injunction to restrain sale. This action was brought by the holders of certain

railway bonds, secured by a mortgage — which provided that all property subsequently acquired by the company should become part of the property covered thereby — to restrain the fraudulent diversion of certain rails (subsequently acquired by the company), under a resolution of the board of directors authorizing one of the trustees of the mortgage to sell, pledge or dispose of the same, for the purpose of raising money to meet past and future estimates for the construction account of the extension of the road. Held, that the plaintiffs were entitled to maintain the action, and that a temporary injunction was properly granted therein. *Weetjen v. St. Paul and Pacific R. R. Co.*, 4 Hun (N. Y.), 529. 1875.

47. Lands. A mortgage upon "all the property owned, or which may hereafter be acquired," by a railway company, held, not to include lands afterwards acquired, for the reason that at the time of making the mortgage the company had no power to acquire lands. Lands acquired under subsequent authority would not be deemed contemplated by the mortgage. *Meyer v. Johnston*, 53 Ala., 237, 1875; 9 Amer. R'y Rep., 454.

48. — Where a railroad company makes a general mortgage of the railroad this does not pass after-acquired lands, unless they are used in connection with the actual operations of the road as a part thereof. If the intention is to include in the mortgage lands which the company expects to acquire, they should be described with reasonable certainty. They would not pass under a mortgage, where the property is described as "the railroad then constructed and to be constructed, etc., and all other corporate property, real and personal, of said railroad company, belonging or appertaining to said railroad, whether then owned or thereafter to be acquired." *Calhoun v. Memphis and Paducah R. R. Co.*, 2 Flippin (U. S. C. C.), 442. 1879. But see *Hamlin v. European and North American R'y Co.*, 72 Me., 83, 1881; 4 Amer. & Eng. R. R. Cases, 503.

49. Leased lines. A mortgage is valid upon future-acquired property. And such mortgage may properly attach to railway property used upon a leased line. *Buck v. Seymour*, 46 Conn., 156. 1878.

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50. Priority of liens. A mortgage of after-acquired property can only attach itself to such property in the condition in which it comes to the mortgagor's hands. If it is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior in point of time. It only attaches to such interest as the mortgagor acquires. *Williamson v. New Jersey Southern R. R. Co.*, 28 N. J. Eq., 277, 1877; 14 Amer. R'y Rep., 34; *Williamson v. New Jersey Southern R. R. Co.*, 29 N. J. Eq., 311, 1878.

51. Purchase of additional railway. When a railroad company has authority to purchase and does purchase a railroad lying within its chartered limits, the road so purchased becomes subject to a mortgage executed by the purchasing railroad company upon its line of road, completed and to be completed, but not to the prejudice of mortgages previously executed on the railroad so purchased. *Branch v. Atlantic and Gulf R. R. Co.*, 3 Woods (U. S. C. C.), 491. 1879.

52. Statute. The prohibitions against mortgaging future property, found in the Civil Code, relate to ordinary transactions between individuals, and do not apply to railroad corporations which are by their charters, and by general legislation concerning such companies, authorized to mortgage, for construction and repair purposes, their roads, completed or not; therefore, their actual and future property. *Bell v. Chicago, St. Louis and New Orleans R. R. Co.*, 34 La. An., 785. 1882.

53. — Sec. 21, ch. 119, of 1872 authorizes the court, in foreclosure of a mortgage of land to which a railway company has acquired title subject to such mortgage, to appoint commissioners to appraise the land, and to stay proceedings against the company until the coming in of their report; and it contemplates that this report shall be made before judgment. But the company should apply to the court for the appointment of such commissioners; and where this was not done there was no error in rendering a judgment for the sale of the premises held by the company. *Aiken v. Milwaukee and St. Paul R'y Co.*, 37 Wis., 463. 1875.

54. — The appellant company alleges in its answer that the S. and M. R. R. Co.

(under which it claims) condemned and took the land in controversy; but there is no averment or proof that the land was ever appraised. *Held*, that there was no error in adjudging a sale of the mortgaged premises without any exception in favor of the appellant. *Ib.*

55. Subsequent extension of railway. Where a railroad company mortgaged its main line of railroad from the eastern terminus thereof, at the city of Newark, westerly, across the state of New Jersey, to the western terminus of the railroad, at the Pennsylvania state line, and the lands for said main line and the franchises acquired and to be acquired, pertaining to said main line, *held*, that it does not embrace lands and franchises acquired by and under a subsequent act of the legislature authorizing an extension of the road from Newark, easterly, to the Hudson river. *Randolph v. New Jersey West Line R. R. Co.*, 28 N. J. Eq., 49, 1877; 14 Amer. R'y Rep., 11. See *Coe v. New Jersey Midland R'y Co.*, 31 N. J. Eq., 105. 1879.

56. Upon unbuilt railway. The fact that a portion of the road, at the northern end, not built when the deed of trust was executed, was afterwards constructed, not on the route then surveyed and located, but on another route in the general direction authorized by the charter and amendments, did not deprive the holders of bonds secured by the trust deeds on the road to be constructed in Alabama, of the right to a first lien on it. *Meyer v. Johnston*, 53 Ala., 237, 1875; 9 Amer. R'y Rep., 454.

57. Validity. Mortgages of future acquisitions of property by railroad companies are upheld in equity and liberally construed. *Little Rock and Ft. Smith R'y Co. v. Page*, 35 Ark., 304, 1830; 7 Amer. & Eng. R. R. Cases, 35. See, also, *Meyer v. Johnston*, 53 Ala., 237, 1875; 9 Amer. R'y Rep., 454.

58. Vendor's lien. Where the vendor conveyed land to a railroad company which had previously executed a mortgage covering after-acquired property, *held*, that such mortgage became a lien upon such land, subject to the claim of the grantor for purchase money. As to after-acquired property the mortgagee is not a purchaser for value. *Loomis v. Davenport and St. Paul R. R. Co.*,

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3 McCrary (U. S. C. C.), 489, 1882; *Loomis v. Davenport and St. Paul R. R. Co.*, 17 Federal Reporter, 331, 1882.

IV. CHATTELS.

59. Conditional sale. Where a contract between A. and a railroad company for furnishing it cars provides that they shall be his property until paid for, a pre-existing mortgage by the company of all its then property, or that which it might thereafter acquire, does not subordinate the claim of A. for the price of the cars to the lien of the mortgagees. *Fosdick v. Car Co.*, 90 U. S., 255, 1878; *Fosdick v. Schall*, ib., 235, 1878; *Hall v. Frost*, ib., 389, 1878; *Huidekoper v. Locomotive Works*, ib., 258, 1878. See *Coe v. N. J. Midland R'y Co.*, 31 N. J. Eq., 105, 1879.

60. — Conditional sales of personal property are valid in Missouri. *Rogers Locomotive Works v. Lewis*, 4 Dillon (U. S. C. C.), 153, 1877.

61. — An instrument conveying certain cars construed to be a mortgage and not a conditional sale, and therefore held to require registry, under the Missouri statute, to protect the property therein mentioned from the creditors of the grantee. *Heryford v. Davis*, 2 Amer. & Eng. R. R. Cases (U. S. S. C.), 386, 1880.

62. Construction; office furniture. Mortgage construed to cover office furniture. *Raymond v. Clark*, 46 Conn., 129, 1878.

63. Costs; sheriff's fees. For selling mortgage personal property upon a decree of foreclosure, the statute allows the sheriff of Hennepin county a compensation of three dollars only. *Thompson v. St. Paul and Pacific R. R. Co.*, 26 Minn., 353, 1880.

64. Illinois. The real owner of personal property, who vests another, to whom it is delivered, with an interest therein, must, if desirous of preserving a lien on it in Illinois, comply with the requirements of the chattel-mortgage act of that state. *Hervey v. Rhode Island Locomotive Works*, 93 U. S., 664, 1876.

65. Notice. A chattel mortgage upon after-acquired goods will hold against a purchaser with notice; he can acquire no better

title than his vendor. *Robson v. Michigan Central R. R. Co.*, 37 Mich., 70, 1877.

66. Possession. Mortgages of personal property of a railway company, out of possession, are to be postponed to creditors who have obtained a lien by judicial process. *Merchants' Bank v. Petersburg R. R. Co.*, 12 Philadelphia, 482, 1877.

67. Priority of liens. A chattel mortgage on the equipment of a railroad was made by authority of the board of directors of an insolvent corporation for securing the claims of directors against the corporation. *Held*, that it was invalid as against prior mortgagees of the franchise and equipment, whose mortgages were not filed (the transaction was prior to the act of 1876, Rev., p. 924, § 86), because the directors, who were also stockholders, had notice of the prior mortgages. Such prior mortgages, however, *held*, not to be valid against judgment creditors who, but for the receivership obtained in a suit to foreclose one of the mortgages, might have made a valid levy on the equipment. *Coe v. New Jersey Midland R'y Co.*, 31 N. J. Eq., 105, 1879.

68. Rolling stock. As between a mortgagee and an execution creditor, rolling stock of a railroad company mortgaged with the railroad is part of the realty. *Williamson v. New Jersey Southern R. R. Co.*, 28 N. J. Eq., 277, 1877; 14 Amer. R'y Rep., 34.

69. — The engines, cars and rolling stock of a railroad must be regarded as chattels which have not lost their distinctive character as personalty by being affixed to and made part of the realty. *Williamson v. New Jersey Southern R. R. Co.*, 29 N. J. Eq., 311, 1878.

70. — A mortgage executed by a railroad corporation on its road-bed and franchises, together with its engines, cars and rolling stock, so far as regards the latter class of property, is a chattel mortgage within the provisions of the act concerning chattel mortgages (Rev., p. 709). *Ib.*

71. — Where the rolling stock is mortgaged with the road and is fixtures necessary to the operation of the road, the necessity which exists to use it in order to use the real estate itself, the peculiar connection between the rolling stock and the road, are themselves — if it be conceded that

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such stock is personal property — sufficient reasons for holding that the provision of the act concerning mortgages, requiring immediate delivery and continued possession of chattels mortgaged, or filing instead thereof, is not applicable to such mortgages. *Williamson v. New Jersey Southern R. R. Co.*, 28 N. J. Eq., 277, 1877; 14 Amer. R'y Rep., 34.

72. — Rolling stock and other property strictly appurtenant to a railroad is part of the road, and a mortgage thereof in connection with the road, if duly recorded as a mortgage of realty, need not be recorded also as a chattel mortgage. *Farmers' Loan and Trust Co. v. St. Joseph and Denver City R'y Co.*, 3 Dillon (U. S. C. C.), 412. 1875.

73. — Rolling stock does not necessarily become fixed to the railroad upon which it is placed. Therefore, a mortgage, although in terms covering future acquisitions of rolling stock, does not attach to the rolling stock of a third person subsequently placed on the road under a contract with a company then operating it. *Hardesty v. Pyle*, 15 Federal Reporter, 778. 1883. See, also, *Meyer v. Johnston*, 53 Ala., 237, 1875; 9 Amer. R'y Rep., 454.

74. — A mortgage of "all the present and future-to-be-acquired property of the company, including the right of way and land occupied, and all rails, and other materials used therein or procured therefor," includes the rolling stock of the road. *Pullan v. Cincinnati and Chicago R. R. Co.*, 4 Bissell (U. S. C. C.), 35. 1865.

75. — Parties claiming an equitable lien upon rolling stock furnished to an insolvent corporation, by virtue and to the extent of advancements made on account of the same, will not be entitled to be heard on petition, pending foreclosure proceedings upon a mortgage covering the rolling stock and all other property of the corporation, upon which rolling stock other liens are set up by answer, claimed to be paramount to the mortgage of the complainants. *Receivers New Jersey Midland R'y Co. v. Wortendyke*, 27 N. J. Eq., 658. 1876.

76. — Mortgage lien held valid upon rolling stock removed to be changed to a narrower gauge. *Hamlin v. Jerrard*, 72 Me., 62, 1881; 4 Amer. & Eng. R. R. Cases, 488.

77. — Such mortgage lien was not lost by a consolidation of two corporations. *Ib.*

78. — The provision in the Illinois constitution of 1870, that the rolling stock of a railroad company shall be deemed personal property, does not change the rule that a mortgage made by the company, covering all after-acquired property, includes such acquired rolling stock, if obtained before the rights of execution creditors attach. *Scott v. Clinton and Springfield R. R. Co.*, 6 Bissell (U. S. C. C.), 529. 1876.

79. Statute. The chattel-mortgage statute is inapplicable to an ordinary railway mortgage. *Hammock v. Loan and Trust Co.*, 105 U. S., 77, 1881; 7 Amer. & Eng. R. R. Cases, 465.

80. Tools. Iron rails, spikes, ties, etc., constitute part of the realty and pass by the mortgage of the road. So cast-off articles; such as broken rails or ties, remain subject to lien of the mortgage if proper administration would require their being recast or repaired. Tools and implements in workshops and furniture in station houses, etc., are mere personalty and not subject to the lien of a railway mortgage. *Lehigh Coal and Navigation Co. v. Central R. R. Co. of New Jersey*, 12 Amer. & Eng. R. R. Cases, 416; 35 N. J. Eq., 379. 1882.

V. ASSIGNMENT AND NEGOTIABILITY OF BONDS AND MORTGAGES.

81. *Bona fide holder.* The *bona fide* holder of negotiable bonds may collect the full amount thereof, regardless of what they cost him, although the bonds have been wrongfully put in circulation. *Grand Rapids and Indiana R. R. Co. v. Sanders*, 17 Hun (N. Y.), 552, 1879; reversing 54 Howard's Practice (N. Y.), 214, 1877. But see *Newport and Cincinnati Bridge Co. v. Douglass*, 12 Bush (Ky.), 673; 18 Amer. R'y Rep., 221. 1877.

82. — Where the bonds of a railroad corporation, secured by mortgage, are signed and issued by a trustee, whose duty, it usually would be considered, was to act for the bondholders in enforcing payments to them, and to bring suit against the corporation for covenants broken, and not necessarily to include the power to place upon the market

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the bonds for sale, and the bonds are sold for a very small per cent. of the face value, the purchaser is put upon inquiry in regard to the regularity or validity of their issue. *Riggs v. Pennsylvania and New England R. R. Co.*, 16 Federal Reporter, 804. 1883.

83. — Where the proof clearly shows that a railway company never received any consideration for bonds issued by it to the payee, a contractor, which bonds were secured by a mortgage on its road, this will constitute a good defense as against the payee or person to whom delivered, and as against a *bona fide* purchaser when seeking to foreclose the mortgage in a court of equity. *Chicago, Danville and Vincennes R'y Co. v. Læwen-thal*, 93 Ill., 433. 1879.

84. Claim against trustee. Personal claims, by holders of mortgage bonds, against trustees in the mortgage on account of the bonds, do not pass to persons subsequently acquiring such bonds, unless by an agreement to that effect. *Dwight v. Smith*, 9 Federal Reporter, 795. 1881.

85. Constitutional law. Constitution of Illinois construed. *Peoria and Springfield R. R. Co. v. Thompson*, 103 Ill., 187, 1882; 7 Amer. & Eng. R. R. Cases, 101.

86. Not negotiable. A bond which, by its terms, is payable at a time certain, but contains a clause reserving to the makers "the right to pay the same at any time to be named by them, by adding to the principal a sum equal to twenty per cent. thereof," is non-negotiable for uncertainty as to the time of payment. *Chouteau v. Allen*, 70 Mo., 290. 1879.

87. — Bonds containing a condition to bear 9% interest, on each bond, if payable in London, and \$40 interest, if payable in New York, with a provision for selection by the president as to which place they should be payable, are uncertain in amount, and therefore not negotiable. *Jackson v. Vicksburg, etc., R. R. Co.*, 2 Woods (U. S. C. C.), 141. 1875.

88. Power of attorney. A power of attorney, under seal, irrevocable and expressly stated to be for "value received," to transfer a bond, is *prima facie* a sale of the bond, for a present consideration, to the person in whose favor it is made, and relieves him from the burden of proving that he paid

value therefor when transferred to him. *Pennsylvania Co.'s Appeal*, 86 Pa. St., 102. 1878.

VI. COUPONS AND INTEREST.

89. Action by holder of coupon. The pendency of an action for the foreclosure of a mortgage given to trustees by a railroad company, upon its road and franchises, as security for an issue of negotiable coupon bonds, and containing the usual powers found in such instruments authorizing them, upon default in the payment of any installment of interest coupons, to declare the bonds due, and thereupon to proceed to realize upon the security by foreclosure or otherwise, as prescribed in the mortgage, and to apply the proceeds, but with no further or other power or interest in respect to the obligations or their collection, is no bar to an action in favor of any holder or owner of any of such overdue coupons to recover the amount due thereon by judgment and execution. *Welsh v. St. Paul and Pacific R. R. Co.*, 25 Minn., 314. 1878.

90. Detached coupons. Detached interest coupons payable to bearer at a special time and place have all the attributes of negotiable paper; and *assumpsit* will lie thereon. *First National Bank of North Bennington v. Town of Mt. Taber*, 52 Vt., 87. 1879.

91. — Coupons severed from negotiable bonds, secured by a mortgage on the property of a railroad company, are not entitled to priority of payment over the principal of the bonds or the coupons subsequently maturing, unless the mortgage contains some provision to that effect. *Duncan v. Mobile and Ohio R. R. Co.*, 3 Woods (U. S. C. C.), 567. 1877.

92. Interest; rate of. Where such bonds express a rate of interest illegal in North Carolina and also in New York, and were issued in payment of a precedent debt and secured by a mortgage on the corporation property, they could legally bear no greater rate of interest than that allowed in North Carolina. *Comm'rs of Craven County v. Atlantic and North Carolina R. R. Co.*, 77 N. C., 289. 1877.

93. Interest on coupons. Interest is properly allowed upon an interest coupon

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attached to a bond, from and after its maturity, although no such interest is promised in the same. *Humphreys v. Morton*, 100 Ill., 592, 1881; *Welsh v. St. Paul and Pacific R. R. Co.*, 25 Minn., 314, 1878; *Patterson v. Same*, ib., 324.

94. Non-payment of interest. Where a railroad company issues its bonds and mortgages its property to secure the payment of them and of the semi-annual instalments of interest thereon, as they respectively fall due, under the authority of an act of the legislature which declares that the bonds shall not mature at an earlier period than thirty years, a provision in them that, upon a failure to pay any coupon thereto attached when presented at the place of payment, and a continued default thereon for six months, the whole sum mentioned in the bond shall become due and payable, is void. *Howell v. Western R. R. Co.*, 94 U. S., 463, 1876; 16 Amer. R'y Rep., 188.

95. — A provision in a corporation mortgage that the principal shall become due in case default be made in the payment of interest is not in contrariety to a resolution authorizing the giving of the mortgage, which merely provides that the mortgage shall be given to secure the payment of the principal at a certain time, with interest payable semi-annually. *Coe v. New Jersey Midland R'y Co.*, 31 N. J. Eq., 105. 1879.

96. — A mortgage executed by a railway company to secure its bonds provides that, in case of default for six months in the payment of the interest upon either of them, the entire amount of the debt secured "shall forthwith become due and payable," and that the lien of the mortgage may be at once enforced. The bonds themselves declare that, "in case of the non-payment of any half-yearly instalment of interest which shall have become due and been demanded, and such default shall have continued six months after demand," the principal of the bond shall become due, with the effect provided in the mortgage. *Held*, that, the mortgage being a mere security, the terms of the bonds must control in determining when the principal is payable. *Railway Co. v. Sprague*, 103 U. S., 756, 1880; 2 Amer. & Eng. R. R. Cases, 532. See *Parsons v. Jackson*, 99 U. S., 434. 1878.

97. — Mortgage construed, and held that the request of the bondholders was essential to authorize the trustee to sue for the principal, where the principal was declared matured because of non-payment of the interest. *Chicago and Vincennes R. R. Co. v. Fosdick*, 106 U. S., 47, 1882; 7 Amer. & Eng. R. R. Cases, 427.

98. — Where a deed of trust or mortgage, made by a railroad company to secure an issue of bonds and interest thereon, provides that, in default of payment of interest for six months, the principal should also become due, a bill by the trustee for foreclosure, averring such default in payment of interest, is not demurrable because it fails to allege that the interest coupons were presented for payment at the office or agency at which they were payable. *Savannah and Memphis R. R. Co. et al. v. Lancaster*, 62 Ala., 555. 1878.

99. Transfer. The title to interest coupons passes from hand to hand by delivery. A transfer of possession is presumptively a transfer of title, but does not import a guaranty of payment. *Ketchum v. Duncan*, 96 U. S., 659. 1877.

VII. RECORDS, NOTICE AND PRIORITY.

100. Advances. It is a well settled rule that, where the mortgagee has the option to make the advances, each advance is as upon a new mortgage; but where the mortgagee is bound to make the advances, the lien relates back to the date of the mortgage, and is superior to any subsequent lien or conveyance. *Tompkins v. Little Rock and Ft. Smith R'y Co.*, 15 Federal Reporter, 6. 1882.

101. — A claim for advances made to a railway company for the purpose of completing the construction of its railroad will be postponed in equity to the lien of the mortgage bondholders, unless such advances were made in consequence of the requests, promises and acts of all the bondholders. *Kelly v. Receiver of Green Bay and Minn. R. R. Co.*, 5 Federal Reporter, 846. 1881.

102. Attachment. The Virginia and Tennessee R. R. Co. issued bonds, payable at a distant date, with interest payable semi-annually, to raise funds to complete the con-

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struction of its line. To secure the bonds, it conveyed to trustees all of its property *in esse*, and all to be thereafter acquired, with all tolls, issues, income, etc., and provided that the company should remain in possession of the road and its property until some default in paying the interest or principal of said bonds should occur, and should have the right to apply any of the money or personal property of the company to the construction or repair of the road, or to its current expenses, or the purchase of necessary machinery, or the payment of debts; and should have the right, after deducting from the net profits an amount sufficient to pay the semi-annual interest on the bonds and to lay aside a sinking fund of one per cent. upon the amount of the bonds, to distribute the balance in semi-annual dividends; and further, that, in case of default, the trustees should take possession of the road property, etc., and use and employ the same "according to the rules and regulations and lawful directions of the president and directors of said company, and receive and collect the tolls," etc. Before default made, a creditor, whose debt was properly chargeable to the expense account, attached tolls belonging to the road. *Held*, that the attachment was prior to the lien of the trustees, as the attachment had been levied before possession was taken by the trustees. *Clay v. East Tenn. and Va. R. R. Co.*, 6 Heiskell (Tenn.), 421, 1871; 12 Amer. R'y Rep., 38.

103. Indorsement by state. The internal improvement law (Acts of 1869-70, p. 70), while providing that the state shall have a first and permanent lien for its protection, when it has indorsed bonds under that act, does not forbid the railroad corporations from creating other liens on the property subordinate to such lien of the state; especially as a lien to secure the bonds indorsed. *Kelly v. Ala. and Cincinnati R. R. Co.*, 58 Ala., 489, 1877; 21 Amer. R'y Rep., 138.

104. Funding of indebtedness. Under an act of the legislature passed in 1869 certificates of indebtedness were authorized to be issued by a railway company for funding interest due upon its bonds, which were secured by a lien under an act of 1866; and

which lien was extended by the later act to cover these certificates of indebtedness. *Held*, that this was a mere substitution, and not a payment, and that the lien of these certificates was superior to that of a mortgage executed between 1866 and 1869. *Gibbes v. G. and C. R. R. Co.*, 13 So. Car., 228, 1879; 4 Amer. & Eng. R. R. Cases, 459.

105. Income; priority of lien. A company, to secure the payment of its bonds, mortgaged its property, and the rents, issues and profits arising therefrom, with the provision that, if there was default in paying the interest, the mortgagee might take possession of the property, manage the same, and receive and collect all rents and claims due and to become due to the company. Default was made; and the mortgagee, in November, 1874, filed his bill, setting forth that the company had on hand moneys and claims due to it, both of which he prayed might be applied to his mortgage. An execution upon a judgment, which B. had against the mortgagor, having been sued out and returned *nulla bona*, in December of that year, B. filed his bill to subject such moneys and claims to the payment of his judgment. *Held*, that, inasmuch as the mortgagee had not taken possession, his claim to the earnings and income on hand at the time of filing his bill must be postponed to that of B. *American Bridge Co. v. Heidelberg*, 94 U. S., 798. 1878.

106. Innocent purchaser; pre-existing debt. Where, in an action to foreclose an unrecorded mortgage against a subsequent purchaser of the mortgaged premises, the defense is that of a purchase for value without notice, it will not avail if the consideration consisted in merely giving credit for the amount of the purchase money, on claims held by the purchaser against the vendor. *Zorn v. Railroad Co.*, 5 So. Car., 90. 1878.

107. Land grant. A trust deed, executed by a railroad company to secure its bonds, purported to convey a large number of sections of public lands, being a portion of what the company would be entitled to on the completion of its road, the certificates for which were receivable from time to time as portions of the road were completed. *Held*, that purchasers in good faith from the

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company of a part of the certificates, without notice that they were covered by said deed of trust, acquired a good title free from the incumbrance of the trust deed. *Campbell v. Texas and New Orleans R. R. Co.*, 2 Woods (U. S. C. C.), 263. 1872.

108. Overissue of bonds; priority. A railroad company executed a mortgage to secure a series of numbered bonds, all bearing the same date and payable at the same time, not to exceed sixteen bonds of \$1,000 each to the mile of its road. Five hundred bonds, in excess of this limit, purporting to be secured by this mortgage, were issued by the company and sold for value to *bona fide* holders. *Held*, that bonds of this kind are numbered, not for the purpose of giving one number any advantage over another, but simply for convenience in registration and identification. In such case the five hundred bonds bearing the higher numbers stand on the same footing as those bearing the lower numbers; and when the mortgaged property is inadequate to pay, all are entitled to share *pro rata* with the others in its proceeds. *Stanton v. Alabama and Chattanooga R. R. Co.*, 2 Woods (U. S. C. C.), 523. 1875.

109. Pledge; priority. An issue of bonds secured by a first mortgage, and issued for the purpose of taking up others of a prior issue, was larger than necessary for that purpose. In a suit brought by holders of a second mortgage to foreclose their mortgage, *held*, that such surplus bonds, whether actually out and in the hands of *bona fide* holders when the second mortgage went into effect, or issued afterward for the first time, as collateral, to secure a debt contracted at the time they were thus pledged, in either case they were secured by such first mortgage equally with those applied to the purpose of the issue, even though, in the second case, such pledgee had full knowledge of all the facts. *Clafin v. South Carolina R. R. Co.*, 8 Federal Reporter, 118, 1880; 4 Amer. & Eng. R. R. Cases, 231.

110. Priority. Where several bonds, payable at different dates, are secured by a mortgage, the bonds, in the absence of any special provision in the mortgage to the contrary, are entitled to payment from the proceeds of the mortgaged property in the order

of their maturity. But when they all mature at the same time they will be equal as to the principal; and bondholders whose interest has not been paid will have no priority over those whose interest has been paid. *Humphreys v. Morton*, 100 Ill., 592. 1881.

111. — Holders of bonds secured by deed of trust upon property, which, together with other property, not included in the deed of trust, was afterwards mortgaged to secure a subsequent series of bonds, some of which were placed in the hands of a special trustee, "to be applied exclusively for the purpose of discharging the property conveyed from prior liens," are not entitled to have the fund for the payment of their liens increased by means of the bonds in the hands of such trustee, it being the evident purpose of the deposit of the bonds to put all the debts of the company upon an equal footing, and not to increase the security already existing for the payment of the first bonds. *Meyer v. Johnston*, 53 Ala., 237, 1875; 9 Amer. R'y Rep., 454.

112. — The fact that some coupons of first lien bonds were paid in state guarantied bonds under the statute of 1869 raises no equity for the payment of the unfunded coupons of the same class and dates in preference to the bonds and later coupons. Such unfunded coupons are entitled to take only their *pro rata* with other bonds and coupons of the first lien not postponed by settlement or the estoppel of their owners. (Same Case, 12 So. Car., 314, explained.) *Hand v. Savannah and Charleston R. R. Co.*, 17 So. Car., 219. 1881.

113. — On a question of priority of lien, arising eleven years afterwards, entries in the handwriting of a deceased treasurer in the regularly kept books of a railroad company are competent evidence to show who funded coupons and received in exchange therefor bonds under the later statute. *Id.*

114. — There was upon the property of a railway corporation a lien for an early debt established by the charter of the company. A mortgage was made and bonds executed which were chiefly to be issued in taking up the early debt, but the amount exceeded such debt. Afterwards a subsequent mortgage was executed to secure later obligations. *Held*, that as against such second

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mortgage the first mortgage secured not only the amount of the early debt, but also bonds issued in excess of that amount, whether in the hands of *bona fide* holders at the time of the creation of the second mortgage, or issued by the company after that time as collateral security for a debt then contracted. *Clafin v. South Carolina R. R. Co.*, 4 Hughes (U. S. C. C.), 12. 1880.

115. — A railroad company, having executed a mortgage to secure a limited number of bonds, afterwards executed another mortgage on the same property to secure a larger number, which recited that the holders of the bonds, secured by the original mortgage, had agreed to surrender the same, and receive in substitution therefor new bonds, to be secured by the original mortgage, as modified by the second mortgage. All the bonds secured by the first mortgage, except twenty, were exchanged for bonds secured by the second. *Held*, that the holders of said twenty bonds were not entitled to be paid out of the proceeds of the mortgaged property in preference to the holders of the substituted bonds. *Ames v. New Orleans, Mobile and Texas R. R. Co.*, 2 Woods (U. S. C. C.), 207. 1876.

116. **Record; lien.** Where a railway mortgage upon a road, which passes through several counties, is recorded in one of those counties before judgment recovered against the company by a stranger, but is not recorded in the other counties, it has a priority of lien over the judgment upon the part of the road lying in that particular county, but not upon such portions of the road as lie in the other counties. *Ludlow v. Clinton Line R. R. Co.*, 1 Flippin (U. S. C. C.), 25. 1861.

117. **Recitals in mortgage will bind purchaser.** A railway company issued certain bonds designated as "consolidated first mortgage gold bonds," the bonds referring to a mortgage from which it appeared that it was intended to substitute a portion of the bonds for first mortgage bonds already issued upon the road, and to devote the remainder to the extension and completion of the road. *Held*, that the use of the word "consolidated" was sufficient to put a purchaser upon his inquiry; that, as the bonds referred to the mortgage, a purchaser was bound by

the statement contained in the mortgage, and that it was his duty to ascertain whether or not the holders of the old bonds were willing to make the exchange. *Caylus v. New York, Kingston and Syracuse R. R. Co.*, 10 Hun (N. Y.), 295. 1877.

118. **Telegraph lines; notice of claims of telegraph company.** Where the purchaser at a foreclosure sale of a railroad and telegraph line running along the line of the railroad had notice of facts sufficient to put him on inquiry that the telegraph company claimed the telegraph property as personality, and knew that the telegraph company was in possession and operating the telegraph line, and the records of the foreclosure suit under which the sale was made contained a recital of the contract under which the telegraph company claimed the property, it is sufficient notice to such purchaser that the telegraph company claimed an interest in that property, and he was not a purchaser for value and without notice. *Western Union Telegraph Co. v. Burlington and Southwestern R'y Co.*, 11 Federal Reporter, 1; 3 McCrary (U. S. C. C.), 180. 1882.

119. **Track placed on mortgaged land.** The Erie Railway constructed a track over a part of certain premises, which were covered by a prior mortgage duly recorded. The track was built, not under ordinary condemnation proceedings in eminent domain (on the contrary there was an express inhibition in its charter against occupying those lands), but under a grant of right of way from the mortgagors. *Held*, that the company had no right to have the track, etc., reserved from a sale under foreclosure of the mortgage. *Price v. Weehawkin Ferry Co.*, 31 N. J. Eq., 31. 1879.

VIII. GUARANTY.

120. **Bonds; gold coin.** An indorsement by the corporation on the bonds after execution and guaranty, stipulating that they should be payable in gold coin, binds the corporation only and not the guarantor. *Wallace v. Loomis*, 97 U. S., 146. 1877.

IX. COLLATERAL SECURITY.

121. **Bonds; bona fide holder.** A creditor who takes negotiable bonds on a pre-

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existing debt as collateral security, and extends the time of payment, is a *bona fide* holder, if he has no notice of any prior equities. *Tyrell v. Cairo and St. Louis R. R. Co.*, 7 Mo. App., 294. 1879. See, also, *Allen v. Dallas and Wichita R. R. Co.*, 3 Woods (U. S. C. C.), 816. 1878.

122. — Bonds held as collateral security for the debts of the corporation should be paid by the sale of the mortgaged property by which they are secured to the extent of the debts for which they are held, and no further. *Newport and Cincinnati Bridge Co. v. Douglass*, 12 Bush (Ky.), 673, 1877; 18 Amer. R'y Rep., 221.

123. — In a suit by an assignee to foreclose a mortgage held by him as collateral security for non-payment of interest on the bonds, the mortgagee or his assignee cannot set up that the mortgage does not provide that the principal shall become due on the non-payment of the interest, the mortgagor, who was a party, not having interposed such defense. *Ackerson v. Lodi Branch R. R. Co.*, 31 N. J. Eq., 42. 1879.

124. Bonds misapplied by officers. A levy of execution on the franchises and property of a street railway company is entitled to priority over a mortgage dated a year and a half earlier and given to secure bonds which were only meant to be sold in the market, but which, without corporate authority or ratification, had been turned over to the mortgagee, who knew they had never been sold, as collateral security for the private debts of the company's treasurer, who had a controlling interest in its property. *McKee v. Grand Rapids, etc., R'y Co.*, 41 Mich., 274. 1879.

125. — Corporate assets, even though under private contract, cannot be treated as private property or used without corporate authority or ratification. *Id.*

126. Foreclosure. Where a railroad company pledged twenty-eight of its bonds as collateral security for a bank debt, which were included in a subsequent foreclosure decree in a suit for and in behalf of all the bondholders, and a committee of certain bondholders purchased the property, for the costs of the suit, for the benefit of the bondholders contributing towards the payment of the costs, not including the company to

whom the twenty-eight bonds had been surrendered by the bank, and upon which bonds no assessment was paid, and a new company was formed by the persons interested in the purchase, *held*, that the original company took no interest in the purchase as a holder of its own bonds so taken up, and had no property in the purchase liable to be reached by garnishment. *Galena and Southern Wisconsin R. R. Co. v. Stahl*, 103 Ill., 67. 1882.

127. — Where, in a foreclosure of a railway mortgage, bonds are outstanding and pledged by the company as collateral, it is not error for the referee to include them in his estimate of the amount due. *Peck v. New York and New Jersey R'y Co.*, 59 Howard's Practice (N. Y.), 419. 1880.

128. — In a suit to foreclose a mortgage on a railroad, it appeared that the owners of the bonds, who, with the trustee, were complainants, held them as collateral security only for a debt less than the amount of the bonds; *held*, that the assignor should be a party. *Ackerson v. Lodi Branch R. R. Co.*, 28 N. J. Eq., 542. 1877.

X. FORECLOSURE.

129. Agreement. An agreement of compromise in a foreclosure held valid. *Marie v. Garrison*, 83 N. Y., 14, 1880; reversing *Same v. Same*, 45 N. Y. Superior Ct., 158.

130. — The attorneys at law of the plaintiff (the owner of the rolling stock), in that capacity merely, and without special authority so to do, signed an agreement as the basis of a consentable decree in an equity suit to which the plaintiff was a stranger, and in which he had no interest, which provided for the withdrawal of exceptions to the sheriff's sale, filed by the railway company (the defendant in the execution), and the confirmation of the sale, and the return of the locomotive to the railroad, and its delivery to the sheriff's vendee; the preamble of the agreement reciting, "Whereas, it is desirable that the relative rights of all parties interested or concerned should be determined at law;" and the sixth clause of the paper declaring, "The rights of R. S. H. (the plaintiff) to any title or claim to the rolling stock, if he has any legal right, shall

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be determined according to law. This agreement is not to prejudice any right he may have, and which can be legally established, to the rolling stock." The sheriff was not a party to the equity suit or the agreement. *Held*, that the agreement must be construed as reserving to the plaintiff all his legal remedies, and did not operate as an estoppel to bar his action of trespass against the sheriff. *Hardesty v. Pyle*, 15 Federal Reporter, 778. 1883.

131. Appeal. In an action pending in the court below for the foreclosure of a mortgage on the property of a railway company, a decree was rendered directing a sale of the mortgaged property, and an application of the proceeds to the payment, among others, of "all such . . . claims and sums of money as shall be hereafter allowed by this court, . . . in preference to the liens of the hereinbefore mentioned mortgages or deeds of trust, for debts due," etc. *Held*, that there are as many separate and distinct controversies as there are separate and distinct claimants and intervenors, as to the amount due to each; and distinct causes of action in favor of distinct parties have been joined in the same suit, and distinct decrees rendered in favor of distinct parties, and that the appeal should be dismissed for want of jurisdiction. *Farmers' Loan and Trust Co. v. Waterman*, 12 Amer. & Eng. R. R. Cases (U. S. S. C.), 398. 1883.

132. — An order refusing to strike from a complaint alleged irrelevant and redundant matter is not appealable. *Rice v. St. Paul and Pacific R. R. Co.*, 24 Minn., 447. 1878.

133. — A decree is not "final," in the sense of being appealable, where the court by an interlocutory order declares that certain shares in a railroad held by a state are pledged for the payment of certain interest-bearing bonds of the state and the interest on them; and that the plaintiff and others whom he represents, as holders of such bonds, are entitled to have their respective proportions of the stock, or so much thereof as may be necessary, sold in order to pay the interest which is due to them; and orders a master to take an account of such unpaid interest and of what will be due by a day named, and also of the proportion of stock

that may be equitably applicable to the payment of said interest found due to each plaintiff, and make report to the court. *Railroad Co. v. Swasey*, 23 Wallace, 405. 1874.

134. — An appeal lies from the final decree confirming a sale made under the order of the United States circuit court. *Sage v. Railroad Co.*, 96 U. S., 712. 1877.

135. — Appeal dismissed for irregularity, without prejudice, because certain important questions were not directly, or in terms, decided in the decree appealed from. *Hand v. Savannah and Charleston R. R. Co.*, 5 So. Car., 182. 1873.

136. — A personal decree for a deficiency due upon a mortgage debt, remaining after execution of a decree of foreclosure and sale, is appealable; and when rendered in favor of other parties than the complainant will be reversed for the same error that required the reversal of the decree of foreclosure and sale. *Chicago, Danville and Vincennes R. R. Co. v. Fosdick*, 12 Amer. & Eng. R. R. Cases (U. S. S. C.), 367. 1882.

137. — An assignment by a defendant of his interest in the subject matter of a pending suit does not necessarily defeat the suit. The assignee is bound by what is done against the assignor; and may either come in and assume the burden of the litigation in his own name, or act in the name of his assignor. *Railroad Co., Ex parte*, 95 U. S., 221. 1877.

138. — The pendency of an appeal from a final decree in equity, in which no *superseas* exists, does not deprive the court which rendered the decree from making proper orders to enable the party in whose favor the decree was rendered to have the same executed. *Farmers' Loan and Trust Co. v. Central R. R. Co. of Iowa*, 4 Dillon (U. S. S. C.), 546. 1877.

139. — Where a foreclosure suit was brought, and the municipal corporation within which the mortgaged property was situate was allowed to intervene and set up a claim for taxes thereon, *held*, that the order of the circuit court rejecting such claim is binding upon the corporation, and where the amount of taxes is sufficient to give this court jurisdiction, the corporation is entitled to an appeal. *City of Savannah v. Jesup*, 9

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140. — A communication addressed to this court by the attorneys for the parties in these appeals, asking that the "same remain for the present at least *in statu quo*," together with other facts, considered, and held not to bind the plaintiffs to a suspension of proceedings herein for any particular length of time. The plaintiffs having withdrawn assent to further delay and requested the court to proceed with the appeals, the request is granted. *Rice v. St. Paul and Pacific R. R. Co.*, 24 Minn., 444. 1878.

141. — A cause involving private interests only will not be advanced for a hearing in preference to other suits on the docket. *Sage v. Central R. R. Co. of Iowa*, 93 U. S., 412. 1876.

142. — The court heretofore rendered a decree of foreclosure of a railway mortgage in favor of the plaintiff as the trustee for all the bondholders. Certain bondholders, dissatisfied with the decree, appealed to the supreme court. The supreme court refused to dismiss the appeal, which is still pending in that court, but vacated the *supersedeas*. Certain bondholders, in March, 1877, applied for an order to compel the trustee to sell, under the decree, pending the appeal, against its judgment of what was best for all the bondholders, and the court refused to interfere with the discretion of the trustee. The same bondholders then applied to the supreme court for a *mandamus* to compel the circuit court to order the trustee to sell, pending the appeal, which the supreme court (March 27, 1877) refused. The same bondholders now (May term, 1877) renew their application for an order to the trustee to cause the special master to execute the decree, notwithstanding the pending appeal and the protest of other bondholders. *Held*, that individual bondholders, not parties to the decree, had no legal right to have the decree executed pending the appeal, against the judgment of the trustee as to what was for the best interests of all the bondholders, but that the trustee was at liberty to execute the decree or not, pending the appeal, as in its judgment was best for all the *cestuis que trust*. *Farmers' Loan and Trust Co. v. Central R. R. Co. of Iowa*, 4 Dillon (U. S. C. C.), 533,

1877. As to vacation of the *supersedeas*, see *Sage v. Central R. R. Co. of Iowa*, 93 U. S., 412. 1876.

143. **Bondholders.** The bondholders may proceed in their own names and in their own behalf, making the trustees defendants, where the trustees have acquired adverse interests as against the bondholders. *Webb v. Vermont Central R. R. Co.*, 20 Blatchford (U. S. C. C.), 218, 1882; *Same v. Same*, 9 Federal Reporter, 798, 1881.

144. — Trustees in a railroad mortgage sued for strict foreclosure and general relief. Afterwards they filed a supplemental bill praying that a plan of reorganization, adopted by a large majority of bondholders, might be decreed, and a certain litigating bondholder restrained from interference. The litigating bondholder filed his independent bill for a foreclosure sale of the property and removal of the trustees. *Held*, that the litigating bondholder could only be heard for his individual rights by coming into the trustees' pending suit, and that his independent suit must be stayed. *Stern v. Wisconsin Central R. R. Co.*, 1 Federal Reporter, 555. 1880.

145. — The rights of a bondholder determined under the facts of a particular case, where a bond had been deposited with the secretary of a committee on reorganization by the holder thereof. *Hitchcock v. Midland R. R. Co. of N. J.*, 33 N. J. Eq., 86, 1880; 1 Amer. & Eng. R. R. Cases, 220. See, also, *Wetmore v. St. Paul and Pacific R. R. Co.*, 5 Dillon (U. S. C. C.), 531. 1880.

146. — The provision in the statute (Code Civil Proc., § 1207) that, in case of default, the judgment shall not be more favorable to the plaintiff than prayed in his complaint, does not inure to the benefit of persons other than the defendant. And where the petition stated the amount of outstanding bonds at less than they actually were, a bondholder could not appear and move to set aside a decree as excessive under the statute above referred to. *Peck v. N. Y. and New Jersey R'y Co.*, 7 Amer. & Eng. R. R. Cases, 422; 85 N. Y., 246. 1881. See *Same v. Same*, 22 Hun (N. Y.), 129. 1880.

147. — Where a railroad corporation, by mortgage, whose sufficiency to secure what it is given to secure is doubtful, mortgages

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its property directly to all its bondholders by name, to secure specifically to each the amount due on the bonds to *him*, no one bondholder, even when professing to act in behalf of all bondholders who may come in and contribute to the expenses of the suit, can proceed alone against the company, and ask a sale of the property mortgaged. *Railroad Co. v. Orr*, 18 Wall., 471, 1873; 6 Amer. R'y Rep., 396.

148. — Where certain bondholders whose bonds were secured by a deed of trust filed in behalf of themselves and all other bondholders whose bonds were secured by the same deed, who chose to come in as complainants and bear their share of the expenses of the suit, a bill against the trustees named in the deed, to have the trust administered and the trust property sold and its proceeds distributed, and the other bondholders were numerous and some of them unknown, *held*, that it was not a valid objection to the making of a decree in accordance with the prayer of the bill, that all the bondholders were not made actual parties; they might be allowed to come in as complainants, or might propound their claims before the master. *Wilmer v. Atlanta and Richmond Air Line R'y Co.*, 2 Woods (U. S. C. C.), 447. 1875.

149. Costs. In general the mortgagee is entitled to the payment of his costs before the subsequent mortgagees receive anything. If, however, the mortgagee commences or adopts a suit for the administration or sale of the mortgagor's estate, the costs of the suit are the first charge, if the estate is insufficient; or if he sets up an unfounded claim or unjust defense he may be deprived of his costs. *Meyer v. Johnston*, 53 Ala., 237, 1875; 9 Amer. R'y Rep., 454.

150. — A contract, entered into by a sheriff to perform certain official services for a gross sum in lieu of the fees provided by statute, where it did not appear whether the stipulated sum would be greater or less than the legal fees, was held to be void because against public policy and in violation of § 3840 of the Code. *Gilman v. Des Moines Valley R. R. Co.*, 40 Ia., 200. 1875.

151. Coupons unmatured. The election of the bondholders to treat a default in payment of interest as a forfeiture of the contracts, so far as they prescribe the length of

time for which the bonds were to run, operated *prima facie* to cancel all coupons representing instalments of interest not then due; and the principal sums, if treated as due in the judgment for the sale of the road, will bear interest at the agreed rate from the date of the election. *Newport and Cincinnati Bridge Co. v. Douglass*, 12 Bush (Ky.), 673, 1877; 18 Amer. R'y Rep., 231.

152. Debts due employe. An act of the legislature of the state of Minnesota provided that, in a foreclosure sale of a railroad, the court granting the foreclosure decree should provide, in such decree, or otherwise, that the purchaser should "fully pay all sums due and owing by such foreclosed railroad company to any servant or employe of such company." *Held*, that the terms "servant" and "employe" did not include a secretary of such railroad company. *Wells v. Southern Minnesota R'y Co.*, 1 Federal Reporter, 270; 1 McCrary (U. S. C. C.), 18. 1880.

153. Decree. *Held* proper, under the state of the record in this cause, to enter a final decree. *Clews v. First Mortgage Bondholders*, 51 Ga., 131. 1874.

154. — If the trustees of a mortgage on a railroad are parties to a suit, a decree rendered in the case is as binding on the bondholders secured by it as if they had been made parties, unless they can show some fraud practiced upon, or connived at, by the trustees themselves. *Campbell v. Railroad Co.*, 1 Woods (U. S. C. C.), 368. 1871.

155. — A former decree between the same parties and upon the same subject matter is final as to all questions which were or might have been investigated in that suit, unless it appears that by some wrong act of the successful party his adversary has been deprived of his right to fully present his case. *Brooks v. O'Hara Bros.*, 2 McCrary (U. S. C. C.), 644. 1881. See, also, *Woods v. Pittsburgh, Cincinnati and St. Louis R'y Co.*, 99 Pa. St., 101, 1881; 7 Amer. & Eng. R. R. Cases, 478.

156. — A decree in a suit in equity brought to foreclose a mortgage given to secure certain bonds, and in which suit the bondholders were represented by their trustees, is conclusive upon the bondholders, especially where the bondholders were cognizant of the proceedings, appeared in the cause, and

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sought and obtained certain orders therein, and were heard from time to time upon questions affecting their interests. *Huntington v. Little Rock and Fort Smith R. R. Co.*, 3 McCrary (U. S. C. C.), 581, 1882; *Huntington v. Little Rock and Fort Smith R. R. Co.*, 16 Federal Reporter, 906, 1882.

157. — The fact that some of the trustees are bondholders is not of itself sufficient to render them incompetent to consent to a decree. *Shaw v. Railroad Co.*, 100 U. S., 605. 1879.

158. — A decree of court declaring the mortgages executed by a railway company to be the first lien on its property and franchises does not give them precedence over the prior lien of a party who had no notice of the proceedings and was not a party nor privy to the decree. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Marshall*, 85 Pa. St., 187, 1877; 18 Amer. R'y Rep., 388.

159. — An action for foreclosure is a proceeding in the nature of a remedy *in rem*, and not *in personam*. The trustees have no right to a personal judgment, to be enforced by execution, for any deficiency in the indebtedness left after exhausting the securities and applying their proceeds. The effect of the judgment rendered in such an action is to determine the amount of the mortgage debt, so as to know how much of the security will be required to satisfy the same. *Welsh v. St. Paul and Pacific R. R. Co.*, 25 Minn., 314. 1878.

160. When a foreclosure suit has proceeded to decree *pro confesso* and order of reference, and the mortgaged premises are then sold, though the purchaser will be admitted as a party defendant, he will not be permitted to answer. He may be present at the taking of the account and avail himself of all the defenses which the mortgagor could, after the decree *pro confesso* against him. *Hewitt v. Montclair R'y Co.*, 25 N. J. Eq., 100. 1874.

161. — A course of procedure prescribed by the mortgages, to be pursued in case of a sale by the trustee without foreclosure, is not binding upon the court in proceedings to foreclose such mortgages. *Farmers' Loan and Trust Co. v. Green Bay and Minnesota R. R. Co.*, 6 Federal Reporter, 100; 10 Bissell (U. S. C. C.), 203. 1881.

162. — Therefore, upon a foreclosure sale, the court is not bound to adopt the provisions of the mortgages, as to the application of the bonds upon the bid of a purchaser, or as to the proportion in which such bonds shall be so received, or as to the manner in which their value shall be ascertained. *Ib.*

163. — A provision in the decree that the purchaser, after the payment of a certain specified amount in cash, could pay the balance of his bid in outstanding bonds and coupons, secured by the first mortgage, "at such percentage of the face value thereof as this court shall, at the approval of said sale, authorize and direct," is not erroneous, and is similar to that inserted in all railroad mortgage foreclosure sales entered in the seventh circuit. *Ib.*

164. — vacation of decree. A purchaser at a receiver's sale of a railroad, who, on the ground of the interest thereby acquired, was admitted as a defendant in a suit to foreclose a first mortgage on the property of the railroad, but with the right only to appear at the taking of the account of the amount due on the mortgage, and to be notified of the taking of the account (a decree had been made that the complainants were entitled to a sale of the mortgaged premises to pay the amount due thereon), but who, before the master's report was made, had lost all his interest in the mortgaged premises by reason of a sale thereof under foreclosure of a second mortgage, has no interest in the suit to entitle him to have the final decree therein opened, and the execution set aside, because he was not notified of the taking of the account. *Ward v. Montclair R'y Co.*, 26 N. J. Eq., 260. 1875.

165. — Where a bill was filed in the supreme court of the District of Columbia, in behalf of some of many bondholders under railway mortgages, impeaching the proceeding in a cause in equity instituted by the trustees in said mortgages in the circuit court of the United States for the western district of Texas, and the title of the purchaser, under such proceedings; and where the bill shows that the circuit court obtained jurisdiction of the cause, and that the same is still pending in said court, and that the relief which is sought here can be obtained

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therein on proper application,—*held*, such a bill is bad on demurrer. *Fayolle v. Texas and Pacific R'y Co.*, 3 Amer. & Eng. R. R. Cases (Dist. Col.), 532. 1882.

166. — A ruling in a foreclosure suit, denying the petition of stockholders to be made parties in the suit brought against their corporation, is not a bar to an independent suit to set aside the decree for fraud. *Tazewell County v. Farmers' Loan and Trust Co.*, 12 Federal Reporter, 752. 1882.

167. — A suit to set aside a decree of foreclosure and sale thereunder is not so far a mere continuation of the original foreclosure suit as to authorize the service of subpoenas upon persons without the territorial jurisdiction of the court. *Pacific R. R. Co. v. Missouri Pacific R'y Co.*, 3 Federal Reporter, 772; 1 McCrary (U. S. C. C.), 647. 1880.

168. — Where a court has jurisdiction of a suit brought to impeach a former decree for fraud, if the decree has been carried into execution the party complaining of the former decree may be put into the situation in which he would have been if the decree had not been executed. *Osborn v. Michigan Air Line R. R. Co.*, 2 Flippin (U. S. C. C.), 503. 1879.

169. Default; fraud. Where a railway company suffers default in the payment of its bonds secured by mortgage on its line and franchises, and in consequence the mortgage is foreclosed and property sold, the sale cannot be attacked on the ground that the directors of the corporation were actuated by corrupt motives in suffering the default, and that this was known to the trustee, in the absence of any claim of collusion between him and the directors. *Harpending v. Munson*, 12 Amer. & Eng. R. R. Cases (N. Y.), 408. 1883.

170. Earnings; mortgage in sections. Where, under a decree of foreclosure against a railroad company, reference had been made to a master to ascertain the gross earnings and expenses of a certain section of the road covered by a mortgage, it is not an erroneous principle for the master to make a *pro rata* estimate of the earnings and expenses of the whole road, it being shown before him that such section had not been operated separately, but as a part of the

whole road, and no separate accounts kept of the income or expenses of any particular part. Though such a rule leads not to actual results, but to approximation merely, it is the best which could be adopted. *Pullan v. Cincinnati and Chicago Air Line R. R. Co.*, 5 Bissell (U. S. C. C.), 237. 1873.

171. Floating debt. The president and directors of a railroad company had contracted a floating debt to pay interest on its bonds, and for supplies and repairs for which certain persons interested in the road had become individually liable. *Held*, in a suit in equity brought by the trustees of the first mortgage on the railroad property, to foreclose the same, that the court had no power, without the consent of the bondholders, to direct the application of the income of the road to the payment of the floating debt, although it was made to appear that it could be paid on favorable terms, and that it was equitable and probably for the interest of the bondholders that such application should be made. *Duncan v. Mobile and Ohio R. R. Co.*, 2 Woods (U. S. C. C.), 542. 1876.

172. Injury to employes; liability of purchaser. A railway property and franchises were bought at judicial sale by H. and others, who subsequently, under the provisions of the act of April 8, 1861, organized a railway company. *Held*, that the company was not liable for the operation of the road, during the time intervening between the purchase and the organization of the company, unless the possession of the company was affirmatively shown. The presumption was that H. and not the company was in possession of the road between the date of the sale and the time of filing the certificate of organization. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Fierst*, 96 Pa. St., 144, 1880; 9 Amer. & Eng. R. R. Cases, 437.

173. Intervention. A party who has intervened in an action for the foreclosure of a mortgage, to which there are several parties defendant, will not, upon the rendering of a decree and the dismissal of all the parties save one, from whom the intervenor claims relief, lose his standing in the action. *Joliet Iron and Steel Co. v. C. C. and W. R. R. Co.*, 51 Ia., 300. 1879.

174. — The court will not allow the peti-

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tioner to intervene upon affidavits alone, and to stay the sale under a decree of foreclosure, which on its face is regular and legal, and more especially where it appears from the papers that the plaintiff, as a co-plaintiff with others, has a suit then pending in which the validity of all the proceedings in the foreclosure suit is questioned. *People v. Erie R'y Co.*, 56 Howard's Practice (N. Y.), 123. 1878.

175. Interest. Where a bondholder alleged the trustee had filed a bill and obtained a decree of foreclosure for the principal of the bonds not due, as well as for the interest which was due, without the written request of the holders of one-third in amount of the bonds, which it was claimed was a necessary prerequisite by the terms of the mortgage to the exercise of the power to declare the principal debt due, and sought for this reason to avoid the foreclosure proceedings, *held*, that it was competent for the trustee to file a bill to foreclose for the interest due; and that the plaintiff ratified the action of the trustee by filing and proving with the master more than one-third of the bonds issued. *Credit Co. v. Arkansas Central R'y Co.*, 15 Federal Reporter, 46. 1892.

176. Judgment creditors. Railway debentures were granted, by which the "undertaking and all tolls and sums of money, arising by virtue of the act, and all estate, right and interest of the company," were assigned to the debenture creditors. Other creditors subsequently obtained judgments against the company, and afterwards, by authority of an act of parliament, the railway was sold and the purchase money paid into court. *Held*, that the debentures, being prior in date, had priority over the judgments as against the purchase money. *Furness v. Caterham R'y Co.*, 27 Beavan (Eng. Ch.), 858. 1859.

177. — Where a railroad mortgage has been foreclosed and bought in for the benefit of the bondholders, most of whom united in organizing and carrying on a new corporation, and afterwards certain creditors, by judgments subsequent to the mortgage, succeeded in obtaining a decree on a bill filed to set aside the foreclosure and subject the property to payment of their judgments, *held*, that the decree rendered the foreclosure

invalid only as to the creditors who filed the bill, and those who took stock in the new company cannot again claim under the mortgage, nor can the trustee under the mortgage maintain a new bill of foreclosure for their benefit. *Barnes v. Chicago, Milwaukee and St. Paul R. R. Co.*, 8 Bissell (U. S. C. C.), 514. 1879.

178. — minor. The guardian *ad litem* appointed for an infant judgment creditor made a defendant in foreclosure, who had no notice of his appointment until after final judgment, should then, if he applies promptly, be allowed to answer; especially if the priority of the lien of his judgment is in dispute. *Farmers' Loan and Trust Co. v. Erie R'y Co.*, 9 Abbott's New Cases (N. Y.), 264. 1878.

179. Jurisdiction. The constitution of 1874 takes from the supreme court jurisdiction to decree a sale of the property, etc., of a corporation under a mortgage. *Fargo v. Oil Creek and Allegheny River R'y Co.*, 81½ Pa. St., 266. 1875.

180. Law and equity. Where the plaintiff, who held income bonds of the Union Pacific R'y Co., eastern division, the coupons of which were payable out of "net earnings," on the first of March and September in each year, brought an equity suit in March, 1880, claiming an account of net earnings by reason of a default on March 1, 1880, and thereafter brought suit at law to recover coupons on other bonds of the same issue held by him but not included in the equity suits, for defaults arising September 1, 1880, March 1 and September 1, 1881, and March 1, 1882, *held*, that plaintiff was entitled to an account in the equity suits, not merely for net earnings prior to the commencement of such equity suit, to pay the coupons then due, but also for all coupons due and net earnings received after the commencement of the suit until the accounts were stated, and afterwards, on the foot of the decree in the equity suit, and that the law suits could all be stayed without prejudice to plaintiff, as all his rights hereafter to recover could be protected in the equity suit. *Morgan v. Union Pacific R'y Co.*, 11 Federal Reporter, 692. 1892.

181. Maturity. Plaintiff filed a bill to foreclose a mortgage for default in the pay-

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ment of interest on the railway and appurtenances of the defendant. The defense was that the promoters of the suit had extended the time of payment beyond the date at which the suit was brought. The facts relating to this defense stated, and held not to amount to an agreement to extend, nor to estop the trustee from maintaining the bill, but only to a waiver of payment of interest at the covenant day, which may be terminated on notice and demand for full payment. *Union Trust Co. v. St. Louis, Iron Mountain and Southern R'y Co.*, 5 Dillon (U. S. C. C.), 1. 1878.

182. On portion of railway. If a mortgage is given by a railway company upon its entire road to secure bonds issued by it, and it procures the grading of only a part of the road in the middle, and then abandons the work, leaving each end of the road unfinished, and another company organizes and completes the road, on a bill to foreclose the mortgage given by the first company, it is erroneous to decree a sale of the middle portion of the road, leaving the two ends worthless. If any foreclosure can be had the entire road must be sold, and the proceeds distributed as between the bondholders of the original company and the new company in the proportion the work done by the first company bears to the cost or value of the entire road as completed. *Chicago, Danville and Vincennes R'y Co. v. Lawenthal*, 93 Ill., 433. 1879.

183. Ownership of bonds. If a party to a foreclosure proceeding in his pleadings claims the ownership of bonds secured by the mortgage, it is error to enter up a decree in his favor as pledgee. *Chouteau v. Allen*, 70 Mo., 290. 1879.

184. Parties. If a railway company executes a mortgage to trustees to secure the payment of certain bonds, and afterwards executes a second mortgage to the same trustees to secure other bonds, the bondholders under the second mortgage are not necessary parties to a bill in equity by the bondholders under the first mortgage to compel the trustees to take possession of the mortgaged property. *National Fire Ins. Co. v. Salisbury*, 4 Amer. & Eng. R. R. Cases (Mass.), 480. 1881.

185. — A party interested in the *res in*

controversy, not made a party in the bill, may, on his motion or petition, be made a party by amendment of the bill. *Scott v. Mansfield, Coldwater and Lake Michigan R. R. Co.*, 2 Flippin (U. S. C. C.), 15. 1877.

186. — Bondholders are not necessary parties to a bill for foreclosure, by their trustees, of the mortgage given to secure the bonds. Under the circumstances of this case, the petitioners are not proper parties complainant, but they will be admitted as defendants, if they desire. *Williamson v. New Jersey Southern R. R. Co.*, 25 N. J. Eq., 13. 1874.

187. — The state, being a party in court, is bound as much as other parties by the judgment in a foreclosure. *Hand v. Savannah and Charleston R. R. Co.*, 13 So. Car., 467. 1880.

188. — Whether the United States can compulsorily be made a defendant to a foreclosure bill where it holds a lien or mortgage on the property in respect of which the foreclosure is sought, query? *Meier v. Kansas Pacific R'y Co.*, 4 Dillon (U. S. C. C.), 378. 1877.

189. Pleadings. The pleadings in the foreclosure of a railway mortgage examined. *Williamson v. N. J. Southern R. R. Co.*, 25 N. J. Eq., 13. 1874.

190. — Where the cross-bill of the defendant sets up new matter which is intimately connected with the subject matter of the original bill, and which if true, as alleged, entitles the defendant to affirmative relief, it is error to strike it from the files and refuse leave to defendant to refile and prosecute it. *Peoria and Springfield R. R. Co. v. Bryan*, 5 Bradwell (Ill.), 387. 1879.

191. — Where none of the rights of a party asking leave to file a cross-bill in proceedings to foreclose a railroad mortgage will be lost to him by the refusal of the court to grant such leave, such refusal is clearly within the discretion of the court. *Indiana Southern R. R. Co. v. Liverpool, London and Globe Ins. Co.*, 12 Amer. & Eng. R. R. Cases (U. S. S. C.), 543. 1883.

192. — A bill to foreclose a deed of trust to secure bonds issued and put in circulation by a corporation and made payable to bearer is not demurrable because it fails to allege to whom such bonds were negotiated in the

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first instance, or how much was paid for them, or when they were issued. Sufficiency of the pleadings determined. *Savannah and Memphis R. R. Co. et al. v. Lancaster*, 62 Ala., 555. 1878.

193. — Interrogatories are not to be framed and limited upon the theory that everything stated in the bill is precisely and in every detail true. *Chicago, St. Louis and New Orleans R. R. Co. v. Maccomb*, 2 Federal Reporter, 18. 1880.

194. Possession. A provision in a railway mortgage authorizing the trustee, on default of the company to pay interest, to take possession of the road, operate it and receive its income, and, upon notice, to sell it, is a cumulative remedy, and does not affect the right to foreclose by bill in equity. *Alexander v. Central R. R. Co. of Iowa*, 3 Dillon (U. S. C. C.), 487. 1874.

195. Priority. The defendant in a mortgage foreclosure, claiming that a trust deed of the premises, executed to a third person, is prior to the mortgage, has a right to have that question determined in the action, and for that purpose to have the grantee in such deed made a defendant. *Baass v. Chicago and Northwestern R'y Co.*, 39 Wis., 296. 1876.

196. — There was no error, therefore, in refusing to vacate an order that such grantee be made a defendant, although plaintiff offered to stipulate, "for the purposes of this case," that the lien of said deed was prior to that of his mortgage; such stipulation not being conclusive of the question as against other parties, nor, perhaps, as against the plaintiff himself, in any other action or proceeding. *Ib.*

197. — Where there was no provision in the mortgage for a *pro rata* dividend, it was held that unpaid coupons, belonging to a class in which a part of the coupons had been paid, should be paid before any coupons falling due at a later period, and before the principal of any of the bonds; and that detached coupons in the hands of others than the holders of the bonds from which they were detached should be paid before such bonds. *Stevens v. N. Y. and Oswego Midland R. R. Co.*, 13 Blatchford (U. S. C. C.), 412. 1876.

198. — It is not error to order the payment of undisputed claims, having an un-

doubted priority, in advance of the adjustment of the rights of other creditors, whose claims are of an inferior rank. *Hand v. Savannah and Charleston R. R. Co.*, 13 So. Car., 467. 1880.

199. Proceedings. Proceedings in foreclosure examined. *Milttenberger v. Logansport R'y Co.*, 12 Amer. & Eng. R. R. Cases, 464; 106 U. S., 286. 1892.

200. Railway in several states. Where a railway is situated in several states the foreclosure of a mortgage may be made in one of them. *Blackburn v. Selma, Marion and Memphis R. R. Co.*, 2 Flippin (U. S. C. C.), 525. 1879.

201. — Where part of a railroad is in South Carolina and part in another state, the court should order a sale of the entire road, so much thereof as lay in the other state being sold subject to the liens existing in that state. *Hand v. Savannah and Charleston R. R. Co.*, 12 So. Car., 314. 1879.

202. — A mortgage was made by a railway company whose road ran through parts of the states of Delaware and Pennsylvania, of all its property, franchises, etc., to trustees, to secure the payment of certain bonds; default was made in payment of the interest, and as the trustees declined to sell the Delaware franchises and the Birdsboro extension of the road, the plaintiff, a bondholder, filed a bill asking for a decree directing the mortgaged premises to be sold as one property. *Held*, that the court had power to decree relief, notwithstanding that part of the railroad was in the state of Delaware. *Randolph v. Wilmington and Reading R. R. Co.*, 11 Philadelphia (U. S. C. C.), 502. 1876.

203. — If two railroad corporations, created by different states, join in making a trust deed conveying their joint property to secure bonds issued by them jointly, and suit is brought to enforce the trust in the district where one of the corporations resides, and it is served with process, and the other corporation, being a non-resident of the state or district where the suit is brought, enters its appearance, and files an answer jointly with the other, both will be bound by the decree of the court. *Wilmer v. Atlanta and Richmond Air Line R'y Co.*, 2 Woods (U. S. C. C.), 447. 1875.

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204. — The N. G. and W. R. Co. was incorporated under the laws of the states of Pennsylvania, Ohio and New York. A mortgage upon the Ohio division was executed to M., as trustee, and another and subsequent mortgage upon all the property in the three states was executed to T. and D., as trustees, who brought suit in each of the three states to foreclose the same. An agreement was entered into between M. and a majority of the bondholders under the Ohio mortgage and T. and D. extending the time of payment of the Ohio mortgage for three years, and changing the interest during such extended term from currency to gold. This agreement was not to take effect until confirmed by the courts in each of the three states. It has been confirmed by the court in Ohio, and is now presented to this court and a confirmatory order asked for upon the basis of the Ohio order, which application is opposed by some of the second mortgage bondholders. *Held*, that the agreement itself contemplates a distinct and independent approval by the courts of each one of the states in which actions are pending for the foreclosure of the mortgage and the sale of the company's property. A distinct and separate approval was what was in terms required, according to the conclusions reached as to the propriety of the agreement by the courts respectively of these different states; and that rendered an examination of the facts, upon which the application has been made, necessary for the purpose of determining whether such approval ought to be given. *Taylor v. Atlantic and Great Western R'y Co.*, 55 Howard's Practice (N. Y.), 275. 1877.

205. — A receiver was appointed under the petition for foreclosure in the state of New York. *Held*, that the courts of New York could not delegate the control of the receiver to the courts of Ohio. *Taylor v. Atlantic and Great Western R. R. Co.*, 57 Howard's Practice (N. Y.), 9. 1878.

206. — For foreclosure in case of a mortgage in several states, and the questions of practice arising thereunder, see *Taylor v. Atlantic and Great Western R. R. Co.*, 55 Howard's Practice (N. Y.), 275, 1877; 57 ib., 9, 1878; 57 ib., 26, 1873; *U. S. Rolling Stock Co.*, *In re*, 55 ib., 286, 1878; 57 ib., 16, 1878.

207. **Reorganization.** A plan for the reorganization of an insolvent railway company, which, among other things, provides that the holders of unsecured indebtedness shall receive second preferred income bonds of the new company at par to the full amount of their respective debts and interest, and also provides that the stockholders of the old company shall receive stock of the new company in exchange at a certain ratio, is not fraudulent and void as to the holders of the unsecured indebtedness. *Hancock v. Toledo, Peoria and Warsaw R. R. Co.*, 11 Bissell (U. S. C. C.), 148. 1882. Reorganization contract construed. *Child v. New York and New England R. R. Co.*, 129 Mass., 170, 1880; 2 Amer. & Eng. R. R. Cases, 329; *Hancock v. Toledo, Peoria and Warsaw R. R. Co.*, 9 Federal Reporter, 738. 1882.

208. — Plaintiff's complaint alleged in substance that the property and franchises of the T. W. and W. R. R. Co., of which he was a stockholder, were sold under a decree of foreclosure and were bid off by a committee of the holders of the bonds secured by the mortgage; that a portion of the stockholders disputed the validity of the sale, and a litigation arose which resulted in an arrangement under which said stockholders withdrew all opposition and were accorded by the purchasers of the road the right to take stock in a new company to be organized, upon certain terms specified, among others, that the option so to do must be made within thirty days, otherwise all rights should be forfeited; that in pursuance of this arrangement, defendant, the W. R. Co., was organized and is operating the road, and possesses the rights and property of the old company and has issued stock under the agreement; that plaintiff had no knowledge or notice of this agreement until after the expiration of the thirty days; that when notified he tendered performance on his part and demanded his proportionate share of the new stock, which was refused. The other defendants were the purchasing committee, who were authorized to carry out the said agreement. Plaintiff asked damages for the refusal. *Held*, that a demurrer to the complaint was properly sustained. If the foreclosure sale was valid, the plaintiff's

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legal rights were cut off; if invalid, his right to attack it was not impaired by the agreement unless he elected to come in and ratify it, in which case he could not vary its terms. *Thornton v. Wabash R'y Co.*, 81 N. Y., 462. 1880.

209. — The right of a stockholder in a railroad company to demand an exchange of stock, pursuant to a plan for reorganization after foreclosure of the road, is not forfeited by failure to pay the assessment pursuant to a notice published in the newspapers, which is not brought home to his knowledge, where the stock of the new company to which he would otherwise be entitled has not been sold or disposed of. In such case notices published in New York are admissible in evidence, but those published in a foreign country are not. *Vatable v. N. Y., Lake Erie and Western R. R. Co.*, 11 Abbott's New Cases (N. Y.), 133. 1882. See, also, *Same v. Same*, 9 ib., 271. 1881.

210. — Certain persons projected the formation of a new railway company, founded on a foreclosure sale of a company already existing, and published a scheme of reorganization, and it directed the holders of first mortgage bonds, who wished to join in such reorganization, to deposit their bonds with the Central Trust Co. of New York, and appointed a permanent committee, having a president and secretary, with a place of business in New York city. A bondholder presented his bond to the Central Trust Co., but, on account of some irregularity in it, was referred to the committee above referred to. The president and secretary accepted the bond. *Held*, that such acceptance bound the new company, the committee having been held out to the public as its general agent in the business of organizing the new company. *Midland R. R. Co. of New Jersey v. Hitchcock*, 37 N. J. Eq., 549. 1883.

211. — The provisions of the Railroad Acts (§ 1, ch. 282, Laws 1854; § 1, ch. 469, Laws of 1873; § 1, ch. 710, Laws of 1873) authorizing the purchasers on foreclosure sale of the property and franchises of a railroad company, to organize a new corporation for the purposes of the transfer, do not prevent a sale or transfer by such a purchaser to a company already existing, and capable of holding the property and exercis-

ing the franchises; the authority so given was intended to meet a case where there is no such existing corporation. *People v. Brooklyn, Flatbush and Coney Island R'y Co.*, 89 N. Y., 75, 1882; 9 Amer. & Eng. R. R. Cases, 454.

212. Rights of mortgage creditors. Persons belonging to a class represented in the suit, such as mortgage creditors represented by the trustees of the mortgage, are regarded as *quasi* parties, and may be heard on petition or motion. *Anderson v. Jacksonville, etc., R. R. Co.*, 2 Woods (U. S. C. C.), 628. 1873.

213. Right of way of railroad; town lot. The judgment of foreclosure, where the mortgage is paramount to the right of way, should direct the sale of the property, subject to the right of way, or, that being insufficient to pay the mortgage debt, then the sale of such right of way, either with the lot or independent of it, as shall be most advantageous. *Severin v. B., C. R. and M. R'y Co.*, 38 Ia., 463. 1874.

214. Set-off. The Walkkill Valley R'y Co. having made default in the payment of the interest on the mortgage bonds issued by it, the plaintiffs, the trustees under the mortgage, in pursuance of the terms thereof, entered into possession of the road in May, 1873, and received the rents and tolls for the benefit of the bondholders. Subsequently the mortgage was foreclosed and the road sold to the plaintiffs. An action was brought to recover money due to the road for transporting the mails for the half year ending December 31, 1873, received by the defendant, who had acted as agent for the road in collecting such money from the treasury department, and which he refused to pay over, he claiming to be entitled to set off against this amount a note given by the company to him in October, 1872, due one year after date. *Held*, that, as the plaintiff's right to receive the earnings of the road became absolute in May, 1873, at which time defendant's note had not yet become due, no set-off thereof could be made in this action. *Murray v. Deyo*, 10 Hun (N. Y.), 3. 1877.

215. Sinking fund. Provision for the payment of bonds secured by a mortgage on defendant's railway was made by agreement

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that the defendant should deposit a fixed amount of money annually, as a sinking fund, with the complainant as trustee, and the bonds themselves prescribed that the sinking fund should be invested in certain other specified bonds of the defendant. *Held*, that the court would not, in the absence of the bondholders, direct the trustee to invest the sinking fund in other bonds of the defendant than those specified as secured by the same mortgage, but bearing a lower rate of interest, merely because the bonds required by the terms of the trust could only be purchased at a premium. *Fidelity Insurance, Trust and Safe Deposit Co. v. United New Jersey R. R. and Canal Co.*, 12 Amer. & Eng. R. R. Cases, 404; 36 N. J. Eq., 405. 1883.

216. State and federal courts. Where the supreme court of the state has declared a foreclosure of a mortgage to be *bona fide*, such decision is obligatory upon the federal courts. *Sullivan v. Portland and Kennebec R. R. Co.*, 4 Clifford (U. S. C. C.), 212. 1874.

217. — A trustee of a first mortgage upon a portion of a railroad cannot plead the pendency of suit by him for foreclosure in the United States court in bar of a foreclosure suit in a state court against him and others, by trustees of a subsequent mortgage, covering the entire property of the company, including that mortgaged to him, especially when, on account of their citizenship, his bill in the United States court was dismissed as to the complainants in the state court. *Meyer v. Johnston*, 53 Ala., 237, 1875; 9 Amer. R'y Rep., 454.

218. — The rule that of two courts of concurrent jurisdiction, the one first giving jurisdiction over the parties and subject matter of a suit retains it to the exclusion of the other, applies only where suits brought in the two courts involve the same parties and the same subject matter. *Boston and Providence R. R. Corp. v. New York and New England R. R. Co.*, 12 R. I., 220. 1878.

219. — Where a suit for foreclosure was pending in the state courts, but the parties were not identical, and the same relief was not asked in both cases, it was held that the suit in the state court would not prevent the prosecution of an action in the federal

courts for foreclosure of the same mortgage. *Brooks v. Vermont Central R. R. Co.*, 14 Blatchford (U. S. C. C.), 463. 1878.

220. — Where a receiver has been appointed by the state court the federal court will proceed with the cause, but will not interfere with the possession of the receiver of the state court. *Mercantile Trust Co. v. La-moille Valley R. R. Co.*, 16 Blatchford (U. S. C. C.), 324. 1879.

221. — A creditor who is not a party to a general creditor's bill may sue upon his mortgage lien in the federal court, notwithstanding the pendency of such bill in the state courts. *Parsons v. Greenville and Columbia R. R. Co.*, 1 Hughes (U. S. C. C.), 279.

222. Stockholders. Where the stockholders, having full knowledge of all the facts and an opportunity to move in the original suit before decree, or to file a bill immediately upon the rendition of the decree, failed to do either for a period of four years, and in the meantime the decree had been fully executed, the property sold thereunder to a new company and the sale confirmed, and the stock and bonds of the new company gone into the market, it is too late for them to obtain relief from a decree alleged to have been obtained by fraud. *Pacific R. R. Co. v. Missouri Pacific R'y Co.*, 13 Federal Reporter, 641; 2 McCrary (U. S. C. C.), 237. 1881.

223. — Upon the question of notice there is no distinction between the corporation and its officers or stockholders; so, if stockholders were advised of the foreclosure suit, and of the facts charged as constituting fraud in the execution of the bonds and mortgages sued on in the original suit, and had an opportunity to intervene and defend, and did not do so, the corporation is concluded by their laches. *Ib.*

224. — A stockholder of a defunct corporation has such an interest as entitles him to defend a suit brought to foreclose a mortgage alleged to have been executed by the corporation in its life-time. So has one who has acquired an independent title to part of the lands embraced in the mortgage. *Chouteau v. Allen*, 70 Mo., 290. 1879.

225. Unpaid land damages. A railway company, being unable to agree with a land owner for a right of way, gave a bond and

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took possession for railway purposes. Subsequently the railway and property were sold under foreclosure of a mortgage. *Held*, in a proceeding by *scire facias* against the purchasers to compel the payment of land damages, that the purchaser took a clear title, and that the owner of the land was thrown back upon the bond for his said damages. *Fries v. Southern Pennsylvania R. R., etc., Co.*, 85 Pa. St., 73, 1877; 18 Amer. R'y Rep., 375.

226. — A railway company took a tract of land under the right of eminent domain. Subsequently it mortgaged its property to trustees to secure bonds to a certain amount, which stated that "the mortgage was the first and only lien on the property and franchises of the company when the existing mortgage debt is retired." The making of this mortgage was ratified by the legislature. The mortgage was afterwards foreclosed, and the bondholders formed a new corporation; and their acts were confirmed by the legislature, and the new company was vested with all the franchises, powers and privileges of the old company, and made subject to all the restrictions, duties and liabilities set forth in the general law relating to railway companies, then or thereafter in force. *Held*, that the new company might properly be made a party respondent to a petition for damages, originally filed by the person whose land had been taken against the old corporation, and might be restrained from using or occupying the land, unless the damages were paid or secured to the land owner. *Drury v. Midland R. R. Co.*, 127 Mass., 571. 1879.

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227. Charter. Act 96 of 1859 permits the purchasers on a foreclosure sale of the property of a railway company to exercise the charter powers of the corporation on certain conditions, and frees them from liability for any debts embraced in the foreclosure. *Cook v. Detroit, Grand Haven and Milwaukee R'y Co.*, 43 Mich., 349, 1880; 9 Amer. & Eng. R. R. Cases, 443.

228. Combination of bidders. A combination of bidders held not to be inequitable under the facts of the case. *Walker v. Mont-*

clair and Greenwood Lake R'y Co., 30 N. J. Eq., 525. 1879.

229. Combination of creditors. The creditors of a mortgagor may fairly combine to purchase the property of the debtor at mortgage sale, and other creditors are not, by such combination, deprived of the right to bid at such sale. *Kropholler v. St. Paul, Minneapolis and Manitoba R'y Co.*, 2 Federal Reporter, 302; 1 McCrary (U. S. C. C.), 299. 1880.

230. Costs. Where a decree of foreclosure of a mortgage upon a railroad had been obtained by the mortgage bondholders and a sale of the road had taken place thereunder, at which a certain corporation not a party to the foreclosure was the bidder, and the transfer of its bid to the trustees of the bondholders was subsequently approved by the court rendering the decree, it was held that the officer's fees for the sale should be the same as if the execution plaintiffs had been the immediate purchasers. *Gilman v. Des Moines Valley R. R. Co.*, 42 Ia., 495. 1876.

231. Deed of trust; sale on notice. A sale on notice, under the provisions of a trust deed, is effectual to divest the title of a railway company without foreclosure in the courts. *Brunswick and Albany R. R. Co. v. Hughes*, 52 Ga., 557, 1874; 7 Amer. R'y Rep., 137.

232. Earnest money. Upon the sale of a railway, it is customary and reasonable to require cash sufficient to pay costs and other claims demanding immediate payment. But the officer conducting the sale should not be authorized to exact a cash advance previous to the close of the biddings. *Hand v. Savannah and Charleston R. R. Co.*, 13 So. Car., 467; 12 Amer. & Eng. R. R. Cases, 488. 1881.

233. Execution. A railway may be levied upon and sold under execution on a judgment in favor of a mortgage creditor. Reversing *County of Drummond v. South Eastern R'y Co.*, 22 Lower Canada, Jurist, 25, 1878; *Same v. Same*, 24 ib., 276, 1879.

234. Fraud. Where the local managers and officers of an embarrassed railway company holding a small portion of its bonds, of which a much greater portion was held by non-residents, got an order of sale under a mortgage, and proceeded in a hasty and

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rather secret way to sell it, and to buy it at a price much below its value, for themselves, the conditions of sale being made such as to render it difficult for persons generally to purchase, and the whole proceeding of sale being attended also with evidences of gross disregard of the interests of the bondholders generally, and of course of the stockholders, *held*, that the sale should be set aside. *Jackson v. Ludeling*, 21 Wallace (U. S.), 616, 1874; 6 Amer. R'y Rep., 457.

235. — Where a sale is set aside for fraud, the purchasers, under the Civil Code of Louisiana, are entitled to compensation for repairs. *Jackson v. Ludeling*, 99 U. S., 513. 1878.

236. — The second mortgage not covering certain portions of the property of the North Missouri R. R. Co., the Illinois, Missouri and Kansas association, for the express purpose of acquiring those portions, bought up the greater part of the floating debt of the company at a discount, caused judgments to be obtained against the company on these claims at their face value, in the name of individual members of the association, had the road with all its property again sold under these judgments, and became the purchaser. The directors of the North Missouri R. R. Co. were at the time members of this association, but they were also creditors of the company to a very large amount, and were liable on its obligations as indorsers, and other members of the association were also creditors to a large amount. *Held*, that none of these circumstances rendered the sale *per se* fraudulent and void. The judgment for the face value of the claims may have been excessive and improper, but before there could be a divestiture of the title acquired under the sale, equity would, at the very least, require the plaintiffs to repay the amount actually expended in purchasing them. *Kitchen v. St. Louis, Kansas City and Northern R'y Co.*, 69 Mo., 224. 1878.

237. — The Northern Missouri R. R. Co. being heavily indebted and unable to negotiate a sale of its bonds, an association was formed, the object of which, as expressed in its articles, was the purchase of the bonds, and ultimately, if found profitable to do so, the purchase of the road itself, provided the association could obtain control of the com-

pany. The bonds were subsequently purchased of the company, and the association was allowed to name a majority of the directors. This transaction being assailed as fraudulent, because the control of the company was surrendered to the association, and because the association looked to the ultimate acquisition of the road, *held*, that these facts did not establish fraud. The control of the directory was nothing more than a proper security for the due application of the money advanced on the bonds. *Ib.*

238. — The law does not prohibit the creditors of a corporation from combining for the purpose of protecting themselves, by purchasing its property when legally brought to sale, provided it is no part of the agreement to prevent competition at the sale or to use any unfair advantage. *Ib.*

239. Jurisdiction. Where a judicial sale of a railway was made by the Fayette circuit court, and the supervision of the property sold was retained by that court for this purpose of carrying out the terms of sale, the Kenton circuit court has jurisdiction in an original action to charge the purchaser as a trustee for the corporation. Neither court will be required to subordinate itself to the other. *Covington and Lexington R. R. Co. v. Bowler*, 9 Bush (Ky.), 468. 1872.

240. Payment in bonds. If bondholders secured by a mortgage on a railroad purchase the entire property at a foreclosure sale, they have an equitable right, after satisfying the costs and charges of the litigation and trust, to pay the residue of their bid in bonds, so far as to cover their own proportion of such residue. *Duncan v. Mobile and Ohio R. R. Co.*, 3 Woods (U. S. C. C.), 597. 1879.

241. Postponement of sale. The fact that a railroad begins, after a period of financial adversity, to show a prosperous state of earnings, indicating that in a few years it will be able to pay off an accumulation of overdue and unpaid interest, does not furnish ground for a postponement of its sale in foreclosure;— especially if the company owning the railroad offers no guaranty that such prosperity will continue. But a court of equity will take the responsibility of delaying a sale to await a better

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condition of financial prosperity than exists at the time of the decree. *Duncan v. Atlantic, Miss. and Ohio R. R. Co.*, 4 Hughes (U. S. C. C.), 125. 1882.

242. Proceedings to set aside sale. Application to set aside a master's sale refused, no improper control of complainant's solicitor over the adjournments, nor any surprise upon the petitioner, appearing; nor that any greater price could be obtained upon a resale, or that a resale could in any way benefit the petitioner. *Hewitt v. Montclair R'y Co.*, 25 N. J. Eq., 392. 1874.

243. — In order to set aside a master's sale in foreclosure proceedings on account of the inadequacy of the bid, it is not sufficient to show that the property has not realized its full value; the price must be so inadequate as to show that it is not the result of fair dealing and an honest purchase. *Turner v. Indianapolis, Bloomington and Western R'y Co.*, 8 Bissell (U. S. C. C.), 380. 1878.

244. — Where this court modified a decree of foreclosure, giving the mortgagor the right to have an account taken against the party in possession of the road up to the date of the master's deed, or up to the time of the rendition of a new decree in case the sale was set aside, and giving the mortgagor leave to move the court below to vacate the sale, and the mortgagor came into court and requested it not to set aside the sale, but to have an account stated up to the time the master made the deed, it was held that this action was a waiver of the right to afterwards insist upon a motion to vacate the sale. *Racine and Mississippi R. R. Co. v. Farmers' Loan and Trust Co.*, 86 Ill., 187. 1877.

245. — Where a bill for relief was brought fourteen years after the making of a railroad mortgage, ten years after the commencement of bankruptcy proceedings against the railroad corporation, nine years after the entry of the decree of foreclosure of the railroad mortgage, and seven years after the decree of foreclosure became absolute, and the road was conveyed to the new corporation by trustees lawfully appointed, and during all this time the records of the courts, upon which appear all the proceedings by which the alleged fraud is claimed to have been consummated, have been open

to inspection and examination, and what has been done might have been known to plaintiff if he had made inquiry, a court of equity will not grant relief. *Graham v. Boston, Hartford and Erie R. R. Co.*, 14 Federal Reporter, 753. 1883.

246. Proceeds of sale. The city of Logansport issued its bonds to aid the L. C. and S. W. R'y. The contract between the parties required the railway to be finished to the city, and in case of failure the company was bound to pay \$40,000 penalty as liquidated damages. The road was not finished and passed into the hands of a receiver. The city issued its bonds as agreed. Upon the sale of the railway, the city applied for the payment of the penalty out of the proceeds of the sale. *Held*, that the proceeds could not be so applied. *Farmers' Loan and Trust Co. v. Logansport, Crawfordsville and South Western R'y Co.*, 4 Federal Reporter, 184. 1880.

247. Purchase by president of the company. Where the property of a railroad company is sold under a decree of foreclosure, at which all persons are authorized to bid, the fact that it is purchased by the president of the company in his individual right will not in itself raise a trust relation between him and a holder of the bonds of the company which will entitle the latter to treat him as a trustee of the property so purchased. *Credit Co. v. Arkansas Central R'y Co.*, 15 Federal Reporter, 46. 1882. See, also, *Covington and Lexington R. R. Co. v. Bowler*, 9 Bush (Ky.), 468. 1872.

248. Purchase by solicitor. The purchase by the solicitor of a railroad company of its property at a judicial sale, made pursuant to a decree in a foreclosure suit, is not of itself necessarily invalid. It will, however, be closely scrutinized, but, until impeached, must stand. *Pacific Railroad Co. v. Ketchum*, 101 U. S., 289. 1879.

249. Purchase by trustee. The trustees who made a sale under a mortgage were themselves members of the association which made the purchase, their interest amounting to one thirty-fourth part of the whole capital of the association. *Held*, that this fact did not render the sale void, but it gave the company the right to redeem, provided the right was exercised within a rea-

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sonable time and before the intervention of new equities. *Kitchen v. St. Louis, Kansas City and Northern R'y Co.*, 69 Mo., 224. 1878.

250. — In the mortgage of a railroad it was covenanted and agreed by all the parties thereto, that, in case of a foreclosure sale of the mortgaged property under a decree, the trustee named in the mortgage should, on the written request of the holders of a majority of the then outstanding bonds thereby secured, purchase the property at such sale for the use and benefit of the holders of such bonds, and that the right and title thereto should vest in him, no holder to have any claim to the proceeds except his *pro rata* share thereof, as represented in a new company or corporation, to be formed for their use and benefit; and that the trustee might take such lawful measures to organize a new company for their benefit, upon such terms, conditions and limitations as the holders of a majority of the bonds should in writing request or direct, and he should thereupon reconvey the premises so purchased to such new company. On default of payment a suit was brought by the trustee against the mortgagor and subsequent mortgagees, praying for a foreclosure of the first mortgage and for general relief. *Held*, that such an agreement inures equally to the benefit of such bondholders, and that each holds his interest subject to the controlling power given to the majority of them. *Sage v. Central R. R. Co.*, 99 U. S., 334. 1878.

251. **Purchaser's liability.** A common law action for the debt of a railway company cannot be maintained against those who have obtained control of its franchises by a purchase of its track and appurtenances on foreclosure of a mortgage securing other indebtedness. *Cook v. Detroit, Grand Haven and Milwaukee R'y Co.*, 43 Mich., 349, 1880; 9 Amer. & Eng. R. R. Cases, 443.

252. — A railroad having been sold by order of court to pay the debts of the corporation, the purchaser is not responsible for injuries done by the railroad to adjoining lands before the sale. *Hammond v. Port Royal and Augusta R. R. Co.*, 15 So. Car., 10, 1880; 11 Amer. & Eng. R. R. Cases, 352.

253. — A. and B., two railway companies, entered into an agreement under seal, by which B. was admitted to the permanent

use, jointly with A., of a portion of the track owned by A., on certain expressed terms. The portion of the track subject to the contract was used by A. and B. jointly for some time, until B., becoming insolvent, its franchise, together with its line of road and all its tangible property, was sold and purchased by C., another and distinct company, and thereupon C. for some time used the said portion of A.'s track, but afterwards abandoned its use. *Held*, that C. had become liable to A. to perform obligations which the terms of the contract imposed upon B. *South Carolina R. R. Co. v. Wilmington, Columbia and Augusta R. R. Co.*, 7 So. Car., 410. 1875.

254. — C. became the purchaser under a decree to foreclose certain mortgages, some of which bore date before the contract between A. and B. *Held*, that this did not discharge C. from its obligations under the contract. *Id.*

255. — A railway company organized under the provisions of § 1820, R. S., with power to purchase the franchises and property of an older company, previously sold under a mortgage, as well as to construct and operate other lines, is not, by virtue of such purchase, an assignee of the older company so as to be bound by any of its contracts except such as are a lien upon or otherwise bind the property and franchises thus purchased. *City of Menasha v. Milwaukee and Northern R. R. Co.*, 52 Wis., 414, 1881; 5 Amer. & Eng. R. R. Cases, 300.

256. — A railway company, having power to extend its track from its depot in the plaintiff city through the city of Neenah, so as to connect with the Wisconsin Central Railroad, entered into a contract with the city, for a valuable consideration, not to make such connection. *Held*, that this (if valid) was a mere personal contract, binding only said company and such persons as may be, in a strict sense, its successors or assignees. *Id.*

257. — The property of a railway company having been conveyed to a trustee for the benefit of its bondholders, by a trust deed or mortgage providing that he should receive the earnings and pay the running expenses of the road, which road, with all its appurtenances, having been sold to the bond-

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holders to satisfy such indebtedness, a company was reorganized and the line run under a new corporate name; whereupon the holder of a judgment which had been obtained against the old company during the management of the trustee, for killing stock, brought suit against the new company to obtain the amount of such judgment, alleging that the trustee had failed to pay the same, but had paid all the earnings to the bondholders. *Held*, on demurrer, the complaint not alleging what amount, if any, of the earnings had ever been received by such trustee, that it is insufficient. *Nicholson v. Louisville, New Albany and Chicago R'y Co.*, 55 Ind., 504, 1876; 16 Amer. R'y Rep., 258.

258. Sale pending litigation. Where the amount of claims to be allowed against a railroad depends upon a long course of litigation, it is proper for the court to order the property sold, to be subject to such claims as are finally adjudicated. *Turner v. Indianapolis, Bloomington and Western R'y Co.*, 8 Bissell (U. S. C. C.), 380. 1878.

259. Subsequent proceedings. After confirmation of the sale of a railroad under decree of foreclosure, holders of the mortgage bonds will not be allowed at a subsequent term to be made parties to the original foreclosure suit, for the purpose of impeaching the decree, sale and confirmation as fraudulent, although in the order of confirmation the power to make further orders is expressly reserved. *Wetmore v. St. Paul and Pacific R. R. Co.*, 3 Federal Reporter, 177; 1 McCrary (U. S. C. C.), 466. 1880.

260. Time of sale. Where the rights of the several classes of creditors of a railway company have been declared, and the condition of the railroad demands an early sale, such sale will not be postponed until the interests of individual creditors have been adjusted, and the class to which their demands belong has been ascertained. *Hand v. Savannah and Charleston R. R. Co.*, 13 So. Car., 467. 1880.

XII. REDEMPTION.

261. Bill to redeem; operation by trustee. A railroad corporation executed a mortgage of its road and other property to a trustee, to

secure payment of its bonds. The bonds not being paid at maturity, the trustee took possession under the mortgage, and for several years controlled and managed the road and property on behalf of the bondholders. On a bill in equity, brought by the corporation and several stockholders therein, against the trustee and others for an accounting, and to redeem, *held*, that the trustee, while so in possession, must be regarded as the trustee of the corporation as well as of the bondholders. *Ashuelot R. R. Co. v. Elliot*, 57 N. H., 397. 1874.

262. Costs. A rule of the federal court requiring a person redeeming from a mortgage sale to pay, in addition to the amount required to effect redemption, a commission of one per cent. to the clerk, sustained. *Blair v. Chicago and Pacific R. R. Co.*, 11 Bissell (U. S. C. C.), 320, 1882; *Blair v. Chicago and Pacific R. R. Co.*, 12 Federal Reporter, 750, 1882.

263. Equity of redemption. Where the owner of the equity of redemption in mortgaged lands has assigned for the benefit of his creditors, he retains such an interest that he may apply to set aside a sale of the lands under foreclosure, notwithstanding the assignment. *Delaware, Lackawanna and Western R. R. Co. v. Scranton*, 34 N. J. Eq., 429. 1881.

264. — rights of creditors. A railway company cannot defeat the right of its creditors to sell the equity of redemption by executing a deed of trust with long time to run, etc. To hold that it could would be a violation of the Code (§ 2414). Nor are the judgment creditors limited to a bill to obtain satisfaction of their judgments to the earnings or the income of the company. To so hold would not only deprive them of what they are entitled to under the law, but would recognize the right of a railroad company to secure itself in the possession and enjoyment of its property for an indefinite time, and compel all of its creditors to resort to the means it has provided for their payment, and not to those the law has given. *Vicksburg and Meridian R. R. Co. v. McCutchen*, 52 Miss., 645. 1876.

265. Judgment creditors. Real estate sold at judicial sale, in part satisfaction of a personal judgment and decree foreclosing a

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prior mortgage lien, may, upon being deemed from such sale by a purchaser thereof at a sheriff's sale of the same on a junior judgment lien, be sold to satisfy the residue of such mortgage judgment, notwithstanding the fact that, at the time of the latter sale, the debtor has other property subject to execution. *Cauthorn v. Indianapolis and Vincennes R. R. Co.*, 58 Ind., 14. 1877.

266. No redemption. There is no redemption from the sale of railroad property under foreclosure proceedings in the federal courts in the seventh circuit. *Turner v. Indianapolis, Bloomington and Western R'y Co.*, 8 Bissell (U. S. C. C.), 380. 1878.

267. — Where a railroad, its appurtenances and franchises, are mortgaged as a whole, there is no power or authority to sell them separately. Such property not being, strictly speaking, either real or personal estate, when sold on a decree of foreclosure is properly sold without any right of redemption. The rule is founded partly upon considerations of public policy. *Peoria and Springfield R. R. Co. v. Thompson*, 103 Ill., 187, 1882; 7 Amer. & Eng. R. R. Cases, 101.

268. Rents. A mortgage of real property was assigned as collateral security for a debt other than the mortgage debt to the commissioners of the sinking fund of the Western R. R. Co., who held their offices under the St. of 1839, ch. 50, and was foreclosed by them. Subsequently, by a bill in equity brought by A. against the assignor, a decree was entered by consent that A. was entitled to the land, subject to the mortgage held by the commissioners. A. took possession of the land and received the rents and profits, and afterwards, the interest and taxes not being paid, surrendered the land to the commissioners, and they took possession, and, acting with proper care, appointed an agent, who, by reason of wilful or gross negligence, failed to collect such rents from the property as a prudent owner, by the exercise of reasonable care, might have realized. Held, on a bill in equity by A. to redeem, that the commissioners were bound to exercise such care and diligence in the management of the land as a prudent owner would exercise under like circumstances, and were liable for the negligence of the agent. *Montague v.*

Boston and Albany R. R. Co., 124 Mass., 242. 1878.

269. Stay of proceedings. A mortgagor, who incumbers an embarrassed title, cannot obtain a stay of proceedings on account of an apprehension that the mortgaged premises will not bring their full value at a judicial sale. His remedy is by redemption. *American Dock Co. v. Trustees of Public Schools*, 35 N. J. Eq., 181. 1882.

270. Time. Redemption may be made at any time before confirmation of the sale. *Howell v. Western R. R. Co.*, 94 U. S., 463, 1876; 16 Amer. R'y Rep., 188; *Chicago and Vincennes R. R. Co. v. Fosdick*, 106 U. S., 47, 1882.

271. Trustee. An application to compel a trustee for mortgage bondholders to redeem certain property refused; the necessities of the trust estate not being regarded by the court such as to make it its duty to make the order. *Williamson v. New Jersey Southern R. R. Co.*, 27 N. J. Eq., 225. 1876.

XIII. TRUSTEES.

272. Appointment. The appointment of trustees under the St. of 1876, ch. 236, to receive a mortgage to be made to them by the Eastern R. R. Co., may be made in the exercise of the equity jurisdiction of the court; and the trustees so appointed may be ordered at any time thereafter to report or account to the court, without any express provision to that effect in the statute or in the order of appointment. *Eastern R. R. Co., In re*, 120 Mass., 412. 1876.

273. Bonds. The trustee can enforce the payment of bonds given to him to secure a just debt; but he cannot do so when the money for which the debt was incurred did not go to increase the fund from which the bondholders are entitled to payment. *Duncomb v. N. Y., Housatonic and Northern R. R. Co.*, 22 Hun (N. Y.), 133. 1880.

274. Compensation. A trustee held entitled to the compensation agreed upon, notwithstanding that the mortgage was not fully issued, and another issued in its stead. *Maury v. Chesapeake and Ohio R. R. Co.*, 27 Grattan (Va.), 698. 1876.

275. — When a mortgage upon a railway and its lands stipulated, *inter alia*, that the

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proceeds of the sale of the mortgaged lands were to constitute a sinking fund for the discharge of the bonds secured by the mortgage; that the holders of any mortgage bonds should have the privilege of purchasing lands with the same at not less than a fixed minimum price; that the trustees of the bondholders should be required to cancel the bonds so received, and that "for services in selling and conveying the lands herein described, and applying the proceeds to the sinking fund," the trustees were to receive "two per cent. on the par amount of the bonds canceled," *held*, that a sale of lands and payment in bonds were equivalent to a sale for cash, and that the trustees were entitled to two per cent. on the par value of bonds received in exchange for lands and canceled. *Gilman v. Des Moines Valley R. R. Co.*, 41 Ia., 22. 1875.

276. — A trust deed by a railroad company provides that upon a sale of the trust property by the trustees out of the proceeds of sale, after satisfying the costs and expenses of sale and of this trust, the trustee shall pay to the holders of the bonds secured thereby the amount so held by them. If the trustee has performed services in executing the bonds, etc., for which he is entitled to compensation, he is entitled to be paid for these services in preference to the bondholders secured by the deed. *Smith v. Washington, Va. Midland, etc., R. R. Co.*, 33 Grattan (Va.), 617, 1880; 1 Amer. & Eng. R. R. Cases, 493.

277. — A trustee having removed to a foreign country, and thus having become incapacitated from performing the trust, cannot delegate his trust to another so as to entitle himself to the compensation of a trustee. So held where the bondholders had selected another trustee. *Hughes v. Chicago, Milwaukee and St. Paul R'y Co.*, 47 N. Y. Superior Ct., 531. 1881.

278. — The sufficiency of the pleadings determined. *Hughes v. Chicago, Milwaukee and St. Paul R'y Co.*, 45 N. Y. Superior Ct., 114. 1879.

279. Death of a trustee. Where, to secure bonds issued by a railroad company, the franchise, road-bed and appurtenances are conveyed to trustees jointly, the trust does not, upon the death of one, descend to

his heirs, but vests in the other; and it is unnecessary to make the heirs of the deceased trustee parties to a bill in chancery to foreclose a prior mortgage. *McAllister v. Plant*, 54 Miss., 106. 1876.

280. — A mortgage of railway property was made to one, his heirs and assigns, as trustee for bondholders. Under proceedings for foreclosure, the mortgagee being dead, another trustee was substituted and decree of foreclosure rendered. Afterwards a petition was filed by a son of the original mortgagee, claiming to be his heir-at-law, and praying to be made a party. Petition dismissed. *Gibbes v. G. and C. R. R. Co.*, 13 So. Car., 228, 1879; 4 Amer. & Eng. R. R. Cases, 459.

281. Expenses of trustee. Trustees have an inherent equitable right to be reimbursed for all expenses reasonably incurred in the execution of the trust; and it is immaterial that there are no provisions for such expenses in the instrument of trust. All such expenses are a lien upon the trust property; and the trustee will not be compelled to part with the property until such expenses are paid. *Rensselaer and Saratoga R. R. Co. v. Miller*, 47 Vt., 146. 1874.

282. Power of corporation to execute mortgage. Trustees in junior mortgages, who are parties defendant to a bill to foreclose a senior mortgage given by a railroad company on its franchise, road-bed and appurtenances, cannot be heard to say that the corporation had no power to execute such an instrument. *McAllister v. Plant*, 54 Miss., 106. 1876.

283. Powers of trustees. A mortgage of a railroad to trustees, which gives them power to take possession of the road and use it in certain contingencies, and, at their discretion, on certain conditions, to sell it, contemplates that they may do the former only, or both. The trustees need not confine themselves to either measure, but may first enter and then sell, using the road for the purposes of the trust until a sale is effected. *Macon and Augusta R. R. Co. v. Ga. R. R. Co.*, 63 Ga., 103, 1879; 1 Amer. & Eng. R. R. Cases, 378.

284. — The trustee represents the bondholders in all legal proceedings carried on by him affecting his trust, to which they are

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not actual parties, and whatever binds him, if he acts in good faith, binds them. *Shaw v. Railroad Co.*, 100 U. S., 605. 1879.

285. — Where trustees under the mortgage, of whom it is alleged in the bill that they had refused to proceed to realize on the security, apply to come in and be admitted as complainants, they must control the proceeding. *Richards v. Chesapeake and Ohio R. R. Co.*, 1 Hughes (U. S. C. C.), 28. 1875.

286. — By the terms of a mortgage executed by the W. S. E. P. R. Co., defendant C., as trustee, was authorized, in case of default, to commence foreclosure on request of holders of bonds to a certain amount; also, on written request of a majority of the bondholders, he was authorized to purchase on foreclosure sale, and to take measures to organize a new company for the benefit of the bondholders, upon such terms as a majority of them should direct, to which company he should convey the property. A default having occurred, and the proper request having been made, C. commenced foreclosure. Before sale plaintiff herein, as a bondholder, presented a petition asking for a stay of proceedings. An order was entered in the action, to which plaintiff's counsel assented, by which C. was directed to bid, "for the benefit of all the holders of the bonds," up to \$450,000. C. bid \$750,000, and took the title to the property. No request was made by a majority of the bondholders for C. to make the purchase. In an action brought by plaintiff to recover the amount of his bonds, *held*, that as against the plaintiff, C. had the right, and it was his duty, to make the purchase, and as no restraint as to the price was put upon him by the mortgage, and as the order did not forbid the offer of a higher price than that specified, but simply fixed the minimum price at which he should allow others to purchase, he had the right in his discretion to bid over that sum. C., after such purchase, upon a request of a majority of the bondholders, advertised the property for sale and sold it at public auction to the N. Y. E. R. Co. for \$100,000. *Held*, that such sale was unlawful; that the request of a majority of the bondholders gave no authority to make it, so long as any bondholder dissented and insisted upon the performance

of the trust; that if for any reason the due execution of the trust seemed to the trustee to be impossible, he should have sought the direction of the court. *James v. Cowing*, 82 N. Y., 449, 1880; 2 Amer. & Eng. R. R. Cases, 336.

287. **Removal of trustee.** When a court of equity was called on, for the purpose of preserving a trust estate situate mainly within its jurisdiction, to remove a non-resident trustee and appoint another in his stead, it had the power to do so *ex parte*, in a case where service on the absent trustee was impossible. The fact that such absent trustee was within the territory of a country at war with the country in which the court was sitting did not detract from the power of the court to remove him and appoint another, but furnished a good reason for its exercise. *Ketchum v. Mobile and Ohio R. R. Co.*, 2 Woods (U. S. C. C.), 532. 1876.

288. — Pending an action to remove the trustees under a mortgage made to secure the bondholders of a railroad, the defendants cannot, by bringing an action in another department against the prosecuting bondholders, on the theory that such bondholders are improperly resisting a scheme to which a large majority of the bondholders have assented, and which is for the best interest of all, obtain an injunction perpetually staying the action for their removal. *Farmers' Loan and Trust Co. v. McHenry*, 9 Abbott's New Cases (N. Y.), 235. 1878.

289. — The defendant was appointed by the plaintiff company trustee of a sinking fund to pay the debts of the corporation, and it was provided in the trust deed that the moneys of said fund might be invested, in the discretion of the trustee, in such securities as the president of the company or its board of directors might recommend. The trustee, without any previous direction, loaned a portion of said moneys to a banking firm of which he was the senior member, and which soon thereafter became insolvent. *Held*, that such action constituted a breach of trust, which it was not in the power of the board of directors to condone, their relation to the company being that of an agent to his principal. *North Carolina R. R. Co. v. Wilson*, 81 N. C., 223. 1879.

Receiver — Injunction — Lease.

290. Suit by bondholders. It is the positive duty of each trustee to protect the trust estate from any misfeasance on the part of his co-trustees, and to institute such proceedings as shall prevent it. *Wheetjen v. Vibbard*, 5 Hun (N. Y.), 265. 1875.

291. Vacancy. The manner of filling vacancies in trusteeships under the statutes of Maine determined. *Pillsbury v. Consolidated European and North American R'y Co.*, 69 Me., 394. 1879.

292. — removal of trustee to foreign country. The rights and duties acquired by and imposed upon a trustee under a mortgage executed by a railroad company are personal in their character and incapable of delegation. Where such trustee voluntarily removes to and becomes a resident of a foreign country, he incapacitates himself from discharging the duties of his office, and thereby vacates the same. *Farmers' Loan and Trust Co. v. Hughes*, 11 Hun (N. Y.), 130. 1877.

XIV. RECEIVER.

293. When receiver may be appointed. The mere fact that there has been a default in the payment of the debt is no ground for the appointment of a receiver, unless there be a stipulation in the mortgage that the mortgagee shall have the rents. *Tysen v. Wabash R'y Co.*, 8 Bissell (U. S. C. C.), 247. 1878.

XV. INJUNCTION.

294. Action by bondholder; parties. Where an action is brought by a bondholder of a corporation for an accounting and an injunction against a railroad company, wherein he makes the trustee under an income mortgage defendant, it must be alleged and proved that such trustee has been requested to bring such action, and that he neglected and failed to do so, and that he is, therefore, made a defendant in the action. *Morgan v. Kansas Pacific R'y Co.*, 15 Federal Reporter, 55. 1882.

295. — A party who is a sole trustee under an income mortgage of a railroad company is a necessary party to a suit against such company for an accounting

and an injunction, and on failure to join him as such the bill will be dismissed, although it is shown that he was not and could not be found within the district to be served with process, when the issue is as to whether he was requested and refused to sue. *Id.*

XVI. LEASE.

296. Redemption; ultra vires. The H., P. and F. R. R. Co., a Rhode Island corporation, executed in 1863 an agreement and lease to the B., H. and E. R. R. Co., a Connecticut corporation, whereby all the property and business of the former was transferred in perpetuity to the latter, the stockholders of the former to be remunerated by receiving stock in the latter, or by receiving a fixed price per share in money. This transfer was ratified by the legislature of Rhode Island in 1865. In 1866 the B., H. and E. R. R. Co. mortgaged its road. It subsequently became bankrupt, and was dissolved by a decree in Connecticut in 1873. The mortgagees foreclosed by equity proceedings in Rhode Island in 1875, and formed the N. Y. and N. E. R. R. Co., into whose possession the road passed by deeds from the mortgage trustees and from the assignees of the B., H. and E. R. R. Co. In December, 1875, certain stockholders of the H., P. and F. R. R. Co. filed in Rhode Island a bill in equity to set aside the agreement and lease to the B., H. and E. R. R. Co., and to redeem the H., P. and F. R. R. Co. from the mortgages executed by the B., H. and E. R. R. Co., alleging that the agreement and lease were *ultra vires*, that they were obtained by fraud, and that they were subject to certain conditions precedent, which had not been fulfilled. *Held*, that the agreement and lease were *ultra vires* and violated the rights of the dissenting minority of the stockholders of the H., P. and F. R. R. Co. *Boston and Providence R. R. Co. v. New York and New England R. R. Co.*, 13 R. I., 260, 1881; 2 Amer. & Eng. R. R. Cases, 300.

297. Rents; garnishment. A railway company leased its line to another corporation for five years, and afterwards mortgaged the same property to trustees, the

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mortgage providing that the mortgagees, on default of the payment of the semi-annual interest on the bonds for six months, might enter and take possession of the property and receive the rents and income. The mortgagees entered for default of payment of interest, and gave notice to the lessees to pay to them all rents then due or thereafter to accrue. At this time a large sum was due from the lessees for rent, and a few days after the entry a creditor of the lessors garnished the lessees as debtors of the lessors for the rents overdue. *Held*, that these rents were not taken by the attachment, but belonged to the mortgagees. *King v. Housatonic R. R. Co.*, 45 Conn., 226. 1877.

XVII. GENERAL MATTERS.

298. Bankruptcy; costs. Where the general creditors of a railway company obtained an order for the sale of the property in bankruptcy proceedings, and the property only sold for the amount of the liens thereon, the costs of the bankruptcy proceedings are not chargeable against the fund realized from the sale. Only the costs of the sale are properly chargeable against the fund. And, in such a case, the court has no power to adjust the claims of the trustee under the mortgage, nor to ascertain what is due to his counsel. *Blue Ridge R. R. Co., In re*, 2 Hughes (U. S. C. C.), 224. 1874.

299. Canadian statute; change of bonds. Bonds were executed in Canada, payable in New York. Subsequently the parliament of Canada passed an act authorizing the company to issue new bonds at a lower rate of interest, in substitution, and declaring the assent of the bondholders thereto. *Held*, that the owners of the bonds in the United States were not bound by the statute. *Gebhard v. Canada Southern R'y Co.*, 17 Blatchford (U. S. C. C.), 416, 1880; 1 Federal Reporter, 387, 1880.

300. Certificates. Where mortgage bonds of a railway company, past due, were funded by the company into registered certificates bearing a higher rate of interest, and giving additional time for the payment of the bonds, and there was no agreement, express or implied, between the bondholders and the company, that the acceptance of the certifi-

cates should operate as a waiver of the lien of the bonds, *held*, that the lien remained in force. *Skiddy v. Atlantic, Miss. and Ohio R. R. Co.*, 3 Hughes (U. S. C. C.), 320. 1877.

301. Charter. The Cornwall Minerals R'y Co.'s charter construed. *Harrison v. Cornwall Minerals R'y Co.*, 3 Amer. & Eng. R. R. Cases (Eng. Ch.), 606, 1881; *Same v. Same*, 1 ib., 601, 1880.

302. Consolidation of railway. The holder of the bonds of a railway and telegraph company payable to bearer, with interest semi-annually, secured on the income from the sale of its land and the operation of its road and line, which have passed by consolidation to another company, is a creditor having a specific lien upon the income of the property which has gone from his debtor into the hands of the other company, and he may file a bill in equity to enforce such lien after the default in payment of the principal of such bonds and interest according to the terms thereof. *Rutten v. Union Pacific R'y Co.*, 17 Federal Reporter, 480. 1883.

303. — One of these consolidated railroad companies, not having been able to pay the interest on its bonds, gave to the holders of the interest coupons the coupon bonds of the company for the amount of said interest. This was not a novation of the debt for the interest, and these bonds are secured by the mortgage. *Gibert v. Washington, Va. Midland, etc., R. R. Co.*, 33 Grattan (Va.), 586, 1880; 1 Amer. & Eng. R. R. Cases, 473.

304. — The Vermont Central R. R. Co., of which the Vermont and Canada R. R. Co. was an extension, leased the whole line of road, and subsequently a contract was made that, upon default in payment of rent for four months, the Canada Company might enter upon both roads, and take the whole income of them until the rent should be paid up, when the Central Company might resume control. The state court, in construing this lease and agreement, *held*, that the Vermont Central Company became the owner of the whole line, including the two roads, subject to certain rights and interests in the property of its mortgage bondholders, and the rent claims of the Vermont and Canada Company, and that the Vermont and Canada Company held and owned the right to a fixed annual rent, as a first charge on

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the income, arising from the use of said lines of road, and a right to compel the application of such income to the extinguishment of such rents, if in arrear. Subsequently the roads consolidated as the Consolidated R. R. Co. of Vermont, which issued \$7,000,000 of bonds, secured by mortgage of its roads and property to the American Loan and Trust Company, as trustee for the bondholders, to further secure which a mortgage was executed by the Canada Company, and the bonds delivered to the same trustee; \$1,000,000 of which, as a compromise, it was agreed should be accepted by the security holders of the Canada Company in place of all claim for rent, past and future. *Held*, that the mortgage executed by the Canada Company was a mortgage of the rent charge only, and that, as it had the right to deal with the rent, it had the right to change the security by the issue of the bonds as proposed; and, as it appeared to be for the benefit of the stockholders that such compromise should be carried out, the delivery of the bonds of the Consolidated Company to the stockholders of the Vermont and Canada Company would not be restrained. *Hazard v. Vermont and Canada R. R. Co.*, 12 Amer. & Eng. R. R. Cases (U. S. C. C.), 388. 1893.

305. Constitutional law. The New York and Erie R. R. Co., by various laws of Pennsylvania, was authorized to procure rights of way and construct its road through certain counties of that state. It purchased real estate and then executed several mortgages upon its property. An act was passed for the appointment of a commissioner to decide what portion of said lands were necessary for the use of the line, and that the residue might be sold; and, upon the mortgagees releasing their mortgages as to the residue, the mortgages should be ratified as to the other property of the corporation. The commissioner reported that lands, describing them, and containing eighty acres, were necessary for the use of the line, and his report was confirmed. The mortgagees released the residue. *Held*, that this was an executed grant on the part of the commonwealth, and was under the protection of the constitution of the United States, art. I, § 10, forbidding state laws to impair the obligation of contracts, and the constitution

of Pennsylvania, art. IX, § 17, forbidding the passage of such laws. *Drew v. New York and Erie R. R. Co.*, 81½ Pa. St., 46. 1870.

306. Contractor's lien. In an indenture of mortgage executed by a railroad corporation to trustees to secure bonds issued to raise moneys to pay off its existing indebtedness, and to complete and equip its road, the corporation covenanted with the trustees, among other things, that the expenditure of all sums of money realized from the sale of the bonds should be made with the approval of at least one of the trustees, and that his assent in writing should be necessary to all contracts made by the company before the same should be a charge upon any of the sums received from such sales; *held*, that a contractor, agreeing with the corporation to construct a portion of the road, and obtaining the assent of two of the trustees to his contract, and subsequently doing the work, did not acquire any lien for the payment of his work, under this covenant of the indenture, upon the funds received by the corporation from the bonds. *Dillon v. Barnard*, 21 Wallace, 430. 1874.

307. — To create, for future services of a contractor, a lien upon particular funds of his employer, there must be not only the express promise of the employer to apply them in payment of such services, upon which the contractor relies, but there must be some act of appropriation on the part of the employer relinquishing control of the funds, and conferring upon the contractor the right to have them so applied when the services are rendered. *Ib.*

308. Earnings. Where it is clearly implied by the terms of a mortgage executed by a railroad company that the latter was to hold possession and receive the earnings of the road until the mortgagees should take it or the proper judicial authority intervene, such possession gives the right to the whole fund derived therefrom, and renders it, therefore, liable to the creditors of the company as if no mortgage existed. *Gilman v. Illinois and Mississippi Tel. Co.*, 91 U. S., 603. 1875.

309. Exchange of bonds; ratification. A corporation having the power to issue its bonds to another corporation for the purpose

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of enabling it to exchange them for the bonds of the state, may ratify and affirm a former irregular issue of such bonds. *State v. Florida Central R. R. Co.*, 15 Fla., 690. 1876.

310. Execution. The bonds of a corporation cannot, before delivery, be levied upon under an execution. *Sickles v. Richardson*, 23 Hun (N. Y.), 559. 1881.

311. Forged bonds. Nine bonds were stolen from the T. and N. R. R. Co. At the time they were taken they were incomplete; the seal of the company and the certificate of the Union Trust Co., requisite to their validity, not having been affixed. Subsequently these were forged and affixed to the bonds, and the same were purchased by the plaintiff for value, and in good faith. In an action brought by him upon the bonds, held, that the company was not liable thereon. *Maas v. Missouri, Kansas and Texas R'y Co.*, 11 Hun (N. Y.), 8. 1877.

312. Indorsement by state. The remedies afforded by the statute are given to, and enforceable by, the state alone; they cannot be set up by the purchasers of the road, in a contest between them and the holders of indorsed bonds, secured also by the corporation's mortgage, to defeat the latter in foreclosing such mortgage, whatever might be their effect if the state were a party, and the holders of indorsed bonds, secured also by the corporation's mortgage, should seek to set up rights under the mortgage to embarrass the state in pursuing its remedies. *Kelly v. Ala. and Cincinnati R. R. Co.*, 58 Ala., 489, 1877; 21 Amer. R'y Rep., 138.

313. — Although railroad bonds be indorsed by the state in contravention and fraud of the internal improvement law, and the indorsement be therefore void, this will not release the corporation of its liability for such bonds, which the corporation has secured by a deed of trust upon its property. *Ib.*

314. Irredeemable bonds. The grant to a railway company of the general power to borrow money, and to issue bonds below par, will not authorize it to issue irredeemable bonds at a rate below par, entitling the holder to a contingent share in the profits, nor to execute a mortgage to secure such bonds. *McCalmont v. Philadelphia and*

Reading R. R. Co., 3 Amer. & Eng. R. R. Cases (U. S. C. C.), 163. 1881.

315. — A railway company has the power, without any specific authority being conferred by the charter, to accept a perpetual loan and to issue irredeemable bonds to the lenders. *Philadelphia and Reading R. R. Co.'s Appeal*, 4 Amer. & Eng. R. R. Cases (Pa.), 118. 1892.

316. Limitations. A mortgage is not barred in less than twenty years under the laws of Maryland. *Baltimore and Ohio R. R. Co. v. Trimble*, 51 Md., 99. 1878.

317. Lost bonds. The holders of lost bonds refused a distributive share, under the facts in the case. *Gibbes v. Greenville and Columbia R. R. Co.*, 15 So. Car., 224; 12 Amer. & Eng. R. R. Cases, 360. 1880.

318. — Certain persons holding ten first mortgage bonds and thirty-seven non-mortgage bonds of a railway company, all of which were alleged to have been destroyed, but there was difficulty in establishing the loss, made, through their attorney, with the corporation, an agreement by which, in settlement of their claims, they received interest-fund bonds to the amount of \$8,600 for their first mortgage bonds and state guaranteed bonds to the amount of \$16,000, and interest-fund bonds for \$6,725 for their non-mortgage bonds; and upon such bonds they collected interest for four years. The corporation afterwards became insolvent, and, upon sale, realized enough to pay its first mortgage and state guaranteed bonds in full, but the non-mortgage and interest-fund bonds proved to be worthless. These parties, retaining their state guaranteed bonds, offered to return their interest-fund bonds of \$8,600, and to establish their ten lost first mortgage bonds, claiming the lien of the first mortgage, and that the substituted bonds were *ultra vires*. This court concurred with the referee and circuit judge in holding that the intention of the settlement was payment and not substitution, and, for that reason, and because it was a compromise of a doubtful right, made with full knowledge of the facts, and an arrangement which was a unity, refused to permit the petitioners to establish the ten lost bonds, or to claim for the substituted bonds the lien of the first mortgage. *Ib.*

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319. Mechanics' liens. Claims of contractors and laborers for labor performed in the construction of a railroad subsequent to the execution of a mortgage on the road will not be allowed, except as postponed to the mortgage debt, and this whether or not mechanics' or laborers' liens have been filed in the proper court. *Tommey v. Spartanburg and Asheville R. R. Co.*, 4 Hughes (U. S. C. C.), 640. 1881.

320. Merger. A railway company, after taking and recording a mortgage of land and assigning it to A., who did not record the assignment, acquired the fee of a part of the same land, and then executed a trust deed of the land so held by it in fee (with a large amount of other property) to secure its bonds; and this deed was recorded. On a subsequent foreclosure of the trust deed, the property described in it was sold to persons who organized the M. and St. P. R'y Co., which took and has ever since held possession of the land, putting valuable improvements upon it. In a suit by A. to foreclose his mortgage, *held*, that there was never any actual merger of the mortgage interest in the fee, the two interests having never met in the same person. *Aiken v. Milwaukee and St. Paul R'y Co.*, 37 Wis., 469. 1875.

321. Old material. Old rails taken up from the track are still covered by a deed of trust of the railway. *First National Bank of Salem v. Anderson*, 75 Va., 250; 12 Amer. & Eng. R. R. Cases, 411. 1883.

322. Preferred stock. An agreement that preferred stock shall be a lien of a certain order, if brought to the knowledge of subsequent incumbrancers, creates a valid equitable lien which will be enforced. *Skiddy v. Atlanta, Miss. and Ohio R. R. Co.*, 3 Hughes (U. S. C. C.), 320. 1877.

323. Reorganization. A bondholder of a former organization has no standing in chancery to dissolve the present organization of a railroad company, for which his agents had voted his bonds, it was alleged, in excess of authority, and to enforce a different plan, where it appears that he had known of what his agent was doing, but had not dissented, and that he had accepted his share of the bonds of the new organization, had offered to buy and sell, and had brought suit for them. Such conduct ratified the

act; or, inducing others to believe he had acquiesced in the organization, worked estoppel. *Matthews v. Murchison*, 15 Federal Reporter, 691. 1883.

324. — The complainant was the holder of a first mortgage bond of the defendant, and agreed to come in under a plan to reorganize the defendant by force of the statute; the bill alleged that the defendant, as reorganized, was about to issue to the other holders of such first mortgage bonds its own bonds, but did not show that such new bonds were to be secured by a mortgage. *Held*, that such statements did not lay a ground for equitable jurisdiction. *Midland R. R. Co. v. Hitchcock*, 34 N. J. Eq., 278, 1881; 4 Amer. & Eng. R. R. Cases, 522.

325. Right of possession. The conveyance of lands by the Southern Pacific R. R. Co. to Mills and Tevis, in trust, to secure the payment of certain "first mortgage bonds," in the usual form of a mortgage, except being to trustees, with a condition of defeasance providing that, upon the payment of the bonds, "this indenture and the estate hereby granted shall cease and determine," etc., reserving to the grantor the "sole and exclusive management and control" of the lands, and only providing for an entry, foreclosure and sale by the trustees upon default and subsequent demand by the bondholders, is in substance and law a mortgage under the California Code, and the right of possession until default, and a demand by the bondholders, remains in the mortgagor or grantor. *Southern Pacific R. Co. v. Doyle*, 11 Federal Reporter, 253. 1882.

326. — Express trusts may be created to sell real property and apply or dispose of the proceeds, but only "in accordance with the instrument creating the trust;" and, in this instance, the lands conveyed by the terms of the deed are left in the sole and exclusive management, control and possession of the grantor till default and demand. *Id.*

327. — By special provision of its charter the St. Paul and Pacific R. R. Co. is empowered to confer upon its mortgagees the right of possession of mortgaged property, upon the common law conditions, or upon any other conditions that may be agreed upon and expressed in the mortgage. The effect

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is that by these charter provisions it is made competent for the company, by the terms of a mortgage or trust deed, to confer upon its mortgagee or trustee a right to the possession of the mortgaged property upon default in the payment of money secured thereby, and such a right as will entitle the mortgagee or trustee to sustain an action under our practice in the nature of ejectment to obtain possession if it is withheld. *Rice v. St. Paul and Pacific R. R. Co.*, 24 Minn., 464. 1878.

328. Statute impairing rights. The creditors of a corporation who are secured by mortgages of its property acquire therein rights of which they cannot be deprived even by an act of the legislature. *Montgomery and West Point R. R. Co. v. Branch*, 59 Ala., 139. 1877.

329. Sinking fund. Where a deed of trust directs, in plain terms, in what particular securities funds coming into the hands of the trustees shall be invested, and how, until so invested, they shall be held, the court cannot, by its judgment, defeat the intentions of the creator of the trust and the beneficiaries thereunder by directing different investments. Courts cannot change a provision for a sinking fund. *Clark v. St. Louis, Alton and Terre Haute R. R. Co.*, 58 Howard's Practice (N. Y.), 21. 1879.

330. Stockholders' rights. It is a general rule that the stockholders of a railroad are only to be paid after the claims of other lien holders, and where they come forward and insist upon having a priority of payment over mortgage creditors, a specific lien beyond all doubt should be shown to exist in their favor. *King v. Ohio and Mississippi R. R. Co.*, 2 Federal Reporter, 36; 9 Bissell (U. S. C. C.), 278. 1880.

331. Stock of corporation. The New Jersey Southern R. R. Co. (formerly the Raritan and Delaware Bay R. R. Co.), under the chartered powers of the latter company, to which it succeeded, had power, when the mortgage in controversy in this suit was given, to mortgage after-acquired property. That mortgage held to cover railroad stock (of another railroad company) subsequently purchased by the mortgagors. *Williamson v. New Jersey Southern R. R. Co.*, 26 N. J. Eq., 398. 1875.

332. — The capital stock of a corporation is not goods and chattels within the meaning of the act concerning chattel mortgages. Hence, a mortgage of such stock need not be filed in accordance with the provisions of that act. *Id.*

333. Stolen bonds and coupons. Where coupon bonds of a corporation, transferable by delivery, were stolen, and were afterwards sold in the regular course of business to a *bona fide* purchaser, before they matured, for their market price, held, that the title in them passed to the purchaser, as to the bonds, and as to each coupon which had not yet become payable at the date of the sale, but did not pass as to the coupons which were past due. *Gilbough v. Norfolk and Petersburg R. R. Co.*, 1 Hughes (U. S. C. C.), 410. 1877.

334. — The owner of a stolen coupon payable to bearer, and which has not been paid by the promisor, is entitled to judgment against the promisor, on filing a bond of indemnity conditioned to save the defendant harmless against all lawful claims by any other person, and against all costs and expenses by reason of such claims. *Hinckley v. Union Pacific R. R. Co.*, 129 Mass., 52. 1880.

335. — The T. and N. R. R. Co. executed a mortgage on its road to secure its bonds to defendant, the U. T. Co., as trustee, and bonds were prepared for issuing, each of which contained a clause that it should not become obligatory until authenticated by an indorsement by the trustee. Said bonds were signed by the proper officers of the company, but, before the company's seal was affixed or the required certificate attached, a portion of them were stolen, a seal and certificate forged thereon, and the bonds sold; plaintiffs purchased them for a valuable consideration and in good faith. The T. and N. Co. was consolidated with defendant, the M., K. and T. R. Co.; by the agreement of consolidation the latter was to take up outstanding bonds of the former company, issuing its own in exchange. In an action to compel such an exchange for plaintiffs' bonds, held, that plaintiffs were bound by the condition in the bonds, making the certificate of the trustee essential to their validity; that neither the payment of value nor good faith

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on their part created a cause of action; and that the defect in the bonds was not waived by the agreement of consolidation; also, that the failure of the obligor, after discovering that the bonds had been lost or stolen, to notify the public of that fact did not constitute negligence making it liable. *Maas v. Missouri, Kansas and Texas R'y Co.*, 83 N. Y., 223, 1880; 3 Amer. & Eng. R. R. Cases, 30.

336. To indorser; release. A mortgage, made to an indorser by the maker of a note merely to secure the indorser, may be released by the latter at his pleasure; but where it is agreed that the indorser shall hold the mortgage not only for his own security, but for the security of the creditor, a conveyance of the mortgaged property to a party who knew of the agreement will not defeat the equitable rights of the creditor. *Hartford and New York Transportation Co. v. First National Bank*, 46 Conn., 569. 1879.

MUNICIPAL AID AND BONDS.

[The decisions in relation to such aid and bonds are to be found under the titles of Subscriptions by Cities and Towns and Subscriptions by Counties.]

MUNICIPAL CORPORATIONS.

See FEDERAL COURTS; HIGHWAY; INJURIES TO PERSONS ON THE TRACK; SEWERS; SUBSCRIPTIONS BY CITIES AND TOWNS; SUBSCRIPTIONS BY COUNTIES; WHARVES.

1. Incorporation. Proceedings for incorporation under the statutes of Indiana examined. *Baltimore, Ohio and Chicago R. R. Co. v. Commissioners of St. Joseph County*, 73 Ind., 213. 1881.

2. Speed of trains. Municipal corporations have power, as a police regulation, to pass ordinances regulating the speed of trains within the corporate limits, but such regulations must be reasonable and proper. *Meyers v. Chicago, Rock Island and Pacific R. R. Co.*, 57 Ia., 555, 1881; 7 Amer. & Eng. R. R. Cases, 406.

3. — Where an ordinance of a city limits the speed of railway trains to four miles per hour, and the road passes through agricultural lands, fenced on both sides, for three

miles after entering the limits of the city, and before reaching the inhabited portion thereof, such ordinance operates as a restraint upon commerce, as to such portion of the road, and is unreasonable and void. *Ib.*

NAME OF CORPORATION.

1. Change. A change in the name of a corporation can only be effected by changing the articles of incorporation, and of this change the best evidence is the articles themselves. *C., D. and M. R. R. Co. v. Keisel*, 43 Ia., 39. 1876.

2. — The presumption is that a change of name, authorized by the articles of incorporation, has been made in accordance with the law. *Wells, Fargo & Co. v. Oregon R'y and Navigation Co.*, 8 Sawyer (U. S. C. C.), 600. 1883.

3. — The resolution changing the name of the St. Paul and Pacific R. R. Co. to St. Paul and Chicago R. R. Co. held inoperative. *Morris v. St. Paul and Chicago R. R. Co.*, 19 Minn., 528, 1873; 10 Amer. R'y Rep., 289.

4. Evidence. Where a corporation was spoken of in the evidence as the Louisville, New Albany and Chicago Railroad, instead of railroad company, *held*, that if this description was not sufficient it was cured by other testimony descriptive of the corporation. *Louisville, New Albany and Chicago R'y Co. v. Grubb*, 88 Ind., 85. 1882.

NEGLIGENCE.

[Most of the decisions upon questions of negligence will be found under other heads. Nearly every title contains some decision in which questions of negligence are considered.]

1. Children. An infant, to avoid the imputation of negligence, is bound only to exercise that degree of care which can reasonably be expected of one of its age. *Byrne v. New York Central and Hudson River R. R. Co.*, 83 N. Y., 620, 1881; reversing *Same v. Same*, 14 Hun (N. Y.), 322, 1878; *Rockford, Rock Island and St. Louis R. R. Co. v. Delaney*, 82 Ill., 198, 1876; *Mobile and Montgomery R'y Co. v. Crenshaw*, 65 Ala.,

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566, 1880; 8 Amer. & Eng. R. R. Cases, 340; *Chicago and Alton R. R. Co. v. Lammert*, 12 Bradwell (Ill.), 408, 1883; *Dowling v. New York Central and Hudson River R. R. Co.*, 12 Amer. & Eng. R. R. Cases, 73; 90 N. Y., 670, 1882; *McMillan v. Burlington and Missouri River R. R. Co.*, 46 Ia., 231, 1877; 16 Amer. R'y Rep., 239; *Chicago and Alton R. R. Co. v. Murray*, 71 Ill., 601, 1874.

2. — An infant under six years of age is not of sufficient discretion to be guilty of contributory negligence. *Bay Shore R. R. Co. v. Harris*, 67 Ala., 6. 1880.

3. — The question whether the capacity of a child is such that he can be charged with contributory negligence is one of fact which must be determined by the jury. *Moore v. Metropolitan R. R. Co.*, 2 Mackey (Dist. Col.), 437. 1883.

4. — Where a child is the plaintiff, whether the fault is that of the child or the negligence of the person having the care of the child, the doctrine of contributory negligence applies. *Hathaway v. Toledo, Wabash and Western R'y Co.*, 46 Ind., 25, 1874; 6 Amer. R'y Rep., 399; *Toledo, Wabash and Western R'y Co. v. Miller*, 76 Ill., 278, 1875. See, also, *Higgins v. Jeffersonville, etc., R. R. Co.*, 52 Ind., 110. 1875.

5. — Negligence cannot be imputed to a child not of sufficient capacity or discretion to understand the danger and guard against it. *Pittsburgh, etc., R'y Co. v. Caldwell*, 74 Pa. St., 421, 1873; 6 Amer. R'y Rep., 100; *Pennsylvania Co. v. James*, 81½ Pa. St., 194, 1874; *Government St. R. R. Co. v. Hanlon*, 53 Ala., 70, 1875; *Cleveland, etc., R. R. Co. v. Manson*, 30 Ohio St., 451, 1876; *Evansich v. G., C. and S. F. R'y Co.*, 57 Tex., 126, 1882; 6 Amer. & Eng. R. R. Cases, 182.

6. — A child two years and ten months old cannot be guilty of contributory negligence. Neither is it bound by the neglect of its parents. *Norfolk and Petersburg R. R. Co. v. Ormsby*, 27 Grattan (Va.), 455, 1876. See, also, *Government St. R. R. Co. v. Hanlon*, 53 Ala., 70. 1875.

7. — Where a parent sues for the loss of services of a child by reason of injuries resulting from the defendant's negligence, contributory negligence on the part of the parent is a complete defense; but it is otherwise if the child sues by the parent or any

other next friend. *Moore v. Metropolitan R. R. Co.*, 2 Mackey (Dist. Col.), 437, 1883; *Bellevue R'y Co. v. Snyder*, 24 Ohio St., 670, 1874.

8. — A railway company will not be held liable for injuries received by a child while attempting to get upon one of its cars, in consequence of an invitation from one of its servants in charge of the car, where the evidence shows no authority on the part of the servant to permit persons to ride on the car, and it does not appear that the invitation or permission were in furtherance of the interests of the road or connected in any manner with the service which the servant was employed to render. *Snyder v. Hannibal and St. Joseph R. R. Co.*, 60 Mo., 413, 1875; 9 Amer. R'y Rep., 254.

9. **Comparative.** The doctrine of comparative negligence denied. *Houston and Texas Central R'y Co. v. Gorbett*, 49 Tex., 573, 1878; *Pennsylvania R. R. Co. v. Righter*, 42 N. J. Law, 180, 1880; 2 Amer. & Eng. R. R. Cases, 220; *Terre Haute and Indianapolis R. R. Co. v. Graham*, 12 Amer. & Eng. R. R. Cases (Ind.), 77, 1883; *Kansas Pacific R'y Co. v. Peavey*, 29 Kans., 169, 1883; 11 Amer. & Eng. R. R. Cases, 260; *St. Louis and Southeastern R'y Co. v. Britz*, 72 Ill., 256, 1874; *Indianapolis and St. Louis R. R. Co. v. Evans*, 88 Ill., 63, 1878; 21 Amer. R'y Rep., 284; *Toledo, Wabash and Western R'y Co. v. Spencer*, 66 Ill., 528, 1873; *Illinois Central R. R. Co. v. Cragin*, 71 Ill., 177, 1873; *Illinois Central R. R. Co. v. Hammer*, 72 Ill., 347, 1874; *Chicago and Northwestern R'y Co. v. Clark*, 70 Ill., 276, 1873; *Chicago, Burlington and Quincy R. R. Co. v. Dunn*, 61 Ill., 885, 1871; 12 Amer. R'y Rep., 427; *Chicago and Alton R. R. Co. v. Langley*, 2 Bradwell (Ill.), 505, 1877; *Chicago, Burlington and Quincy R. R. Co. v. Colwell*, 3 Bradwell (Ill.), 545, 1878; *Chicago, Burlington and Quincy R. R. Co. v. Avery*, 8 Bradwell (Ill.), 133, 1880; *Illinois Central R. R. Co. v. Brookshire*, 3 Bradwell (Ill.), 225, 1878; *Chicago, Burlington and Quincy R. R. Co. v. Dougherty*, 12 Bradwell (Ill.), 181, 1882; *Lake Shore and Michigan Southern R'y Co. v. Berlink*, 2 Bradwell (Ill.), 427, 1878; *Wabash R'y Co. v. Jones*, 5 Bradwell (Ill.), 607, 1879.

10. — The plaintiff may recover if his

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negligence is slight and that of the defendant is great. *Illinois Central R. R. Co. v. Maffit*, 67 Ill., 431, 1873; *Illinois Central R. R. Co. v. Patterson*, 93 Ill., 290, 1879; *Stratton v. Central City Horse R'y Co.*, 95 Ill., 25, 1880; *Schmidt v. Chicago and Northwestern R'y Co.*, 83 Ill., 405, 1876; *Chicago and Northwestern R'y Co. v. Dimick*, 96 Ill., 42, 1880; 2 Amer. & Eng. R. R. Cases, 201.

11. — In an action to recover damages for a personal injury, where the plaintiff is chargeable with contributory negligence, it is erroneous to instruct the jury, in substance, that the plaintiff may recover, though guilty of slight negligence, if the defendant's employes fell short, in *any degree*, of the exercise of that high degree of care as, under the circumstances, it was reasonable to have used to prevent the injury. *Illinois Central R. R. Co. v. Hammer*, 85 Ill., 526. 1877.

12. — An instruction attempting to state the rule as to contributory negligence must refer to a standard of comparison of the negligence of both parties. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Shannon*, 11 Bradwell (Ill.), 222. 1882.

13. — Where the vital question was the comparative negligence of the plaintiff with that of the defendant, and the evidence on this point was conflicting and difficult to resolve, the court, in two instructions for the plaintiff, substantially told the jury that if the defendant, by its servants, the engine-driver and fireman of the engine that caused the injury, was guilty of negligence in managing the engine, then the defendant was liable for such negligence. *Held*, that the instructions in themselves were erroneous. *Chicago and Alton R. R. Co. v. Murray*, 62 Ill., 326. 1872.

14. — In an action against a railroad company to recover for injuries to the plaintiff, occasioned by the alleged negligence of the defendant, the court, at the instance of the plaintiff, instructed the jury incorrectly in regard to the rule of comparative negligence. *Held*, as the evidence showed no negligence on the part of the plaintiff to compare with that of the defendant, the latter could not be heard to complain of the erroneous instruction. *Chicago, Burlington*

and Quincy R. R. Co. v. Dickson, 63 Ill., 151, 1872; 7 Amer. R'y Rep., 45.

15. — The *onus* of establishing the relative degrees of negligence of the plaintiff or the deceased, and of the defendant, is not upon the latter. The gross negligence of the defendant is as indispensable an element in the rule of comparative negligence as the slight negligence of the plaintiff, or the plaintiff's intestate, and unless both are proved as alleged, no recovery can be had, although neither party in the first instance is presumed to have been negligent. *Chicago, Burlington and Quincy R. R. Co. v. Harwood*, 90 Ill., 425. 1878.

16. — Where there is negligence on the part of an injured party, or on the part of those charged with the care of the injured party, as, a child of tender years, contributing directly to produce the injury, there can be no recovery, unless such negligence is slight, and that of the defendant is gross in comparison, in regard to that which produced the injury. It is not sufficient that the defendant may have been guilty of a greater degree of negligence in regard to the producing cause of the injury. *Toledo, Wabash and Western R'y Co. v. Grable*, 88 Ill., 441, 1878; 21 Amer. R'y Rep., 336.

17. **Contributory.** In an action for damages on account of negligence, an instruction to the effect that the negligence of plaintiff must have contributed "directly" to the injury, to excuse defendant, was held to be correct. *Locke v. Sioux City and Pacific R. R. Co.*, 46 Ia., 109, 1877; 16 Amer. R'y Rep., 138.

18. — A person who is guilty of contributory negligence cannot recover damages, even if the defendant contributed to the loss by his negligence. *Flemming v. Western Pacific R. R. Co.*, 49 Cal., 253, 1874; 7 Amer. R'y Rep., 265.

19. — An instruction that, if the deceased, at the time he was killed, was using reasonable care, etc., is erroneous. The language, as it stands, ignores the fact of any previous neglect on the part of the deceased, and, according to the instruction, no matter what previous neglect there had been, if he were not negligent at the time of the collision, a recovery could be had. *Chicago and Northwestern R'y Co. v. Clark*, 2 Bradwell (Ill.), 116. 1878.

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20. — In a suit for damages for an injury caused by negligence, although the court charges the jury that the plaintiff cannot recover if his own negligence contributed to the injury, yet, in connection with such charge, so instructed the jury that they may reasonably believe that this rule only applies when the defendant is not negligent, such charge is misleading and erroneous. *Baltimore and Ohio R. R. Co. v. Whittaker*, 24 Ohio St., 642, 1874; 7 Amer. R'y Rep., 182.

21. — **burden of proof.** Contributory negligence is a matter of defense, and the burden of proving it is upon the defendant. *Carter v. Columbia and Greenville R. R. Co.*, 19 So. Car., 20, 1882; *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Noel*, 77 Ind., 110, 1881; 7 Amer. & Eng. R. R. Cases, 524; *Central R. R. Co. v. Brinson*, 64 Ga., 475, 1880; 8 Amer. & Eng. R. R. Cases, 343; *Randall v. Northwestern Telegraph Co.*, 54 Wis., 140, 1882; *Paducah and Memphis R. R. Co. v. Hoehl*, 12 Bush (Ky.), 41, 1876; 18 Amer. R'y Rep., 338; *Kentucky Central R. R. Co. v. Thomas*, 79 Ky., 160, 1880; 1 Amer. & Eng. R. R. Cases, 79; *Robinson v. Western Pacific R. R. Co.*, 48 Cal., 409, 1874; 7 Amer. R'y Rep., 244; *MacDougal v. Central R. R. Co.*, 12 Amer. & Eng. R. R. Cases, 143 (Cal.), 1883; *Chadbourne v. Delaware, Lackawanna, etc., R. R. Co.*, 6 Daly (N. Y.), 215, 1875; *Pennsylvania R. R. Co. v. Weber*, 76 Pa. St., 157, 1874; *Savannah and Memphis R. R. Co. v. Shearer*, 58 Ala., 672, 1877; 20 Amer. R'y Rep., 451; *Kansas Pacific R. R. Co. v. Pointer*, 14 Kans., 37, 1874.

22. — The plaintiff, in an action founded upon negligence, must show that he was free from contributory negligence. *Hart v. Hudson River Bridge Co.*, 80 N. Y., 622, 1880; *Patterson v. Burlington and Missouri River R. R. Co.*, 38 Ia., 279, 1874; *Nelson v. Chicago, Rock Island and Pacific R. R. Co.*, 38 Ia., 564, 1874; *Mitchell v. Chicago and Grand Trunk R'y Co.*, 12 Amer. & Eng. R. R. Cases (Mich.), 163, 1883; *Michigan Central R. R. Co. v. Coleman*, 28 Mich., 440, 1874; 12 Amer. R'y Rep., 59; *Walsh v. Oregon R'y and Navigation Co.*, 10 Oreg., 250, 1882.

23. — In suits for injuries from negligence, as in other civil actions, all issues of fact are to be determined upon the preponderance of

evidence; and it is not necessary that defendant's negligence should be proven beyond a reasonable doubt. *Quaife v. Chicago and Northwestern R'y Co.*, 48 Wis., 513, 1879.

24. — **choice between hazards.** Where one, in the face of great danger, and obliged to choose between two hazards, makes such choice as a person of ordinary prudence and care placed in the same situation might make, and is thereby injured, the fact that if he had chosen the other hazard he would have escaped injury will not relieve the one by reason of whose negligence he was put in jeopardy. *Haff v. Minneapolis and St. Louis R'y Co.*, 14 Federal Reporter, 558, 1882; *Schultz v. Chicago and Northwestern R'y Co.*, 44 Wis., 638, 1878; 18 Amer. R'y Rep., 146; *Mark v. St. Paul, Minneapolis and Manitoba R'y Co.*, 12 Amer. & Eng. R. R. Cases (Minn.), 86, 1883; *Moore v. Central R. R. Co. of Iowa*, 47 Ia., 688, 1878.

25. — **knowledge of neglect of injured party.** Where the neglect of the injured party is seen by the employees of the railway company in time to prevent injury from such negligence, their failure to exercise care to prevent the injury will render their employer liable. *Morris v. Chicago, Burlington and Quincy R. R. Co.*, 45 Ia., 29, 1876; *Harlan v. St. Louis, Kansas City and Northern R'y Co.*, 65 Mo., 22, 1877; *Yarnall v. St. Louis, Kansas City and Northern R'y Co.*, 75 Mo., 575, 1882; 10 Amer. & Eng. R. R. Cases, 726; *Karle v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 55 Mo., 476, 1874; *Little Rock and Ft. Smith R'y Co. v. Pankhurst*, 36 Ark., 371, 1880; 5 Amer. & Eng. R. R. Cases, 635; *Kansas Pacific R'y Co. v. Cranmer*, 4 Colo., 524, 1879; *Healey v. Dry Dock, etc., R. R. Co.*, 46 N. Y. Superior Ct., 473, 1881; *Cook v. Central R. R. and Banking Co. of Georgia*, 67 Ala., 533, 1880; *Bunting v. Central Pacific R. R. Co.*, 16 Nev., 277, 1881; 6 Amer. & Eng. R. R. Cases, 282; *Chicago, Burlington and Quincy R. R. Co. v. Johnson*, 103 Ill., 512, 1882; 8 Amer. & Eng. R. R. Cases, 225.

26. — **pleading.** If a complaint against a railway company for a personal injury shows by its statement of facts that the plaintiff was himself guilty of negligence contributing to his injury, the complaint is bad, notwithstanding it may contain an

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avermment that he was without fault. *Jeffersonville, etc., R. R. Co. v. Goldsmith*, 47 Ind., 43, 1874; 8 Amer. R'y Rep., 315.

27. — proximate cause. Where a passenger upon a street car was himself guilty of a want of care, but it did not contribute to the accident whereby he was injured, or only remotely contributed to it, he will not thereby be prevented from recovering damages from the company, when the negligence of the company was the proximate cause of the injury. *Thirteenth and Fifteenth Street Passenger R'y Co. v. Boudrou*, 92 Pa. St., 475, 1880; 2 Amer. & Eng. R. R. Cases, 30.

28. — The rule that plaintiff cannot recover, if his own wrong, as well as that of the defendant, has conduced to the injury which he has sustained, is confined to cases where his wrong or negligence has immediately or proximately contributed to the result. *Meeks v. Southern Pacific R. R. Co.*, 56 Cal., 513, 1880; 8 Amer. & Eng. R. R. Cases, 314; *Meyers v. Chicago, Rock Island and Pacific R. R. Co.*, 59 Mo., 223, 1875; 8 Amer. R'y Rep., 473.

29. — Where the plaintiff may have been guilty of negligence, and that negligence may, in fact, have contributed to the accident, yet if the defendant could, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse the defendant. *Richmond and Danville R. R. Co. v. Anderson*, 31 Grattan (Va.), 812, 1879; *Meyers v. Chicago, Rock Island and Pacific R. R. Co.*, 59 Mo., 223, 1875; *Chicago and Alton R. R. Co. v. Becker*, 76 Ill., 25, 1875; *Tanner v. Louisville and Nashville R. R. Co.*, 60 Ala., 621, 1877.

30. — verdict. Where a jury found specially facts which, under an instruction given by the court, would entitle the defendant to a verdict, as showing contributory negligence, it was held that a general verdict in favor of the plaintiff should have been set aside. *Baird v. Chicago, Rock Island and Pacific R. R. Co.*, 55 Ia., 121, 1880; 8 Amer. & Eng. R. R. Cases, 128.

31. — wanton injury. When contributory negligence is relied on as a defense to an action to recover damages for personal injuries, if it be shown that they were inflicted recklessly, wantonly or intentionally,

such defense is vitiated and overcome. *Cook v. Central R. R. and Banking Co. of Georgia*, 67 Ala., 533, 1880.

32. — To avoid the defense of contributory negligence, it is not necessary that the wrongful act of the defendant, or its agents and servants, should be "wanton and intentional," as erroneously stated in the case of *Government St. Railroad Co. v. Hanlon*, 53 Ala., 70. *Tanner v. Louisville and Nashville R. R. Co.*, 60 Ala., 621, 1877.

33. — when a question for the jury. Where the question of contributory negligence depends on a number of circumstances, from which different minds may arrive at different conclusions as to whether there was negligence or not, the question ought to be submitted to the jury under proper instructions. *Marietta and Cincinnati R. R. Co. v. Picksley*, 24 Ohio St., 654, 1874; 7 Amer. R'y Rep., 186; *McNarra v. Chicago and Northwestern R'y Co.*, 41 Wis., 69, 1876; *McHugh v. Chicago and Northwestern R'y Co.*, 41 Wis., 75, 1876; *Pennsylvania R. R. Co. v. Fortney*, 90 Pa. St., 323, 1879; 1 Amer. & Eng. R. R. Cases, 128; *Kansas Pacific R'y Co. v. Ward*, 4 Colo., 30, 1877; *Corcoran v. New York Elevated R. R. Co.*, 19 Hun (N. Y.), 368, 1879; *Nehrbas v. Central Pacific R. R. Co.*, 62 Cal., 320, 1882.

34. — when a question of law. Contributory negligence becomes a question of law when the facts are clearly settled. *Fernandes v. Sacramento City R'y Co.*, 52 Cal., 45, 1877; 9 Amer. R'y Rep., 352; *Delaware, Lackawanna and Western R. R. Co. v. Toffey*, 38 N. J. Law, 525, 1875; *Bonnell v. Delaware, Lackawanna and Western R. R. Co.*, 39 N. J. Law, 189, 1877; *Pennsylvania R. R. Co. v. Righter*, 42 N. J. Law, 180, 1880.

35. — women. It cannot be laid down as a rule of law that a less degree of care is required of a woman than of a man; and an instruction to that effect is erroneous. The rule of reasonable care and prudence knows nothing of sex. *Hassenger v. Michigan Central R. R. Co.*, 48 Mich., 205, 1882; 6 Amer. & Eng. R. R. Cases, 59.

36. Corporate powers. It is not necessary, to fix the liability, that the wrongful act, or the negligence from which the injury proceeds, should have been committed while

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the corporation was in the exercise of powers conferred by the charter; it may have been committed while the corporation, or its servants acting under its authority, were exceeding corporate power, or engaged in transactions wholly foreign to its nature. *South and North Ala. R. R. Co. v. Chappell*, 61 Ala., 527. 1878.

37. Crossings; city ordinance. A person about to cross a railroad upon the street of a city, which has an ordinance limiting the speed of trains, has a right to presume, until the contrary is made apparent, that the company will not run its trains in violation of such ordinance. *Correll v. B., C. R. and M. R. R. Co.*, 38 Ia., 120. 1874.

38. Defined. Negligence is the absence of care, according to the circumstances. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Stinger*, 78 Pa. St., 219, 1875; *Jamison v. San Jose and Santa Clara R. R. Co.*, 55 Cal., 593, 1880; 3 Amer. & Eng. R. R. Cases, 350; *Marcott v. Marquette, Houghton and Ontonagon R. R. Co.*, 47 Mich., 1, 1881; 4 Amer. & Eng. R. R. Cases, 548.

39. Evidence. It is not allowable to prove by a witness that the act complained of was not negligent, or objectionable. It is for the jury to say, from all the facts and circumstances, whether an act constitutes negligence. *Pennsylvania Co. v. Stoelke*, 104 Ill., 201, 1882; 8 Amer. & Eng. R. R. Cases, 523.

40. Gross neglect. To instruct the jury that, if the plaintiff failed to exercise ordinary care, he was guilty of gross negligence, and that, if he was injured for the want of ordinary care, no action will lie unless the defendant wilfully inflicted the injury, presents unsound propositions of law. *Stratton v. Central City Horse R'y Co.*, 1 Amer. & Eng. R. R. Cases (Ill.), 115. 1880.

41. — Where the jury found that the defendant was guilty of gross negligence, immediately causing the injury, and they also found that the plaintiff was guilty of negligence contributing to the injury, without specifying what degree of negligence, or whether proximately or remotely contributory, *held*, that it was apparent from the other findings, and the instructions of the court, that they intended only such slight negligence as was consistent with a right to

recover compensation. *Kansas Pacific R. R. Co. v. Pointer*, 14 Kans., 37. 1874.

42. Instructions. Where the term *negligence* is used without any qualifying word it will be generally understood that *ordinary negligence* is meant. *Ib.*

43. — An instruction which attempts to define the character and degree of negligence which would authorize a recovery for an injury, but which omits the essential qualification that the negligence upon which a recovery must be based is such as helped to produce the injury, and such alone, is erroneous. *Chicago and Northwestern R'y Co. v. Carroll*, 12 Bradwell (Ill.), 643. 1883.

44. — In a suit against a railroad company for causing the death of a person through negligence, where there is a question as to whether the deceased was guilty of negligence or not, an instruction which directs the jury, if they believe certain facts, to find absolutely for the plaintiff, without containing the requirement of any degree of care whatever on the part of the deceased, is erroneous. *Chicago and Alton R. R. Co. v. Mock*, 72 Ill., 141. 1874.

45. Iowa statute. The following instruction was given: "It is the law of Iowa that every railroad company is liable for all damages sustained by any person, including employees, in consequence of any neglect of the agents or by any mismanagement of the engineers or other employes of the corporation, provided the plaintiff did not contribute to the injury by his own want of proper care or negligence." It was urged by the defendant that the use of the terms "*any neglect*" and "*any mismanagement*" implied that defendant was liable for want of extraordinary care; but the court held otherwise, and that the instruction was not erroneous. *Hamilton v. Des Moines Valley R. R. Co.*, 36 Ia., 31. 1872.

46. Master and servant. The true test by which to determine the liability of the employer or master for the negligence or wrongful acts of the servant is, was the wrongful or negligent act done in the course and scope of the servant's employment? If it was, the employer is liable. *Johnson v. Chicago, Rock Island and Pacific R. R. Co.*, 53 Ia., 348, 1882; 8 Amer. & Eng. R. R. Cases, 206.

Pleading — Wilful Acts.

47. Pleading. Under a general charge of negligence in the running of a train, evidence may be given of any and every degree of negligence. Negligence must be charged in the complaint, but it is the province of the evidence to show in what it consisted. *Pennsylvania Co. v. Krick*, 47 Ind., 368. 1874.

48. — The due care of the injured party need not be alleged except in cases where the facts stated would, if unexplained, make a *prima facie* case of contributory negligence. *Texas and Pacific R'y Co. v. Murphy*, 46 Tex., 356, 1876; 13 Amer. R'y Rep., 819.

49. Proximate cause. In determining what is proximate cause, the true rule is, the injury must be the natural and probable consequence of the negligence; such a consequence, as from the surrounding circumstances of the case, might and ought to have been foreseen by the wrong-doer as likely to flow from his act. *Hoag v. Lake Shore and Michigan Southern R. R. Co.*, 85 Pa. St., 293, 1877; 18 Amer. R'y Rep., 405.

50. — Negligence of the plaintiff which contributes remotely to the injury will not prevent a recovery, if the defendant could, by the exercise of ordinary care and prudence, have avoided the danger. *Neier v. Missouri Pacific R'y Co.*, 12 Mo. App., 25, 1882; *Same v. Same*, ib., 35, 1882.

51. Rate of speed. No rate of speed in a railroad train is negligence *per se* except where the law of the state, or of a municipal corporation authorized to do so, prescribes a limit. *Maher v. Atlantic and Pacific R. R. Co.*, 64 Mo., 267. 1876.

52. Third party's neglect; neglect of co-employee. A stranger is not relieved from liability for an injury caused by his negligence to a third person, by the fact that the negligence of a co-employee of the person injured contributed thereto. *Busch v. Buffalo Creek R. R. Co.*, 29 Hun (N. Y.), 112. 1883.

53. Verdicts; successive. Where three successive juries have, on a doubtful question of negligence, found for the plaintiff, this court should be clearly convinced of the existence of error before it orders the setting aside of the third verdict. *Kansas Pacific R. R. Co. v. Pointer*, 14 Kans., 37. 1874.

54. Where a question of fact. Negligence is a question of fact; and where the inferences to be drawn from the proof are not certain and uncontrovertible, it cannot be decided, as a question of law, by directing a verdict or non-suit, but must be submitted to the jury. *Thurber v. Harlem Bridge, Morrisania and Fordham R. R. Co.*, 60 N. Y., 326, 1875; 10 Amer. R'y Rep., 126; *Kansas Pacific R. R. Co. v. Pointer*, 14 Kans., 37, 1874; *McNamara v. North Pacific R. R. Co.*, 50 Cal., 581, 1875; 12 Amer. R'y Rep., 190; *Abbett v. Chicago, Milwaukee and St. Paul R'y Co.*, 30 Minn., 482, 1883; *Bonnell v. Delaware, Lackawanna and Western R. R. Co.*, 39 N. J. Law, 189, 1877; 14 Amer. R'y Rep., 220.

55. When a question of law. When the facts are undisputed the question of negligence becomes one of law. *O'Neill v. Chicago and Northwestern R'y Co.*, 1 McCrary (U. S. C. C.), 505, 1881; *Hoag v. Lake Shore and Michigan Southern R. R. Co.*, 85 Pa. St., 293, 1877; 18 Amer. R'y Rep., 405; *Flemming v. Western Pacific R. R. Co.*, 49 Cal., 253, 1874; 7 Amer. R'y Rep., 265; *Solen v. Virginia and Truckee R. R. Co.*, 13 Nev., 106, 1878; *McMahon v. Northern Central R'y Co.*, 39 Md., 438, 1873; *Stockstill v. Dayton and Michigan R. R. Co.*, 24 Ohio St., 83, 1873.

56. Wilful acts. A corporation is liable for the wilful acts and torts of its employees committed within the general scope of their employment, as well as for acts of negligence; and the corporation is thus bound, although the particular acts have not been previously authorized or subsequently ratified by the employer. The act of the agent, within the general scope of his employment, is the act of the employer, and if wrongful, the master is liable, although the act be unnecessary to the performance of the master's service, and was not intended for that purpose. The liability of the master does not depend upon the necessity of the act or the intent with which it was done, but upon whether the act was wrongful and within the general scope of the employment of the agent. *Indianapolis, Peru and Chicago R'y Co. v. Anthony*, 43 Ind., 183. 1873.

57. — Where the plaintiff is guilty of ordinary negligence, contributing directly to the injury, he cannot recover, except perhaps in cases of wanton and wilful injury.

Accident — Newly-discovered Evidence.

Kansas Pacific R. R. Co. v. Pointer, 14 Kans., 37. 1874.

58. — When wilful negligence is established, the guilty party must answer in damages, no matter how negligently the person killed may have acted. Contributory negligence is not a question in the case when wilful negligence is established. Ch. 57, Gen. St., §§ 1 and 3. *Claxton v. Lexington and Big Sandy R. R. Co.*, 13 Bush (Ky.), 636. 1878.

59. — In an action for wilful neglect, under § 3 of ch. 57 of Gen. Stats., a special verdict having been demanded, the court should have instructed the jury as to what "wilful neglect" was, and then left it to them, by questions properly framed, to decide whether it existed; and, the jury not having passed on the question of wilful neglect, their special verdict is not sufficient to support a judgment for the plaintiff. *Paducah and Elizabethtown R. R. Co. v. Letcher*, 12 Amer. & Eng. R. R. Cases (Ky.), 61. 1883.

NEW TRIALS.

See COSTS; EMINENT DOMAIN.

1. **Accident.** New trial granted because of failure to defend through misinformation as to the time of the term of the court. *Buena Vista County v. Iowa Falls and Sioux City R. R. Co.*, 49 Ia., 657. 1878.

2. **Arrest of judgment.** Sustaining a motion in arrest of judgment is equivalent to granting a new trial. *Morehead v. International R. R. Co.*, 46 Tex., 178, 1876; 13 Amer. R'y Rep., 314.

3. **Concurrent verdicts.** Concurrent verdicts will not justify the refusal of a new trial where there has been misconduct on the part of the juries. *Brown v. Atchison, Topeka and Santa Fe R. R. Co.*, 29 Kans., 186, 1883; 10 Amer. & Eng. R. R. Cases, 739.

4. **Costs.** The first trial was had before a judge who was a stockholder in the defendant corporation. On a second trial the plaintiff again recovered a verdict. Held, that he was entitled to costs for two trials. *Cregin v. Brooklyn Cross-Town R. R. Co.*, 10 Hun (N. Y.), 349. 1879.

5. **Demurrer to evidence.** A demurrer to evidence cannot be made after verdict. A

motion for new trial is then the only remedy, and is addressed to the discretion of the trial judge. *Aldrich v. Springfield, Athol and Northeastern R. R. Co.*, 125 Mass., 404. 1878.

6. **Evidence.** New trial granted under the evidence. *Kuse v. N. Y., New Haven and Hartford R. R. Co.*, 4 Hun (N. Y.), 673, 1875; *Chicago and Alton R. R. Co. v. Buttolf*, 66 Ill., 347, 1872; *Delane v. Central R. R. and Banking Co.*, 59 Ga., 633, 1877.

7. — Verdict held not contrary to the evidence. *Western and Atlantic R. R. Co. v. Brown*, 59 Ga., 880, 1877; *Chicago and Alton R. R. Co. v. Stover*, 63 Ill., 358, 1872; *Illinois and St. Louis R. R. Co. v. McClintock*, ib., 514, 1872; *Marietta and Cincinnati R. R. Co. v. Strader*, 29 Ohio St., 448, 1876.

8. **Fraud.** Issues cannot be retried in another cause, upon allegations of fraud and perjury in the first action. *New York Central R. R. Co. v. Harrold*, 65 Howard's Practice (N. Y.), 89. 1882.

9. **Misconduct of jury.** Where the natural tendency of what a juror does or says or willingly listens to from others is to bias his mind, or where his misconduct evinces a prejudice of the case, or ill-will or passion against the losing party, the inference of prejudice in the true sense inevitably follows, because the verdict cannot be said to be the result of a fair trial. The various matters of misconduct of a jury held prejudicial to the plaintiff in a personal injury case, and a new trial awarded. *Pool v. Chicago, Burlington and Quincy R. R. Co.*, 6 Federal Reporter, 814. 1881.

10. **Misconduct of prevailing party.** Where it appears that during the progress of a trial the prevailing party or his attorney has furnished intoxicating liquors to a juror, it is a good ground for a new trial, unless it is clearly shown that it was not intended to influence his action in the case, and that it had no influence on his mind as a juror. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Porter*, 32 Ohio St., 328. 1877.

11. **Newly-discovered evidence.** The granting of new trials, because of newly-discovered evidence, rests for the most part with the trial court. *Cook v. St. Louis and Keokuk R. R. Co.*, 56 Mo., 380. 1874.

12. — A new trial granted on the ground

Appeal.

of newly-discovered evidence. *Cairo and St. Louis R. R. Co. v. Schumacker*, 77 Ill., 583, 1875; *Wayt v. B., C. R. and M. R. R. Co.*, 45 Ia., 217, 1876; *Cairo and Fulton R. R. Co. v. Titus*, 32 N. J. Eq., 397, 1880; reversing *Cairo and Fulton R. R. Co. v. Titus*, 30 N. J. Eq., 502, 1879.

13. — A new trial in a personal injury case refused. No sufficient diligence was used in discovering the evidence upon which the application is based. *Schultz v. Third Avenue R. R. Co.*, 47 N. Y. Superior Ct., 285. 1881.

14. — Newly-discovered evidence, which is merely cumulative, will not entitle the party to a new trial. *Hickenbottom v. Chicago, Burlington and Quincy R. R. Co.*, 57 Ia., 704, 1882; 9 Amer. & Eng. R. R. Cases, 609.

15. — A new trial granted in a personal injury case because of admissions of the plaintiff newly discovered since the trial. *Houston and Tex. Central R'y Co. v. Forsyth*, 49 Tex., 171. 1878.

16. — A written contract relating to the matter in controversy, made by a former agent of the appellants, and not produced at the trial because the appellants were ignorant of its existence, is material, within the rule requiring newly-discovered evidence, as ground of relief, to be material. *Cairo and Fulton R. R. Co. v. Titus*, 28 N. J. Eq., 269, 1877; 14 Amer. R'y Rep., 28.

17. — The granting a continuance upon a motion for a new trial is a matter of discretion with the trial court. *Toledo, Wabash and Western R'y Co. v. McLaughlin*, 63 Ill., 389. 1872.

18. — When, in the opinion of the court, the verdict should have been for defendant, upon the evidence, it will not, upon the motion of plaintiff, set aside a verdict in his favor because its amount was less than the evidence showed him to be entitled to, if entitled to recover at all. *Reading v. Texas and Pacific R'y Co.*, 4 Federal Reporter, 134. 1880.

19. Practice. Practice on applications for new trial considered. *Steele v. C., C. and A. R. R. Co.*, 14 So. Car., 324, 1880; *Cleveland, Columbus, Cincinnati and Indianapolis R. R. Co. v. Long*, 24 Ohio St., 133, 1873; *Georgia Southern R. R. Co. v. Neel*, 68 Ga.,

609, 1882; *Western and Atlantic R. R. Co. v. Johnson*, 59 Ga., 626, 1877; *Mehan v. Chicago, Rock Island and Pacific R. R. Co.*, 55 Ia., 805, 1880; *Kansas Pacific R'y Co. v. Twombly*, 2 Colo., 559, 1875; *Ottawa, Oswego and Fox River Valley R. R. Co. v. McMath*, 91 Ill., 104, 1878; *Peoria, Decatur and Evansville R'y Co. v. Booth*, 11 Bradwell (Ill.), 358, 1882.

20. Proceedings in equity. Where a judgment has been recovered at law, and the party who recovered it has been enjoined in chancery from proceeding thereon, and a new trial has been ordered, such new trial may, in a proper case, be had in chancery, or, in the discretion of the chancellor, may be had at law, either by an issue out of this court or in the suit at law; and where a new trial in the suit at law is ordered, unless the party who recovered the judgment will consent to such new trial, he will be perpetually enjoined from enforcing his judgment. *Cairo and Fulton R. R. Co. v. Titus*, 35 N. J. Eq., 384. 1882.

21. — A court of equity will not grant a new trial in a law action except upon clear testimony. *Toledo, Wabash and Western R'y Co. v. Ingram*, 85 Ill., 172. 1877.

22. Remittitur. The court below made an order granting the defendant a new trial, unless the plaintiff should remit a specified portion of the damages. The plaintiff declined to do so, and appealed from the order. Held, the practice adopted by the judge below has been several times approved here, and we cannot say the evidence did not justify his action. *Gregg v. San Francisco and North Pacific R. R. Co.*, 59 Cal., 312. 1881.

23. — Upon a motion for a new trial, the trial judge stated that he thought the damages too high and would require a remittitur, if the defendant would abide the judgment and not appeal, to which defendant refused to agree; therefore he allowed the judgment to stand. Such practice is reprehensible. *Louisville and Nashville R. R. Co. v. Garrett*, 8 Lea (Tenn.) 488. 1881.

NON-SUIT.

1. Appeal. A non-suit, taken by the plaintiff in consequence of the ruling of the

Claim to Land — Culvert.

court sustaining a demurrer to his complaint, is voluntary, and not revisable on appeal under section 2759 of the Revised Code. *Amerson v. Montgomery and Mobile R. R. Co.*, 50 Ala., 497. 1874.

2. Evidence. When there was some testimony before the jury sustaining the plaintiff's case, the order allowing a non-suit was error, even though such evidence would have been excluded as inadmissible had it been objected to. *Jones v. Mobile and Girard R. R. Co.*, 55 Ga., 122. 1875.

3. Writ of error. A writ of error will not lie to a voluntary non-suit. *Jones v. Mobile and Girard R. R. Co.*, 64 Ga., 446. 1879.

NOTICE.

1. Claim to land; grading for railway.

Where it is shown that grading had been commenced, but subsequently suspended, by a railroad company on a tract of land to which it had no record title; and where the evidence as to the kind and quantity of grading was indefinite, and did not show that the grading indicated the purpose for which it was done; and where there was no evidence that the purchaser of the land knew of or suspected the existence of such grading, — *held*, that there was no evidence to warrant a finding that the purchaser took with actual notice of the claim of the railroad to the land. *Masterson v. West End R. R. Co.*, 5 Mo. App., 64, 1878; affirmed, 72 Mo., 342. 1880.

2. *Lis pendens*. Since Laws of 1869, c. 75 (Gen. St. 1878, c. 75, § 34), regulating the filing of notice of *lis pendens*, a purchaser from one of the parties to an action affecting the title to real estate is not charged with notice of the pendency of the action, nor bound by the judgment, except in favor of a party who filed notice of *lis pendens* as provided by that act. *Jorgensen v. Minneapolis and St. Louis R'y Co.*, 25 Minn., 206. 1878.

3. — Where a railway extends through several counties a notice of *lis pendens* would not be operative in the absence of proof that the complaint was filed in some one of the counties. *Cornell v. Utica, Ithaca and Elmira R. R. Co.*, 61 Howard's Practice (N. Y.), 184. 1881.

4. — The exception in favor of negotiable paper to the ordinary rule of *lis pendens* has no application to a suit commenced to enforce a collateral lien created by third persons upon property not belonging to the debtor, and now in the hands of strangers to the obligation of the bonds. The controversies about the lien are independent of and collateral to those controversies about the negotiable securities which are included in the exception. *Stevens v. Railroad Companies*, 4 Federal Reporter, 97. 1880.

5. Purchase of land by railway company.

A railway company contracted for certain lands, and under the conditions of the contract proceeded to build its line across them, receiving at length a deed from the only owner of whose rights it had notice. Meanwhile the same land had been set off by deed of partition to a party who held some unrecorded claim to an undivided interest in the premises, and this party afterwards executed a quit-claim deed to the land, referring to the company's occupancy. *Held*, that an injunction would lie to restrain proceedings in ejectment brought against the company by the holder of the quit-claim deed. *Detroit and Milwaukee R. R. Co. v. Brown*, 37 Mich., 533. 1877.

6. Title; possession. The general rule is that possession of land is notice to a purchaser of the possessor's title. But this rule does not apply to a vendor remaining in possession so as to require a purchaser from his grantee to inquire whether he has reserved any interest in the land conveyed. So far as the purchaser is concerned, the vendor's deed is conclusive on the subject. *Van Keuren v. Central R. R. Co. of New Jersey*, 38 N. J. Law, 165, 1875; 13 Amer. R'y Rep., 43.

NUISANCE.

See BRIDGES; EMINENT DOMAIN; HIGHWAYS; INJUNCTIONS; FIRES.

1. Culvert. A railway company is not responsible for the acts of its employes in creating a nuisance by using a culvert under its railroad near the residence of the plaintiff for the purposes of a privy. *Hopkins v. Western Pacific R. R. Co.*, 50 Cal., 190, 1875;

Damages — Highway.

12 Amer. R'y Rep., 176. In such an action, evidence to show that the land would sell for less on account of the nuisance is not admissible. *Ib.*

2. Damages. In an action to recover damages caused to a house and lot by the construction and operation of railroad tracks in a street in close proximity to the plaintiff's property, the true measure of damages is the loss sustained by the nuisance, the injury from jarring the building and the throwing of cinders and smoke upon the plaintiff's premises; and the depreciation of the value of the property by these causes may be considered, but not general depreciation in value from other causes, such as mere inconvenience in approaching or leaving the property, or the noise and confusion in the vicinity. The injury must be physical. *Chicago, Milwaukee and St. Paul R. R. Co. v. Hall*, 90 Ill., 42. 1878.

3. Dwelling near railway. Where, after the construction of a railroad over a portion of a lot, the owner erected a dwelling-house upon the lot, in close proximity to the road, and occupied the same as a residence, it was held that the owner, having built the house with full knowledge that it would be affected by the road, could not recover for the loss which he thus knowingly and voluntarily incurred, but that, so far as the house sustained a direct physical injury by the company, which it was its duty to avoid, as against all adjacent property, the owner was entitled to recover. *Indianapolis, Bloomington and Western R'y Co. v. McLaughlin*, 77 Ill., 275. 1875.

4. Equitable relief. A person having the mere naked possession of land has an adequate remedy at law for an injury thereto caused by a nuisance, and cannot maintain an equitable action under ch. 190, Laws of 1882. *Denner v. Chicago, Milwaukee and St. Paul R'y Co.*, 57 Wis., 218, 1883; 11 Amer. & Eng. R. R. Cases, 503.

5. — Where a number of persons living along the line of a railway, running from the main line to a granite quarry, operating under charter, and running through the streets of a town with the consent of the council thereof, brought suits against the company for damages resulting from the making of embankments and cuts in the street which

ran in front of their property, and from the use of an improper engine, which cast cinders and soot into plaintiffs' yards and houses, and the running thereof at irregular times, a bill by the company to settle the rights of all parties and to prevent multiplicity of suits was not without equity. *Guess v. Stone Mountain Granite and R'y Co.*, 67 Ga., 215. 1881.

6. Highway — crossing. When a railway company lays its track over a public highway, it is necessary that the company shall have paramount control over its track and the right to regulate the repairs necessary to the use of the public in crossing, and it is therefore responsible to the public as well as individuals for a failure to keep such crossings in repair. *Paducah and Elizabethtown R. R. Co. v. Commonwealth*, 80 Ky., 147, 1892; 10 Amer. & Eng. R. R. Cases, 318.

7. — A railway company, under its charter, cannot be permitted to destroy the usefulness of a public road by raising its rails so high at a crossing that it is dangerous to persons and animals to pass over appellant's track. *Ib.*

8. — crossing; bridge. By s. 8 of 18 and 19 Vict., c. 121, the word "nuisances" shall include any premises in such a state as to be a nuisance or injurious to health. The appellant was the owner of a railway bridge over a highway. The rain-water collected on the bridge, and, running through the planks, dripped on to the highway and on persons using the highway. The appellant was summoned, under s. 12 of the above act, for allowing a nuisance to exist on its premises, and the justices ordered its abatement. Held, that the act, being a sanitary act, applied only to such nuisances as were injurious to health; and that as the nuisance complained of was not injurious to health, the justices were wrong in ordering its abatement. *Great Western R'y Co. v. Bishop*, Law Reports, 7 Queen's Bench Cases, 550. 1872.

9. — signals. It is the duty of a railway company to cause signals to be given where the safety of travelers on intersecting roads demands that a warning should be given of approaching trains. An habitual failure to give such signals, or warnings, is an indictable nuisance. The judgment of the circuit

Indictment — Mortar Mill.

court, imposing a fine upon a railway company on conviction under such an indictment, affirmed. *Louisville and Nashville R. R. Co. v. Commonwealth*, 13 Bush (Ky.), 388, 1877; 15 Amer. R'y Rep., 345.

10. — **speed of trains.** The crossing of a turnpike by trains at the rate of from fifteen to twenty miles an hour, without sufficient warning, is a public nuisance. *Louisville, Cincinnati and Lexington R. R. Co. v. Commonwealth*, 80 Ky., 143. 1882.

11. — Evidence offered as to the absence of casualties on other roads conducted in a more populous community, and at crossings more generally used than the highway in question, was properly excluded. *Ib.*

12. **Indictment.** An indictment will lie against a railway company for the creation and maintenance of a public nuisance. *Northern Central R'y Co. v. Commonwealth*, 90 Pa. St., 300, 1879; 5 Amer. & Eng. R. R. Cases, 818.

13. — **contributory negligence of the public.** Where a nuisance is public, endangering the community by the careless and incautious exercise of a hazardous business, the contributory negligence of any, or, indeed, all the community, furnishes no defense to the injury to the public. *Louisville, Cincinnati and Lexington R. R. Co. v. Commonwealth*, 80 Ky., 143. 1882.

14. — **non-resident corporation.** The Cincinnati R'y Co., by an act of the Kentucky general assembly, is granted all the powers incident to corporations, and should be held, like other railroad companies, liable for any violation of the laws of Kentucky. *Cincinnati R'y Co. v. Commonwealth*, 80 Ky., 137, 1882; 7 Amer. & Eng. R. R. Cases, 91.

15. **Injunction.** The building of a railroad on a party's land, and maintaining it there, is a permanent injury, and if used for the purpose of continuously removing the owner's sand and soil, would become a nuisance, and when attempted to be done without lawful authority, may be enjoined. *Cobb v. Illinois and St. Louis R. R. and Coal Co.*, 68 Ill., 233. 1873.

16. — Occurrences of nuisance, if temporary and occasional only, are not grounds for the interference of the court of chancery by injunction, except in extreme cases.

Therefore, where a railway company carried down to and deposited on a siding to its line manure which was occasionally not proper manure, and it occasionally allowed it to remain there longer than it ought to have remained, *held*, in a suit by a neighboring land owner for an injunction to restrain the nuisance and for damages, that the court would not interfere by way of injunction. *Swaine v. Great Northern R'y Co.*, 4 De Gex, Jones & Smith, 211; 69 Eng. Ch., 211. 1864.

17. **Joint nuisance.** In a suit by a property owner to recover damages against three railroad companies for the laying of their tracks near his dwelling, in the street, whereby smoke, dust and cinders were thrown upon his house and lot, and otherwise creating a nuisance, depreciating the value of his property, where the plaintiff, on the trial, entered a *nolle prosequi* as to all damages arising from the construction and operation of certain tracks, shown to belong to one of the companies exclusively, a finding of damages for the depreciation caused by all the roads, as well as general depreciation of real estate, after the construction of the several roads, cannot be sustained, and a *remittitur* of \$300 out of \$2,000, found by the jury, will not cure the error, as it cannot be known how much the jury allowed for damages occasioned by the tracks to which the *nolle* applied. *Chicago, Milwaukee and St. Paul R. R. Co. v. Hall*, 90 Ill., 42. 1878.

18. **Lessee or grantee.** A party, in whose possession and control a railroad is placed, with power to continue its use, is equally liable with the original owner for a nuisance arising from the manner of its construction. *Tate v. Missouri, Kansas and Texas R'y Co.*, 64 Mo., 149. 1876.

19. **Mortar mill.** Where a railway company for the construction of its works erected a mortar mill on part of its land close to the place of business of the plaintiff, who complained of the injury and annoyance occasioned by the noise and vibration, *held*, that the mortar mill was not necessary for the construction of the line, and an injunction was granted accordingly. *Fenwick v. East London R'y Co.*, Law Reports, 20 Equity Cases, 544, 1875; 15 Eng. (Moak), 480.

Permanent Injury — Streets.

20. Permanent injury; subsequent grantee. The evidence tending to show a permanent injury resulting from the construction and operation of the railroad, such injury was effectuated when the road was constructed and first put in operation, and any right of action therefor vested in him who was then the owner of the premises. His grantee cannot maintain such action. *Chicago and Eastern Illinois R. R. Co. v. Loeb*, 8 Bradwell (Ill.), 627. 1881.

21. Pleading. The declaration averred that the plaintiff owned and occupied as a residence certain property fronting on a certain street; that the defendant constructed and operated its railroad upon said street, and that smoke and cinders were cast and thrown from the engines and locomotives in and upon the property of the plaintiff, thereby greatly damaging the same. *Held*, on demurrer, that the declaration showed a good cause of action. *Stone v. Fairbury, Pontiac and Northwestern R. R. Co.*, 68 Ill., 394. 1873.

22. — equity. Objections to an answer to a bill for nuisance as it stood before amendment cannot be made after amendment, unless the defendant, after being duly called upon to file his answer to the bill as amended, or voluntarily waiving such call, chooses to let it stand as the answer to the amended bill. *Angel v. Pennsylvania R. R. Co.*, 37 N. J. Eq., 92. 1883.

23. — successive actions. Where the injuries sustained by reason of a nuisance consist in the destruction of crops from year to year, the plaintiff will not be limited to a single action, but may sue from time to time as often as the damage occurs. *Dickson v. Chicago, Rock Island and Pacific R. R. Co.*, 2 Amer. & Eng. R. R. Cases, 588, 1880; 71 Mo., 575.

24. Prescription. A right to maintain a nuisance cannot be acquired by prescription. *State v. Louisville, New Albany and Chicago R'y Co.*, 86 Ind., 114, 1882; 10 Amer. & Eng. R. R. Cases, 286.

25. Reversioner's rights. In order to entitle a reversioner to maintain an action for an injury to his reversion, it is necessary that the wrong complained of should be in its nature permanent. Therefore, *held*, that a reversioner could not maintain an action

against a railway company for making loud hammering noises in a shed adjoining his house, by reason whereof the tenant quitted, though it appeared that he was afterwards unable to let the house except at a lower rent. *Mumford v. Oxford R'y Co.*, 1 Hurlstone & Norman (Exchequer), 34, 1856; 36 Eng. Law & Equity, 580.

26. Stock killed on railway. Where a railroad company permits a horse, killed by its locomotive, to remain on the side of its track so near a dwelling-house as to render its occupancy unwholesome, it is guilty of a private nuisance, for which it becomes liable to the person in possession of the house. In such case the husband, being the occupier and in rightful possession, is the proper plaintiff, and not the wife, although the sickness resulting from the nuisance is that of the latter. And he may recover damages resulting from that cause, and also from the sickness of any other members of his household. *Ellis v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 63 Mo., 181, 1876; 20 Amer. R'y Rep., 411.

27. Streets. Abutting owners injured by a public nuisance to the highway can sue for and recover such special damages as they can prove. *Grand Rapids and Indiana R. R. Co. v. Heisel*, 47 Mich., 893, 1882; 10 Amer. & Eng. R. R. Cases, 260.

28. — In an action to recover special damages caused by placing an obstruction in the nature of a nuisance in the street opposite the plaintiff's residence, the defendant is liable only for the damages actually sustained prior to the commencement of the action. *Hopkins v. Western Pacific R. Co.*, 50 Cal., 190, 1875; 12 Amer. R'y Rep., 176.

29. — If the decreased value of the premises could be considered in such case it would be their decreased market value, and not their decreased value as a family residence; so that evidence of the latter fact is not admissible. *Ib.*

30. — If an individual is seriously affected by the exercise of unwarrantable powers by a city council in authorizing a railway upon a street he may invoke the aid of a court of chancery for redress. But this is no concern of the general public. *Chicago and Vincennes R. R. Co. v. The People*, 92 Ill., 170. 1879.

 Compensation.

31. — A railroad track in a street is not necessarily, *per se*, a public nuisance. Nor can it be said, as a matter of law, that it is an obstruction. *Wabash, St. Louis and Pacific R'y Co. v. The People*, 12 Bradwell (Ill.), 418. 1883. See, also, *State v. Louisville, New Albany and Chicago R'y Co.*, 86 Ind., 114, 1882; 10 Amer. & Eng. R. R. Cases, 286.

32. — Where a railway company laid a side-track upon the street of a city within six feet of the line of the street, in violation of the provisions of the city ordinance granting it the right of way, which prohibited the construction of any track within eighteen feet of such line, it was held that such track, and the use thereof, constituted a nuisance, for the maintenance of which a property holder who had sustained special damages by reason thereof might maintain an action, the discretion necessary to be exercised in determining the limits to be imposed upon the use of the street by the railroad being vested in the city council. *Cain v. Chicago, Rock Island and Pacific R. R. Co.*, 54 Ia., 255, 1880; 21 Amer. R'y Rep., 235.

33. — The track, being a side-track, and having been wrongfully constructed in violation of the city ordinance, could not be considered a permanent structure, the damages arising from the maintenance of which would be original and not continuous; nor, being a nuisance, could the right to continue such maintenance be acquired by prescription. *Ib.*

34. — A steam railway in a street in Denver, which is not occupied by complainant, although in itself a public nuisance, and intended for carrying passengers in the manner pursued by complainant, is not a special injury to complainant's road which equity will enjoin. *Denver and Swansea R'y Co. v. Denver City R'y Co.*, 2 Colo., 673, 1875; 20 Amer. R'y Rep., 339.

35. — A railway in the streets of a city is not of itself a nuisance, but an improper and unreasonable exercise of a right to use a street by a railway company may become a nuisance. *State v. Louisville, New Albany and Chicago R'y Co.*, 86 Ind., 114, 1882; 10 Amer. & Eng. R. R. Cases, 286.

36. — Under provisions in a town charter giving the board of trustees the control and

supervision of the highways, streets, alleys, public grounds and parks within its limits, and power "to define and declare what shall be deemed nuisances, and to prevent and abate the same, and provide for the punishment of offenders against any order or ordinance passed concerning the same by fine or imprisonment, or both," the town authorities are warranted in passing an ordinance declaring the use of steam as a motor upon any street railway, located or running upon or along any street in the town, to be a nuisance, and prohibit, in the absence of any legislative grant authorizing it, the use of steam in propelling street cars. *North Chicago City R'y Co. v. Lake View*, 105 Ill., 207. 1883.

37. — Where a railroad is built in a public street, the escape of soot, smoke and smells from the locomotives, the obstructions of the street with cars, and the jarring of the earth and neighboring buildings by passing trains, to the inconvenience, discomfort and danger of adjoining proprietors, do not, in law, constitute a nuisance, if the charter of the company authorizes the laying of the track, unless the road is negligently or unskillfully built or operated. *Rundle v. Pacific R. R. Co.*, 65 Mo., 325. 1877.

38. Workshops. A railway workshop adjoining a church declared a nuisance. *Baltimore and Potomac R. R. Co. v. Fifth Baptist Church*, 11 Amer. & Eng. R. R. Cases (U. S. S. C.), 15. 1883.

 OBSTRUCTING RAILWAY TRACKS.

See CRIMINAL LAW.

 OFFICERS OF CORPORATIONS.

1. Compensation. The vice-president of a corporation, performing services for the corporation, is not entitled to compensation without the authority of the board of directors. *Bailey v. Buffalo Crosstown R. R. Co.*, 14 Hun (N. Y.), 483. 1878.

2. — A proposal to give large sums to the chairman, secretary and some other officials of a dissolved company in acknowledgment of past services was beyond the power of the company, such a disposal of the funds

Conflicting Boards of Directors — Contract for Their Benefit.

not being an administration for the purpose of paying debts or claims due by the company, and an interdict was granted against such application of the funds. *Clouston v. Edinburgh and Glasgow R'y Co.*, 4 Scotch Session Cases (3d series), 207. 1865.

3. — The president of a street railway performed services as a master builder about the erection of a depot for the company. *Held*, that there was no implied obligation on the part of the company to pay him therefor. *Levisse v. Shreveport City R. R. Co.*, 27 La. An., 641. 1875.

4. — The president and directors of a railway company, occupying the position of trustees of the funds and property of the company, are not entitled to any compensation for their ordinary services as such officers, unless the salary is fixed by the by-laws or a resolution of the board before the services are performed. *Gridley v. Lafayette, Bloomington and Mississippi R'y Co.*, 71 Ill., 200. 1873.

5. — If the president of a railway company or a director performs extraordinary duties, not pertaining to his office, or expends money of his own while discharging the duties of his office, he will be entitled to recover for the same. *Ib.*

6. **Conflicting boards of directors; trespass.** In a suit to recover damages for certain trespasses brought by one board of directors of a corporation against another board, claiming to be the legally appointed directors of the same corporation, it was *held* that the board *de facto* in possession of the franchises of the corporation may maintain an action for any trespass respecting the corporate property; and that the acts of such *de facto* officers cannot be collaterally impeached; the proper way of trying the right or title to the office being by an action in the nature of a *quo warranto*. *Held*, that the defendants could not justify such alleged trespasses under color of proceedings had by a justice of the peace under the provisions of the Rev. Code, chap. 49 (Forcible Entry and Detainer), as the justice in such case had no jurisdiction. *Atlantic, Tennessee and Ohio R. R. Co. v. Johnston*, 70 N. C., 343, 1874; *Same v. Sharpe*, *ib.*, 509.

7. **Contract.** An express contract between the director of a corporation and his com-

pany is not void, but is voidable at the option of the *cestui que trust* exercised within a reasonable time. No consideration of its apparent or intrinsic fairness will induce a court, either of law or equity, to enforce it against the resisting *cestui que trust*. *Stewart v. Lehigh Valley R. R. Co.*, 38 N. J. Law, 505, 1875; 13 Amer. R'y Rep., 54.

8. **Contract against public policy.** An action was brought to enforce a contract between the plaintiffs and the defendant M., which had been subsequently assigned by M. to the defendant railway company under an agreement upon its part to carry its provisions into effect. At the time of the making of the contract the plaintiff, Munson, was a director and president and the holder of a portion of the mortgage bonds of a certain railway company (not this defendant), therein referred to. The agreement, after reciting that the company was insolvent, provided that Munson (its director, president and bondholder) should proceed at once to procure the foreclosure of the mortgage, securing the bonds issued by it, and obtain a sale of all the property, rights of way and interests of the said company; that he should purchase the property on such sale or sales and convey the same to the defendant M., or to a railway company which it was then proposed to organize. M. agreed, in consideration thereof, to deliver to the plaintiffs the first mortgage bonds of the new company to an amount equal to fifty per cent. of the principal and interest of the bonds held or represented by the plaintiffs in the insolvent company. *Held*, that the agreement was void, as being against public policy. *Munson v. Syracuse, etc., R'y Co.*, 29 Hun (N. Y.), 76. 1883.

9. **Contract for their benefit.** It is illegal for directors of a railway company to become members of a company with whom they have made a contract to build and equip the road, so as to share in the profits; and if they do, they will, in equity, be compelled to account for the profits realized. *Gilman, Clinton and Springfield R. R. Co. v. Kelly*, 77 Ill., 426, 1875; *Keeler v. Brooklyn Elevated R. R. Co.*, 9 Abbott's New Cases (N. Y.), 166, 1880; *Thomas v. Brownville, Fort Kearney and Pacific R'y Co.*, 2 Federal Reporter, 877; 1 McCrary (U. S. C. C.), 392,

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1880. See, also, *Aberdeen R'y Co. v. Blaikie*, 1 McQueen, House of Lords, Scotch App., 481, 1853; *Blaikie v. Aberdeen R'y Co.*, 14 Scotch Session Cases (2d series), 66, 1851; *Same v. Same*, 1 Patterson, House of Lords, Scotch App., 394, 1854; 18 Scotch Session Cases (2d series), House of Lords, 20, 1854.

10. — The president of a railroad company made a contract with contractors for the construction of the road for the sum of \$5,000 per mile, to be paid in bonds, but afterward agreed to increase the amount to \$6,500 per mile in consideration that the additional \$1,500 be divided between the contractors, the president and the plaintiff. The \$1,500 per mile was to be paid the contractors by the company when they had laid the iron. The directors of the company ratified the contract, but without any knowledge of the agreement as to the division of the \$1,500. The contractors gave an order on the company in favor of the plaintiff for his share of the bonds under the agreement as to the division, in terms payable out of the \$1,500 per mile; which order the company accepted. Afterward, and before the iron was laid, the contractors assigned their contract to the president of the road, who completed it. In an action by the plaintiff to recover the bonds under the order, *held*, that the company, having treated the president as a contractor while the work was being done, was estopped from treating him afterward as a trustee. *Risley v. Indianapolis, Bloomington and Western R. R. Co.*, 62 N. Y., 240, 1875; reversing *Same v. Same*, 4 Thompson & Cook, 13; 1 Hun (N. Y.), 202, 1874. The fraudulent conduct of the president had not been pleaded and could not be inquired into. *Ib.*

11. **Directors; purchase of stock.** Directors are not technical parties, but only trustees in a general sense, as are agents and bailees intrusted with the care and management of property. They may purchase stock from stockholders without being subject to the stringent rule governing dealings between trustee and *cestui que trust*. *Deadrick v. Wilson*, 8 Baxter (Tenn.), 108, 1874.

12. **Discovery, bill of.** An officer of a corporation cannot be made a party defendant to a cross-bill, for the purpose of discovery, when he did not derive the desired

information in his official capacity. *McComb v. Chicago, St. Louis and New Orleans R. R. Co.*, 7 Federal Reporter, 426, 1881.

13. **Earnings of company; authority to dispose of.** The officers of a railway company hold the earnings and profits as a trust fund for the payment of its debts. But in the absence of contract liens or rights created by legal proceedings they may exercise a reasonable and proper discretion as to the order in which the debts of the company shall be paid, and this discretion cannot be taken from them by notice to the company that a particular creditor intends to demand a preference. *Newport and Cincinnati Bridge Co. v. Douglass*, 12 Bush (Ky.), 673, 1877; 18 Amer. R'y Rep., 221.

14. **Fraud.** An action to recover the property and assets, which are claimed to have been illegally or fraudulently disposed of or converted by the trustees or directors of a corporation, should be brought in the name of the corporation itself. But should the corporation, upon application of stockholders, decline to bring the action; the stockholders may sue, making the corporation a defendant. *Allen v. New Jersey Southern R. R. Co.*, 49 Howard's Practice (N. Y.), 14, 1875.

15. — The officers of a railway company are directly responsible to its stockholders upon the general principles of equity for losses and defalcation, occasioned as well by their neglect as by their positive misconduct and breach of trust. *Shea v. Knoxville and Ky. R. R. Co.*, 6 Baxter (Tenn.), 277, 1873.

16. — To a bill of such a character, charging embezzlement by the directors of the company, and an appropriation by them of a sum of money for purposes of bribery and corruption, it is no ground of demurrer that the charges made are felonies involving criminal liability, to which, if true, they are not bound to subject themselves. *Ib.*

17. — A railway company furnished a director with a large sum of money, to enable him to purchase the "concession" of another line. He purchased it, as it turned out, from himself, he being the concealed owner of it. *Held*, that the transaction could not stand, but that the company must adopt or repudiate the transaction altogether;

Order for Examination — Powers.

and the company having sold the concession pending a suit impeaching the transaction, *held*, also, that it could have no relief, either as to the application of the money or otherwise. *Great Luxembourg R'y Co. v. Magnay*, 25 Beavan (Eng. Ch.), 536. 1858.

18. Order for examination. Where the party, whose examination is desired, is a corporation, the moving affidavits must state the name of the officer or director of such corporation whose testimony is necessary and material. *Williams v. Western Union Telegraph Co.*, 1 N. Y. Civil Procedure Reports, 294. 1881.

19. Powers — directors. Under the ordinary powers granted to a railroad having its *termini* in this state, the directory has no power to purchase other railroads without the sanction of the stockholders. *Deaderick v. Wilson*, 8 Baxter (Tenn.), 103. 1874.

20. — managing director. The managing director of a corporation may properly have the custody of its assets; and, if the company permits him, without objection, to hold himself out as competent to dispose of its assets, strangers are entitled to presume that he has authority to do so. *Walker v. Detroit Transit R'y Co.*, 47 Mich., 338. 1882.

21. — It is immaterial, as against strangers, whether the person acting as managing director received a specific appointment to that position from the directors, if he has long acted in that capacity without objection, and if his services as such have been invariably accepted. *Ib.*

22. — The president of a corporation purchased its interest in certain stock certificates from its assignee at public auction, but the certificates had previously passed by indorsement into other hands by the act of a member of the corporation who had been allowed by the president and company to act as managing director. *Held*, that, as between the president and a *bona fide* purchaser of the assets, the title of the latter could not be disturbed. *Ib.*

23. — president. A president *de facto* of a railroad company, when a suit is pending in which his right to the office is to be tried, and just before the decision of such suit, has no right to make a distribution of the funds of the company to such creditors as

he may elect to give preference. *Walker v. Flemming*, 70 N. C., 483. 1874.

24. — Authority conferred on the president of a railway company to act as "the business and financial agent" of the corporation only authorizes the transaction of the ordinary business of the company. He is not authorized to execute a mortgage upon the corporate property. *Luse v. Isthmus Transit R'y Co.*, 6 Oreg., 125. 1876.

25. — The authority of G. to sell bonds of the company will not be inferred from his position as director of the company, nor from the fact that the president of the company gave him a power of attorney to sell. The authority of the president to execute such power of attorney must be shown. *Titus v. Cairo and Fulton R. R. Co.*, 37 N. J. Law, 98. 1874.

26. — secretary. A secretary of a railway company, without the authority of the directors, pledged certain demands coming to the company as security for the payment of the company's debt and thereby obtained an extension of time upon the debt. *Held*, that his action was unauthorized and that his agreement could not be enforced against the company. *Hamilton and Port Dover R'y Co. v. Gore Bank*, 20 Grant Ch. (Upper Canada), 190. 1873.

27. — superintendent. The plaintiff had some quicks which were carried at his expense by the railway company to the N. station on its line. By the leave of F., the general superintendent of the railway, the plaintiff put them into a piece of ground of the company's, adjoining the station, to keep them alive. Afterwards, wishing to remove them, he applied to the station clerk, who would not permit him to take them, but referred him to F., who refused to let him have the quicks. He subsequently applied to B., the managing director of the company, and met with a like refusal. The plaintiff thereupon brought trover against the company, but offered no evidence to show what were the respective duties of the general superintendent or managing director of the railway. *Held*, that it was the duty of a railway company trading largely as a carrier on its lines, to have some servants authorized to give directions, and act for the company on all occasions as the exigency of

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the traffic might require; that the jury might therefore infer that the general superintendent and managing director had authority to act for the company in all matters in the course of the ordinary business of the company as a carrier. *Taff Vale R'y Co. v. Giles*, 22 Eng. Law & Equity, 202; 23 Law Jour. Rep., N. S. (Q. B.), 43; 2 Ellis & Blackburn, 822; 75 E. C. L., 822. 1853.

28. Quorum; directors. By express statute, a quorum of the directors of a railway corporation are competent to act within the scope of their authority, and to bind the corporation, although the meeting be not regularly called, and no notice given to the other directors. *State ex rel. v. Smith*, 48 Vt., 266; 16 Amer. R'y Rep., 394. 1876.

29. Speculation in company's claims. The president and directors of railroad companies are not allowed to buy up and speculate upon claims against such companies—such contracts being in every respect against good morals, and against public policy. *McDonald v. Haughton*, 70 N. C., 393. 1874.

30. Stockholder's suit. Persons buying stock, in order to bring suits for past wrongful acts of directors, are not favored by courts of equity. *Kingman v. Rome, Watertown and Ogdensburgh R. R. Co.*, 30 Hun (N. Y.), 73. 1893.

31. Trusts; accounting for aid bonds. Township aid bonds were delivered by a railway company to one of its directors to pay for depot buildings which he had erected and agreed to convey, but did not do so. *Held*, on a bill for an accounting, that he should be charged with the bonds. *Michigan Air Line R'y Co. v. Mellen*, 44 Mich., 321, 1890; 5 Amer. & Eng. R. R. Cases, 245.

32. Unauthorized act; ratification. Notice to the officers of a corporation of the unauthorized acts of their predecessors in office is notice to the corporation, and, if no dissent is expressed, ratification will be presumed, and the acts will become binding upon the corporation and its stockholders. *Chouteau v. Allen*, 70 Mo., 290. 1879.

OMNIBUS AND HACK LINES.

1. Preference at depot grounds. A railway company made arrangements, at one of

its stations, with A., the proprietor of an omnibus running between the station and K., to provide omnibus accommodation for all passengers by any of its trains to and from K., and allowed A. the *exclusive privilege* of driving his vehicle into the station yard for the purpose of taking up and setting down passengers at the door of the booking office. *Held*, that, in the absence of special circumstances showing it to be reasonable, the granting of such exclusive privilege to one proprietor and refusing to grant the like facilities to another, who also brought passengers from K., as well as from other places beyond, was a breach of the prohibition against the granting of undue and unreasonable preferences contained in the 17 and 18 Vict., c. 31, s. 2: *Marriott v. London and South Western R'y Co.*, 1 Common Bench (N. S.), 499; 87 E. C. L., 498, 1857; 40 Eng. Law & Equity, 250.

2.—A railway company agreed with a cab proprietor, in consideration of his paying it 600*l.* per annum, to allow him the exclusive liberty of plying for hire within its station. The court refused to grant a writ of injunction against the company, under the Railway and Canal Traffic Act, 1854 (17 and 18 Vict., c. 31), at the instance of another cab proprietor,—no inconvenience to the public being shown to have arisen from the arrangement. *Beadell v. Eastern Counties R'y Co.*, 2 Common Bench (N. S.), 509; 89 E. C. L., 509, 1857; 1 Neville & McNamara, 56, 1857; *Painter v. London, Brighton and South Coast R'y Co.*, 2 Common Bench (N. S.), 702; 89 E. C. L., 701, 1857.

3.—An omnibus proprietor who carries passengers and their luggage for hire, to and from a railway station, cannot maintain an action against the company for refusing to allow him to drive his vehicle into the station yard. *Barker v. Midland R'y Co.*, 18 Common Bench, 46; 86 E. C. L., 45, 1856; 36 Eng. Law & Equity, 253.

OPERATION OF RAILWAYS.

1. Rate of speed. The general law of this state imposes no restrictions upon railroad companies as to the rate of speed their trains may run. When not prohibited by municipal regulation they may adopt such rate of

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speed as they may desire, provided always it is reasonably safe to the passengers being transported. *Chicago and Alton R. R. Co. v. Robinson*, 9 Bradwell (Ill.), 89, 1881.

2. Bridge; negligence. The plaintiffs, colliery owners, had a siding adjoining the defendant's line, which was crossed by a bridge, and on to which the defendant was in the habit of conveying the plaintiffs' trucks from its line, the plaintiffs removing them thence as they thought fit. The defendant brought on to the plaintiffs' siding and left there, after working hours, trucks of the plaintiffs, one of which was loaded with a broken truck to such a height that it would not pass under the bridge. More than twenty-four hours afterwards, but before work was resumed at plaintiffs' works, the defendant, after dark, pushed on to the siding other trucks of the plaintiffs, and pushed the loaded truck up to the bridge, by which means the train of trucks was arrested. The defendant's employes, not being aware of the cause of the obstruction, pushed the train of trucks forward with so much force that the loaded truck knocked down the bridge. In an action for the damage so done, the jury having found that the plaintiffs were guilty of contributory negligence in not removing the loaded truck, *held*, that there was no evidence of contributory negligence to go to the jury. *Radley v. London and North Western R'y Co.*, Law Reports, 9 Exchequer Cases, 71; 8 Eng. (Moak), 516, 1874.

3. Control by the courts. To justify the interference of the courts to enforce the running of through trains on a continuous line of railway, under the 17 and 18 Vict., c. 31, s. 2, it must be shown that *public* convenience requires it, and that it can reasonably be done. They will not interfere at the instance of an individual, where there is a continuous line by which through tickets may be obtained, though by a somewhat longer route, no additional cost or serious loss of time being thereby incurred, and no substantial inconvenience being thereby occasioned to the public, and it appearing that no complaints had been made of the inadequacy of the existing accommodation. *Barrett v. Great Northern R'y Co.*, 1 Common

Bench (N. S.), 423, 1857; 38 Eng. Law & Equity, 218; 1 Neville & McNamara, 38.

4. — mandamus. The remedy for the enforcement of a duty imposed upon a corporation by its charter is by *mandamus* or by proceedings in the name of the state for a forfeiture of the charter. *McCann v. South Nashville R. R. Co.*, 2 Tenn. Ch., 773, 1877.

5. — stations. It is not a sufficient ground for the interference of the court under the Railway and Canal Traffic Act (17 and 18 Vict., c. 31) that a railway company charges higher fares for distances on one of its branch lines than it charges for equal distances on another, nor that it issues third-class return tickets on one branch line and not on another. Nor will the court interfere with the arrangements of a railway company respecting the number of trains that stop, or the times at which they stop, at any particular station, unless it be distinctly shown that such arrangements do not sufficiently provide for the accommodation of the public. A railway company issued third-class return tickets to stations a certain distance only down its line. The court refused to enjoin it to issue such tickets to stations beyond that distance. *Caterham R'y Co. v. London and Brighton R'y Co.*, 40 Eng. Law & Equity, 259, 1856; 1 Neville & McNamara, 32; 1 Common Bench (N. S.), 410; 26 Law Journal (Common Pleas), 16; 87 E. C. L., 410.

ORDER.

1. For payment out of future fund. Plaintiff was employed by the I., C. and D. R. R. Co. to find contractors to build its road. He procured defendants to agree to enter into such contract. It was agreed that the company was to pay, as part of the consideration for the work, \$250,000. At the close of the negotiation, and when the agreement was being reduced to writing, it was further agreed that the sum should be increased to \$255,000; that defendants should give to plaintiff, as compensation for his services, their order on the company for \$5,000, payable *pro rata*, as the money became due under the contract. The agreement was carried out, the contract executed and the order given and accepted by the

Managing Committee—Jurisdiction.

company. The contract was subsequently, and before any money became due under it, surrendered by defendants and canceled. In an action to recover the amount of the order, *held*, that it was given for a good consideration, and could not be defeated by default of the defendants, and that defendants were liable. *Risley v. Smith*, 64 N. Y., 576. 1876.

ORGANIZATION OF CORPORATION.

See CHARTER; SUBSCRIPTIONS BY CITIES AND TOWNS; SUBSCRIPTIONS BY COUNTIES; SUBSCRIPTIONS BY INDIVIDUALS.

1. **Managing committee.** A. and B. were the registered promoters under the Stat. 7 and 8 Vict., c. 110, of a railway company. A provisional committee was afterwards formed, at a meeting of which A. was appointed secretary, and B. solicitor to the company, and other persons a managing committee. *Held*, that A. could not, merely upon these facts, recover against an acting member of the managing committee for services afterwards performed by him as secretary. *Wilson v. Curzon*, 15 Meeson & Welsby (Exchequer), 532. 1846.

2. **Preliminary expenses.** The articles of association of a joint-stock company provided that the company should defray such expenses incurred in its establishment as the directors should consider might be deemed and treated as preliminary expenses, to an amount not exceeding 2,000*l*. The plaintiffs, who were promoters of the company, had incurred preliminary expenses in the establishment of the company. *Held*, that no action would lie at the suit of the plaintiffs against the company for non-payment of such preliminary expenses in accordance with the articles of association. *Melhado v. Porto Alegre R'y Co.*, Law Reports, 9 Common Pleas Cases, 503. 1874.

3. — Defendant was, by his consent, a member of the provisional committee of a projected company. According to the prospectus, the affairs were to be under the control of a managing committee. A managing committee was appointed, and then the provisional committee ceased to act. After this, the solicitor to the company, who had been appointed by the provisional com-

mittee, gave orders for the publication of advertisements. In an action against defendant for the expense of inserting these, it was proved that he had twice attended meetings of the provisional committee, but that he was not on the managing committee nor a shareholder. *Held*, that these facts constituted no evidence for a jury of the defendant having authorized the insertion of the advertisements, nor of his liability. *Cooke v. Tonkin*, 9 Adolphus & Ellis (N. S.), 936; 58 E. C. L., 935. 1847.

4. — The defendant, in answer to an application from the secretary of a railway company, to allow his name to be placed on the provisional committee, wrote to him consenting to do so, and stating that "he concluded his liability would be limited to the amount of his shares." His name was accordingly published in the newspapers as one of the provisional committee, and on one occasion he attended and acted as chairman at a meeting of the committee. *Held*, that he was liable for the price of stationery supplied by the plaintiff on the order of the secretary, and used by the committee, after the date of his letter to the secretary. *Barnett v. Lambert*, 15 Meeson & Welsby (Exchequer), 489. 1846.

5. **Undertaking abandoned.** An association to form a corporation does not amount to a partnership, although the proceedings are abandoned. *Walstab v. Spottiswoode*, 15 Meeson & Welsby (Exchequer), 501. 1846. See, also, *Reynell v. Lewis*, 15 ib., 517. 1846.

OVERCHARGES.

1. **Agreement.** When unexpected difficulties occur in the carriage of goods by a carrier, and the consignor agrees, in view of them, to pay a sum in addition to what had been previously fixed upon, and pays the same, he cannot recover it back as paid without consideration. *Detroit and Bay City R'y Co. v. McKenzie*, 43 Mich., 609, 1880; 21 Amer. R'y Rep., 157.

2. **Jurisdiction.** A bill against several defendants for a discovery, accounting and repayment of alleged unlawful overcharges for freight, the liability therefor being purely legal and enforceable at law, cannot be sus-

Action Against — Eastern Terminus.

tained, on the ground that one defendant is liable as the lessee of several short lines of railroad, and that the other defendants, the lessors, are also liable, and that, if complainant be compelled to resort to law for redress, he must sue each defendant for a fractional part of each overcharge. *Scott v. Erie R'y Co.*, 34 N. J. Eq., 354. 1881.

3. Remedy. Money paid for the use of a railway, under protest, as overcharges, was afterwards paid into court under an order made by consent, and vested in the public stocks, to abide final judgment in an action brought to try the legality of the charges, which the judgment declared to be illegal. *Held*, that the party who paid the money was entitled to the stocks and dividends and accumulations thereof. After the judgment at law finding payments, made to the railway company, to be overcharges, a bill filed, pending a writ of error on that judgment, to restrain the company from continuing the overcharges, and for an account, etc., is not improper nor premature, and the plaintiffs are entitled to the costs. *Barrett v. Stockton and Darlington R. R. Co.*, 1 House of Lords Cases, 18. 1847.

PACIFIC RAILROADS.

1. Action against. The act of March 3, 1873 (17 Stat., 509), is a valid and constitutional exercise of legislative power. Congress, by requiring the attorney-general to bring a suit in equity in the name of the United States in any circuit court against the Union Pacific R. R. Co. and others, intended not to change the substantial rights of the parties to the suit, but to provide a specific mode of procedure, which, by removing certain restrictions on the jurisdiction, process and pleading which are in other cases imposed, would give a larger scope to the action of the court, and a more economical and efficient remedy than before existed. *United States v. Union Pacific R. R. Co.*, 98 U. S., 569. 1878.

2. Central Pacific Railway. The Central Pacific R. R. Co. did not become liable to apply five per cent. of its net earnings annually to the payment of the United States subsidy bonds until October 1, 1874, the day

of the completion of the road. *United States v. Central Pacific R. R. Co.*, 4 Sawyer (U. S. C. C.), 341. 1877.

3. Charter. The several state railway corporations incorporated into the Pacific railroad system by the act of congress chartering the Union Pacific R. R. Co., approved July 12, 1862, and which were authorized to construct branches, and received aid from the United States, are subject to the terms and conditions imposed by said act of congress. *Western Union Telegraph Co. v. Union Pacific R'y Co.*, 3 Federal Reporter, 1; 1 McCrary (U. S. C. C.), 581. 1880.

4. Crossing of other railways. The charter of the Northern Pacific R. R. Co., obtained from the general government, does not exempt its right of way from the operation of the laws of the state of Minnesota, and forbid a railroad company organized under the general law of the state to exercise the right of eminent domain. *Northern Pacific R. R. Co. v. St. Paul, Minneapolis and Manitoba R'y Co.*, 3 Federal Reporter, 702; 1 McCrary, (U. S. C. C.), 302; 1 Amer. & Eng. R. R. Cases, 12. 1880. See, also, *Union Pacific R'y Co. v. Burlington and Missouri River R. R. Co.*, 3 Federal Reporter, 106; 1 McCrary (U. S. C. C.), 452. 1880.

5. Eastern terminus. The charter of the Union Pacific R. R. Co. (12 Stat. at Large, 489, § 12) required its Iowa branch to be constructed westward from a point on the western boundary of the state of Iowa, to be fixed by the president of the United States. *Held*, on a consideration of various provisions of the charter, that the eastern terminus of said branch was on the Iowa shore of the Missouri river, and not on the Nebraska shore, nor at a point "on the middle of the main channel" of the river, although that was the legal western boundary of the state of Iowa. *United States ex rel. Hall v. Union Pacific R. R. Co.*, 4 Dillon (U. S. C. C.), 479. 1875.

6. — The initial point of the Iowa branch of the Union Pacific Railroad was fixed by the act of congress of July 1, 1862 (12 Stat., 489), on the Iowa bank of the Missouri river. The order of the president of the United States, bearing date March 7, 1864, established and designated, in strict conformity to law, the eastern terminus of said

Fraud — Mortgage.

branch at a point on the western boundary of Iowa east of and opposite a certain point in the territory of Nebraska. The bridge constructed by the Union Pacific R. R. Co., over the Missouri river, between Omaha and Council Bluffs, in Iowa, is a part of the railroad. The company was authorized to build it only for the uses of the road, and is bound to operate and run the whole road, including the bridge, as one connected and continuous line. *Union Pacific R. R. Co. v. Hall*, 91 U. S., 343. 1875.

7. — The act of March 3, 1873 (17 Stats. at Large, 509), gives to the proper circuit court jurisdiction in *mandamus* to compel the Union Pacific R. R. Co. to operate its road as required by law. There must be jurisdiction over the company by service upon it to enable the court to exercise the power conferred by the act. *Hall v. Union Pacific R. R. Co.*, 3 Dillon (U. S. C. C.), 515. 1875. See, also, *United States ex rel. v. Same*, ib., 524. 1875.

8. — The term "transfer," as employed in § 1310 of the Code, refers to the act of moving freight, passengers and express matter, and is intended to cover the removal of cars with their burdens, from one road to another, as well as the change of their burdens from the cars of one company to those of another. *Council Bluffs v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 45 Ia., 338. 1876.

9. — Any regulation of the transportation of goods from one state to another, upon railroads, operates as a regulation of commerce, and a statute prescribing such a regulation is unconstitutional and void. *Ib.*

10. — Sections 1310-1316, inclusive, of the Code, requiring railway companies connecting with the Union Pacific R'y to transfer their freight, passengers and express matter at Council Bluffs, is in conflict with the acts of congress, approved, respectively, July 1, 1862, and June 15, 1863, and cannot, therefore, be enforced. *Ib.*

11. **Fraud.** The United States cannot maintain a suit in equity to compel the refunding of money obtained by fraudulent contracts from the Union Pacific R. R. Co. The corporation alone can maintain such action. *United States v. Union Pacific R. R. Co.*, 98 U. S., 569. 1878.

12. **Government aid; interest.** The solution of the question, whether the Union Pacific R. R. Co. is required to pay the interest before the maturity of the principal of the bonds issued by the United States to the company, depends on the meaning of §§ 5 and 6 of the original act of 1862, "to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes," and of § 5 of the amendatory act of 1864. *Held*, upon consideration of said sections, of the scheme of said original act, and of the purposes contemplated by it, that it was not the intention of congress to require the company to pay the interest before the maturity of the principal of the bonds. *United States v. Union Pacific R. R. Co.*, 91 U. S., 72, 1875; 9 Amer. R'y Rep., 411.

13. **Irrigating ditches.** The Pacific railroad companies, by virtue of the acts of congress of 1862 and 1864, granting them lands, did not acquire a right to abate ditches on such lands as a nuisance, provided the ditch had acquired a right to the use of water which was recognized by the local customs and decisions of the courts prior to the passage of the act of congress of July 26, 1866, granting the right of way to ditch owners over the public lands. *Broder v. Natoma Water and Mining Co.*, 50 Cal., 621. 1875.

14. **Military reservation.** The grant of a depot site in the Ft. Riley military reservation construed. *Republican River Bridge Co. v. Kansas Pacific R. R. Co.*, 92 U. S., 315. 1875.

15. **Mortgage.** The mortgage upon the Southern Pacific R. R. Co. construed. *Southern Pacific R. R. Co. v. Doyle*, 6 Sawyer (U. S. C. C.), 60. 1882.

16. — By § 3 of the act of congress, approved July 1, 1862, incorporating the Union Pacific R. R. Co., lands were granted to the company "for the purpose of aiding in the construction of the railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores thereon;" and it was enacted that all such lands "not sold or disposed of" by the company before the expiration of three years after the completion of

Net Earnings — Taxation.

the entire road should be subject to settlement and pre-emption like other lands. Upon a consideration of this and other provisions of the act, and of the amendatory act of July 2, 1864, *held*, that these provisions should be so construed as to effect their primary object, which was to furnish aid in and during the construction of the road, and that it cannot be controlled or defeated by the secondary and subordinate purpose of opening to settlement and pre-emption such of the lands as should not be sold or disposed of within the designated period. Mortgaging their lands is a disposition of them within the meaning of the law. *Platt v. Union Pacific R. R. Co.*, 99 U. S., 48. 1878.

17. Net earnings. Under the act of congress of July 1, 1862 (12 Stats. at Large, 489), construing the charter of the Union Pacific Railroad Company and of the other companies therein named, the United States may recover of the companies receiving its bonds, until such bonds and interest are paid, *five per cent. of the net income* earned after the completion of the roads. *United States v. Kansas Pacific R'y Co.*, 4 Dillon (U. S. C. C.), 367. 1876.

18. Right of way. The right of way granted to the Central Pacific R. R. Co. by act of congress is exclusive in its character, and the company may maintain ejectment against a trespasser thereon. *Central Pacific R. R. Co. v. Benity*, 5 Sawyer (U. S. C. C.), 118. 1878.

19. Sinking fund. The legislation of congress in relation to the Central Pacific R. R. Co. and the Western Pacific R. R. Co.—the latter now, by consolidation, a part of the former—considered, and held that, to the extent of the powers, rights, privileges and immunities thereby granted, congress retains the right of amendment, and, by exercising it, may, in a manner not inconsistent with the original charter granted by California, as modified by the act of that state passed in 1834, accepting what had been done by congress, regulate the administration of the affairs of the company in reference to the debts created by it under authority of such legislation. That the establishment of the sinking fund by the act of May 7, 1878, does not conflict with anything

in said charter. *Sinking-Fund Cases; Union Pacific R. R. Co. v. United States; Central Pacific R. R. Co. v. Gallatin*, 99 U. S., 700. 1878.

20. — So far as it establishes in the treasury of the United States a sinking fund, the act of congress approved May 7, 1878 (20 Stat., 56), entitled "An act to alter and amend the act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes,' approved July 1, 1862, and also to alter and amend the act of congress approved July 2, 1864, in amendment of said first named act," is not unconstitutional. *Ib.*

21. Taxation. The doctrine of federal exemption from state taxation applied to the case of a tax by a state upon the real and personal property, as distinguished from its franchises, of the Union Pacific R. R. Co., which company congress assisted by donations and loans and of whose board of directors the government appoints two, whose operations as well as its rates of toll are subject to regulations imposed by its charter, and to such further regulations as congress may hereafter make, on whose failure to comply with the terms and conditions of its charter, or to keep the road in repair and use, congress may assume the control and management thereof, and devote the income to the use of the United States, the loan of the United States to which, amounting to many millions, is a lien on all the property, and on failure to redeem which loan, the secretary of the treasury is authorized to take possession of the road for the use and benefit of the United States; and, finally, where all the grants made to the company are declared to be upon the condition that, besides paying the government bonds advanced, the company shall keep the railroad and telegraph lines in repair and use, and shall at all times transmit dispatches and transport mails, troops and munitions of war, supplies and public stores for the government, whenever required to do so by any department thereof; and in addition to which control and the obligations and liabilities of the company, congress, not

Contributory Negligence.

forbidding a state tax, reserves the right to add to, alter, amend or repeal the charter. *Railroad Co. v. Peniston*, 18 Wallace, 5, 1878; 6 Amer. R'y Rep., 369.

22. Transportation for the United States. The act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes," approved July 1, 1862 (12 Stat., 489), after providing for the issue of patents for land and of bonds to the Union Pacific R. R. Co. and other companies, from time to time, as successive sections of their respective roads should be completed, requires the companies to perform all government transportation of mails, troops, etc., and to credit the compensation therefor on the government loan, and then adds that, "after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof." *Held*, that the liability of the Union Pacific R. R. Co. to make this payment accrued when it reported, and the president of the United States accepted, its road as completed for the purpose of issuing the bonds, though the acceptance was provisional, and security was required that all deficiencies in construction should be supplied. That the company, having obtained the bonds and agreed in regard to the security, is estopped from denying that the road was then completed. *Union Pacific R. R. Co. v. United States*, 99 U. S., 403, 1878; *United States v. Central Pacific R. R. Co.*, ib., 449, 1878; *United States v. Kansas Pacific R'y Co.*, ib., 455, 1878; *United States v. Sioux City and Pacific R. R. Co.*, ib., 491, 1878.

23. — The Denver Pacific R'y and Telegraph Co. is not liable for the debt incurred by the Kansas Pacific R'y Co. on account of subsidy bonds; and although it is bound to perform the government service stipulated by the Pacific railroad acts at the rates therein prescribed, and is subject to their provisions, so far as they are applicable to it, no part of the compensation due it for such service can be retained by the United States. *United States v. Denver Pacific R'y Co.*, 99 U. S., 460. 1878.

24. Transportation of mails. The sixth section of the act of congress of July 1, 1862, ch. 120, incorporating the Union Pacific R. R. Co. (12 Stat., 439), constitutes a contract between the United States and the company, whereunder the latter, for its services in transporting upon its road the mails, and the agents and clerks employed in connection therewith, is entitled to compensation at fair and reasonable rates, not to exceed those paid by private parties for the same kind of service. *Union Pacific R. Co. v. United States*, 104 U. S., 662, 1881; 9 Amer. & Eng. R. R. Cases, 54.

25. Ultra vires. Certain contracts entered into by the Union Pacific R. R. Co., assigning a large part of its franchise, and alienating property which was necessary to the performance of its obligations and duties to the government and to the public, *held ultra vires*. *American Union Telegraph Co. v. Union Pacific R'y Co.*, 1 McCrary (U. S. C. C.), 188. 1880.

26. Union Pacific Railroad. The act of congress of March 3, 1873 (17 U. S. Stat. at Large, 509), in relation to an action against the Union Pacific R. R. Co., construed. *United States v. Union Pacific R. R. Co.*, 11 Blatchford (U. S. C. C.), 385. 1873.

27. — The gifts of bonds and lands to the Union Pacific R. R. Co. are not in the nature of a trust, but are absolute and unconditioned. *United States v. Union Pacific R. R. Co.*, 11 Blatchford (U. S. C. C.), 385. 1873.

PACKED PARCELS.

See DISCRIMINATION.

PARENT AND CHILD.

See INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS;
INJURIES TO PERSONS ON THE TRACK.

1. Contributory negligence. The authorities upon the question of the effect of contributory negligence of the parents collated. *Galveston, Houston, etc., R'y Co. v. Moore*, 10 Amer. & Eng. R. R. Cases, 745 (Tex.). 1883.

2. — In an action to recover damages from a railroad company, for injuries to a child

Damages.

between five and six years old, alleged to have been caused by the negligence of the defendant's agents, the plaintiff is entitled to recover, if it appear from the evidence that the injuries resulted directly from the want of ordinary care and prudence on the part of the defendant's agents, and not from the want of such care and prudence on the part of the child, as ought, under the circumstances, to be reasonably expected from one of his age and intelligence, nor from the want of ordinary care and prudence on the part of his parents, directly contributing to the accident. *McMahon v. Northern Central R'y Co.*, 39 Md., 438. 1873.

3. — Where a child of tender years is left by its mother in the care of another person, such person must be charged with the duty of exercising reasonable care for its safety; and if for the want of such care the child is killed, there can be no recovery therefor by the next of kin. In this case the evidence shows due care on the part of the railroad company to prevent the accident, and gross negligence on the part of the person in whose care the child was left. *Chicago and Northwestern R'y Co. v. Schumilowsky*, 8 Bradwell (Ill.), 613. 1881.

4. — Circumstances considered under which the court regarded it as unnecessary to express any opinion as to how far the negligence of the mother, or person left in charge of the child by the mother, should be imputed to the infant. *Texas and Pacific R'y Co. v. O'Donnell*, 58 Tex., 27. 1882. See *Same v. Same*, 10 Amer. & Eng. R. R. Cases, 712. 1882.

5. — The contributory negligence of the parent will not exonerate a railway company from liability for damages for injury to the child. *Norfolk and Petersburg R. R. Co. v. Ormsby*, 27 Grattan (Va.), 455. 1876.

6. **Damages.** An action may be maintained by a parent for the loss of his child's services during minority, and for all necessary expenses and losses incurred in attention to it while sick from an injury caused by the negligence of another, and this notwithstanding an action may be maintained in behalf of the child for such injury as results in personal damage to himself. *Evansich v. G., C. and S. F. R'y Co.*, 57 Tex., 123, 1882; 6 Amer. & Eng. R. R. Cases, 182.

7. — The "necessary injury" resulting to a parent from the negligent killing of his minor child, within the meaning of § 3 of the Damage Act (R. S. 1879, § 2123), consists in the loss of services of the deceased during minority, the cost of nursing, surgical and medical attendance and appropriate funeral expenses. *Rains v. St. Louis, Iron Mountain and Southern R'y Co.*, 71 Mo., 164, 1879; 5 Amer. & Eng. R. R. Cases, 610.

8. — Where a minor employe is injured, the father is entitled to recover the value of the services of the son up to the time of his arrival at the age of twenty-one years, together with the necessary expenses attending the care of the injured son. *Houston and Great Northern R. R. Co. v. Miller*, 49 Tex., 322, 1878. See, also, *Frick v. St. Louis, Kansas City and Northern R'y Co.*, 75 Mo., 542, 1882; 10 Amer. & Eng. R. R. Cases, 776.

9. — An action by a parent against a railway company for the loss of service of his child, caused by an injury to the child through the negligence of an employe of the company, is not barred by the fact that the child, by his parent as next friend, has already recovered damages against the corporation for the same injury. *Wilton v. Middlesex R. R. Co.*, 125 Mass., 130. 1878.

10. — In an action by a father against a person for negligently causing a personal injury to his child, he can recover such damages only as he has himself sustained, leaving to the infant a further right of recovery of such damages as are personal to himself. In such action it is error to instruct the jury that their verdict should be the amount of money which would compensate the child for his injuries. *Durkee v. Central Pacific R. R. Co.*, 56 Cal., 388, 1880; 8 Amer. & Eng. R. R. Cases, 321.

11. — In such action it is proper to instruct the jury that the plaintiff is not entitled to recover damages for the pain or suffering which his son experienced from the injuries which he received, or from his disfigurement therefrom. *Ib.*

12. — It seems that a general instruction to the jury, in an action by a parent for the negligent killing of his infant child, that in determining the amount of the verdict they should have "regard to the mitigating and aggravating circumstances," is bad; the in-

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struction should designate what circumstances are to be considered as mitigating or aggravating damages. *Nagel v. Missouri Pacific R'y Co.*, 75 Mo., 633, 1882; 10 Amer. & Eng. R. R. Cases, 792.

13. Death of mother; damages. In an action by a child for the death of its mother, the measure of damages is the support of the child from the date of the mother's death until the child is of age. *Atlanta and West Point R. R. Co. v. Venable*, 67 Ga., 697, 1881.

14. — In such case it is not error to charge the jury that they may consider the probable support which the mother would give the child; as to whether the amount would increase or diminish as the child advanced in years. *Id.*

15. Employment. A railway company employing a minor child, in opposition to the known will of the parents, is liable to the parents for the services of the child. *Grand Rapids and Indiana R. R. Co. v. Showers*, 71 Ind., 451, 1880; 2 Amer. & Eng. R. R. Cases, 9.

16. Injuries causing death. Under the statute of Georgia, the action of the mother for the loss of service by reason of a tort committed upon her child is not barred by the fact of the death of the child from the injury. *Chick v. Southwestern R. R. Co.*, 57 Ga., 357, 1876.

17. Injury to child; action by parent and child jointly. At the time of the trial the minor had attained his majority, and upon his motion he was joined with his mother as a party plaintiff. *Held*, error; that it would have been proper to substitute him as the sole plaintiff in her place, but having no joint interest in the cause of action they could not be united as plaintiffs. This was an action for malicious prosecution against a corporation. *Ricord v. Central Pacific R. R. Co.*, 15 Nev., 167, 1880; 2 Amer. & Eng. R. R. Cases, 394.

PARKS.

1. Assessment. A city cannot assess the expense of improving a street against a railway company having a mere right of way.

South Park Commissioners v. Chicago, Burlington and Quincy R. R. Co., 107 Ill., 105, 1883.

PARTITION.

1. Of railway. A railway company having purchased from another company an undivided interest in the latter's railroad, under the act of April 7, 1853, in relation to insolvent railroad companies, etc., which authorizes such sale under certain conditions, if the same can be made without impairing the usefulness of the road to the vendor company, whereby a tenancy in common was created between the parties, cannot compel partition of the common property either under the statute in relation to partition or in equity. *Railway Co. v. Railroad Co.*, 38 Ohio St., 614, 1883; *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Central Ohio R. R. Co.*, 9 Amer. & Eng. R. R. Cases (Ohio), 535, 1883.

PARTNERSHIP.

See EMINENT DOMAIN; EVIDENCE; SUBSCRIPTIONS BY INDIVIDUALS.

1. Contract. A contract of partnership between the owners of a steamboat line and a railway company enforced. *Silver v. St. Louis, Iron Mountain and Southern R'y Co.*, 5 Mo. App., 381, 1878; affirmed, 72 Mo., 194, 1880.

2. Practice. At common law the general rule is, that all parties must join and be joined by their names in an action; and such is the general import of the Code, which provides that the *precipe* and petition must contain the *names of the parties* to an action, and their *names*, both direct and inverse, shall be entered in the index. *Burlington and Missouri River R. R. Co. v. Dick*, 7 Neb., 243, 1878.

3. Railway companies. A partnership cannot be formed by two railway companies unless so authorized by their respective charters. *Burke v. Concord R. R. Co.*, 8 Amer. & Eng. R. R. Cases (N. H.), 552, 1881.

4. — judgment. B. obtained a judgment against one of three railway companies that

Carriage Beyond the Station — Action at Law — Fish-plate.

were operating three lines of railway in partnership, B. not knowing of the partnership. B. levied an execution upon property owned by the partnership. *Held*, that his rights under the levy were superior to the general equities of the partners. *Lamoille Valley R. R. Co. v. Bixby*, 55 Vt., 235. 1882.

PASSENGERS.

See BAGGAGE; DAMAGES; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; STREET RAILWAYS; RATES.

4. Carriage beyond the station. If a railway company carry a passenger beyond a station to which he is ticketed, without his consent, and without affording him a reasonable opportunity to leave the train, he has a right of action for whatever damage he may sustain by reason thereof. *Illinois Central R. R. Co. v. Chambers*, 71 Ill., 519. 1874.

2. Failure to stop for passenger; damages. Where a train wrongfully fails to stop to take on a passenger, he is entitled to recover nominal damages, and such actual damages as he may sustain by reason of the delay; but he has no right to inflict injury on himself to enhance the damages. *Indianapolis, Bloomington and Western R'y Co. v. Birney*, 71 Ill., 391. 1874.

3. — And where, in such a case, the passenger, instead of procuring a comfortable and safe conveyance to the place he desired to reach, or waiting a few hours for another train, went there on foot, unnecessarily, and thereby brought on sickness, he was not entitled to recover damages on account of such sickness. *Id.*

PATENTS.

1. Action at law. Where, in the nature of the invention, there can be no profits, the patentee cannot sue in equity, as he has an adequate remedy by an action at law for damages. A suit in equity for an accounting of profits in the use of car brakes was dismissed. *Vaughan v. Central Pacific R. Co.*, 4 Sawyer (U. S. C. C.), 280. 1877.

2. Damages; infringement. The use of a combination of a swing-truck with a locomotive having flanges on all its driving-

wheels, not shown to have any advantage over the use of a locomotive with plain forward driving-wheels and a rigid truck. Hence the patentee is not entitled to any allowance as profits. *Locomotive Safety Truck Co. v. Pennsylvania R. R. Co.*, 2 Federal Reporter, 677. 1880.

3. — But where there are profits, in case of infringement they will be computed and allowed to the patentee. *Williams v. Rome, Watertown and Ogdensburg R. R. Co.*, 2 Federal Reporter, 702. 1880.

4. Equity. A suit in equity upon two separate patents may be joined when the effect will not embarrass the defendant and produce confusion in the case. The plaintiff was permitted to join in the same action a suit upon two patents for registering car fares. *Horman Patent Co. v. Brooklyn City R. R. Co.*, 15 Blatchford (U. S. C. C.), 444. 1879.

5. — Suit for infringements, where otherwise maintainable, are of equitable cognizance, although no injunction has issued, and although brought after the expiration of the original or extended term of the patent. *Stevens v. Kansas Pacific R'y Co.*, 5 Dillon (U. S. C. C.), 486, 1879; *Sayles v. Dubuque and Sioux City R. R. Co.*, *ib.*, 561, 1878.

6. — A bill in equity, since the Revised Statutes, will not lie solely to recover damages for the infringement of a patent; but if it pray for an injunction or a discovery, and an account for profits, it will be sustained. *Vaughan v. East Tennessee, Virginia and Georgia R. R. Co.*, 1 Flippin (U. S. C. C.), 621. 1877.

7. Escrow. Where the question was whether the license to use a patent, produced on the hearing of the case by the railway company, had been delivered to the president of the company as an escrow, or as a completed instrument, the evidence of the president and another credible witness must outweigh that of plaintiff alone. *Mellon v. Delaware, Lackawanna and Western R. R. Co.*, 12 Amer. & Eng. R. R. Cases (U. S. S. C.), 309. 1883.

8. Fish-plate. Contrivances substantially the same as that set forth in the second claim of the reissued letters, for fastening metals together, wherein, by the use of slotted side-plates and an adjusting bolt, al-

Injunction — Sleeping-car.

lowance is made for their contraction and expansion caused by changes in temperature, were in use before the issue of the original letters. *Johnson v. Railroad Co.*, 105 U. S., 539. 1881.

9. Injunction. Where the patent is in doubt, where the defendant is solvent and the damages easily ascertained, a preliminary injunction will not be allowed. *Pullman v. Baltimore and Ohio R. R. Co.*, 4 Hughes (U. S. C. C.), 236. 1880.

10. Jurisdiction. A bill for account of profits for the use of a patented article will not be sustained. The patentee must proceed at law, where his patent has expired, and no injunction is allowable. (See cases cited *contra* in note.) *Sayles v. Fredericksburg, etc., R. R. Co.*, 3 Hughes (U. S. C. C.), 172. 1879.

11. — A bill merely for profits and damages cannot be maintained in equity. There is an adequate remedy at law. *Root v. Railway Co.*, 105 U. S., 139, 1881; 11 Amer. & Eng. R. R. Cases, 276.

12. License. A license to use a patented invention upon the locomotives used by a railroad company on its road, or on "any road or roads now owned or that may hereafter be owned or operated by said company," embraces not only locomotives in use at the date of the license upon roads then owned and operated by the company, but also such other locomotives as it might thereafter use, and other roads which it might thereafter operate. *Matthew v. Pennsylvania R. R. Co.*, 8 Federal Reporter, 45. 1881.

13. — A license by one patentee to use the thing patented clothes the licensee with the right to use it, and he becomes liable for the contract price for the license. *Dunham v. Indianapolis and St. Louis R. R. Co.*, 7 Bissell (U. S. C. C.), 223. 1876.

14. Limitations. The limitation contained in s. 55, act July 8, 1870, U. S., was repealed by s. 5526, R. S., but as to all actions arising before such repeal, such limitation was kept in force by s. 5599, R. S.; therefore an action for infringement of a patent, before the date of such repeal, is not within the state statute of limitations. *Sayles v. Oregon Central R'y Co.*, 6 Sawyer U. S. C. C.), 31. 1879.

15. Royalty; car brake. Where there is an established license fee for the use of a

car brake, and proof of the profits is difficult, the court will accept that license fee as a proper basis for estimating the complainant's recovery. *Emigh v. Baltimore and Ohio R. R. Co.*, 4 Hughes (U. S. C. C.), 271. 1881.

16. Sleeping-car; injunction. Preliminary injunction refused, because, upon the affidavits produced, the court was not prepared to determine the validity of complainant's patent, or the question of the infringement; because the threatened damage was not of such irreparable character as to require an injunction, and because the threatened damages were easily ascertainable, and the defendant abundantly able to pay. *Pullman v. Baltimore and Ohio R. R. Co.*, 5 Federal Reporter, 72. 1883.

17. — Various railway patents examined and their validity passed upon. *Johnson v. Flushing and North Side R. R. Co.*, 15 Blatchford (U. S. C. C.), 192, 1878; *Williams v. Rome, Watertown and Ogdensburg R. R. Co.*, 15 ib., 200, 1878; *Williams v. Boston and Albany R. R. Co.*, 17 ib., 21, 1879; *Williams v. Rome, Watertown and Ogdensburg R. R. Co.*, ib., 181, 1880; *Stephenson v. Brooklyn Cross Town R. R. Co.*, 19 ib., 473, 1881; *Slawson v. Grand Street, etc., R. R. Co.*, 17 ib., 512, 1880; *Locomotive Co. v. Pa. R. R. Co.*, 10 Philadelphia (U. S. C. C.), 252, 1874; *Emigh v. Baltimore and Ohio R. R. Co.*, 6 Federal Reporter, 283, 1881; *Nathan v. New York Elevated R. R. Co.*, 2 ib., 225, 1880; *Electric R. R. Signal Co. v. Hall R. R. Signal Co.*, 6 ib., 603, 1881; *Morgan Elevated R'y Co. v. Pullman*, 14 ib., 648, 1882; *Slawson v. Grand Street, Prospect Park and Flatbush R. R. Co.*, 4 ib., 531, 1880; *Stephenson v. Brooklyn Cross-Town R. R. Co.*, 14 ib., 457, 1881; *Ashcroft v. Boston and Lowell R. R. Co.*, 1 Holmes (U. S. C. C.), 366, 1874; *Pike v. Providence and Worcester R. R. Co.*, 1 ib., 445, 1874; *Railroad Co. v. Mellon*, 104 U. S., 112, 1881; *Ashcroft v. Railroad Co.*, 97 ib., 189, 1877; *Railway Co. v. Sayles*, 97 ib., 554, 1878; *Slawson v. Grand Street R. R. Co.*, 107 ib., 649, 1882; *Turrill v. Ill. Central R. R. Co.*, 5 Bissell (U. S. C. C.), 344, 1873; *National Car Brake Shoe Co. v. Lake Shore and Mich. Southern R'y Co.*, 4 Federal Reporter, 219; 9 Bissell (U. S. C. C.), 503, 1880; *Same v. D. L. and N. R. R. Co.*, 4 Federal

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Reporter, 224, 1880; *Illinois Central R. R. Co. v. Turrill*, 94 U. S., 695, 1876; 15 Amer. Ry Rep., 387. See *Railroad Co. v. Turrill*, 101 ib., 836. 1879.

PAUPERS.

1. Liability for bringing paupers into state. The provisions of the Gen. Sts., ch. 71, § 25, and of the St. of 1866, ch. 272, § 1, making any one, by whose means a person not having a settlement in the commonwealth is brought within it, liable for such person's support if he becomes a pauper, do not apply to a railway company which has brought such person into the commonwealth in the ordinary course of business, and without any reason to suspect that he would become a pauper. *Inhabitants of Fitchburg v. Cheshire R. R. Co.*, 110 Mass., 210. 1872.

PAYMENT.

1. Freight charges; bank check. The reception of a bank check for freight charges on goods, held not to be a payment, under the facts of a particular case. *Syracuse, Binghamton and New York R. R. Co. v. Collins*, 57 N. Y., 641; 1 Abbott's New Cases (N. Y.), 47, 1874.

PENALTIES.

See CHARTER; FERRIES; INJURIES TO DOMESTIC ANIMALS; LIMITATIONS; SUBSCRIPTIONS BY INDIVIDUALS; RATES.

1. Action; rights of assignee. A number of actions against a railway company were gotten up by one McCarthy, the attorney for the plaintiffs, and one Bonnell, upon an agreement to divide between them the costs and a considerable part of the penalty to be recovered in such actions, the several plaintiffs consenting thereto, and conveying to McCarthy their rights to such portions of the penalties. After issue joined, the defendant's attorney, for the purpose of preventing McCarthy from recovering such costs and portions of the penalties, procured from each of the plaintiffs an instrument, under seal, releasing the defendant from the cause of action and the costs, and agreeing that the ac-

tions be discontinued, and that orders to that effect might be entered on filing the stipulation. Defendant's attorney accordingly entered orders to that effect, without notice to plaintiffs' attorney. On a motion by the latter to set aside such orders as irregularly entered, and as entered with intent to cheat and defraud him, *held*, that, as the causes of action were not assignable, he acquired no interest in the subject of the actions by his agreement with the plaintiffs, and that the court would not set aside the orders of discontinuance to protect his right to the costs. *McBratney v. Rome, Watertown and Ogdensburg R. R. Co.*, 17 Hun (N. Y.), 385. 1879.

2. Constitutional law. Under the provision of the constitution of Kansas (art. 6, § 6), which provides that "the proceeds of fines for any breach of the penal laws shall be exclusively applied" "to the support of common schools," all the proceeds of penalties imposed as punishment for a breach of a penal statute (and not imposed as damages, where loss has been sustained) must "be exclusively applied to the support of common schools;" and any enactment of the legislature providing otherwise is unconstitutional and void. Hence an act of the legislature giving to an informer, who has sustained no loss, one half of such proceeds, is unconstitutional and void. *Atchison, Topeka and Santa Fe R. R. Co. v. Sanders*, 22 Kans., 1. 1879.

3. — Sec. 2424, Code of 1871, which requires railroad companies to erect sign-boards where they cross highways, and imposes a penalty for failure to do so, is unconstitutional in so far as it gives to the county the fine collected. The suit permitted by it is a civil suit, and the state has no interest in it. The fine, when collected, belongs to the school fund, and the state board of education are the proper parties to bring the suit for a violation of its provisions. The term "highway," as used in this section, means a public road in the country, and not a street in a town or city. *Mobile and Ohio R. R. Co. v. The State*, 51 Miss., 137. 1875.

4. — Where a law, when a corporation is formed, or which it afterwards accepted, exacts certain duties of it, a subsequent statute imposing a penalty, where none existed before, for a failure to perform such duties,

Construction of Statute — Forfeiture of Franchise.

does not impair any corporate right or otherwise violate the constitution. *Mobile and Montgomery R. R. Co. v. Steiner*, 61 Ala., 559. 1878.

5. — The act of April 20, 1874 (71 Ohio L., 146), giving a penalty of \$150 to the party aggrieved by a railway company for overcharging for the transportation of passengers or property, is not unconstitutional. *Cincinnati, Sandusky and Cleveland R. R. Co. v. Cook*, 37 Ohio St., 255, 1881; 6 Amer. & Eng. R. R. Cases, 317.

6. Construction of statute. The rigid rule of the common law, in reference to the liability of common carriers, should not be applied in a case involving the violation of a penal statute. *Whitehead v. Wilmington and Weldon R. R. Co.*, 87 N. C., 255, 1882; 9 Amer. & Eng. R. R. Cases, 168.

7. — A court cannot create a penalty by construction, but should avoid it by construction, unless it is brought within the letter and the necessary meaning of the act creating it. *Western Union Telegraph Co. v. Axtell*, 69 Ind., 199. 1879.

8. Cruelty to animals; appeal. In an action for a penalty under § 13 of the act for the prevention of cruelty to animals (Laws 1873, p. 13), an appeal will lie to the court of common pleas. *Pennsylvania R. R. Co. v. New Jersey Society for Prevention of Cruelty to Animals*, 39 N. J. Law, 400. 1877.

9. Delay. A railway company is not relieved of liability to the penalty of \$25 per day, under the act of 1875, ch. 240, for delay of shipment of goods beyond five days after receipt of same, by reason of its alleged inability to procure the necessary transportation on account of the large accumulation of freight. It is the duty of the company to provide a sufficient number of cars. *Keeter v. Wilmington and Weldon R. R. Co.*, 86 N. C., 346, 1882; 9 Amer. & Eng. R. R. Cases, 165.

10. — In the statute providing for a penalty for delay of five days in shipment, the words "five days" in the act mean five full running days, including Sunday, whenever it intervenes. *Ib.*

11. — The company would not incur the penalty until the full expiration of the sixth day after the receipt of the goods —

the law not regarding the fraction of a day in the enforcement of a penal statute. *Ib.*

12. — In an action by the plaintiff against a railway company for the penalty for delay in shipment of cotton, under the act of 1874-75, ch. 240, caused by increase of freight; by the refusal of a connecting road of the same through line to transfer defendant's flat-cars over its road loaded with cotton; by the detention of defendant's box-cars at terminus of said connecting road; and by its inability to procure other cars in time to ship plaintiff's cotton, and not by its competition with other lines for through freight, the defendant not being responsible for the causes of delay, it was held that the burden was on the defendant to show an agreement to waive such penalty. *Whitehead v. Wilmington and Weldon R. R. Co.*, 87 N. C., 255. 1882.

13. Evidence. Recovery reduced to one excess of fares paid and one penalty, upon the facts of a particular case. *Barker v. N. Y. Central and Hudson River R. R. Co.*, 61 N. Y., 655. 1875.

14. Failure to stop train at railway crossing. In an action against a railway company to recover the penalty for neglecting to stop its train before crossing another railroad on the same level, there is no error in refusing to allow the defendant to prove that the company had rules requiring the engine-driver to comply with the law, and that the rules were in his hands. A railroad company must see that its servants obey the law, and is liable for neglect to do so. *Indianapolis and St. Louis R. R. Co. v. The People*, 91 Ill., 452. 1879.

15. Forfeiture of franchise. An act of the legislature making any discrimination on the part of railroad companies in their charges for freight a penal offense, and providing for a forfeiture of all their franchises for any wilful violation of the act, without any other penalty for the first offense, is in violation of the spirit of the constitutional provision which requires all penalties to be proportioned to the nature of the offense, and also of § 15 of art. 11, under which such a law is framed, which only authorizes the penalty to extend to forfeiture of franchises and property, "when necessary for that pur-

Form of Action — Personal Injury.

pose." *Chicago and Alton R. R. Co. v. The People*, 67 Ill., 11. 1873.

16. Form of action. A state's attorney will not be allowed to bring an action for a statute penalty for his own use and gain. *People v. Wabash, St. Louis and Pacific R'y Co.*, 12 Bradwell (Ill.), 263. 1882.

17. Jurisdiction. Where the evidence, in an action by the people to recover the penalty given by law against a railway company for not coming to a full stop before crossing another railroad track, showed a similar violation of the statute at another and different road about a quarter of a mile distant, it was held that the people were not compelled to unite the two causes of action, and thereby defeat the justice's jurisdiction. *Indianapolis and St. Louis R. R. Co. v. The People*, 91 Ill., 452. 1879.

18. Overcharge. The act of April 25, 1873, amendatory of § 13 of the act of May 1, 1852 (70 Ohio L., 161), which prohibits any corporation operating a railroad in Ohio from demanding and receiving for the transportation of passengers more than three cents per mile for a distance of more than eight miles, gives the party aggrieved a right to recover from such corporation a forfeiture of not less than \$25 for each case of overcharge. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Moore*, 33 Ohio St., 384. 1878.

19. — Where the complaint was for three times the amount of the aggregate of overcharges upon a number of different articles, and a bill of particulars was annexed, it was too late after judgment to object for the first time to the form of pleading, even if it was defective. *Streeter v. Chicago, Milwaukee and St. Paul R'y Co.*, 40 Wis., 291, 1876; 13 Amer. R'y Rep., 432.

20. — The fact that shippers or consignees of goods, under the act of 1874, paid illegal railway charges thereon with full knowledge of the facts, and without protest, will not prevent a recovery. *Ib.*

21. — While ch. 273 of 1874 was in force, defendant, a railway company of Wisconsin, received plaintiff's goods from another company of that state, paying as back charges thereon a greater sum than such other company could lawfully charge, and, on delivery of the goods to plaintiffs, col-

lected from them the amount of such back charges, together with illegal charges for carriage upon its own road. *Held*, that plaintiffs can recover from defendant only three times the excess in its charges for carriage on its own road, and not for the excess in the charges of the other company. *Ib.*

22. Passengers; by-laws; notice. By s. 109 of the 8 and 9 Vict., c. 20, the company is empowered to make by-laws to enforce the observance of its regulations by means of fines; and s. 110 requires that the substance of such by-laws, when confirmed and allowed, "shall be painted on boards, or printed on paper and pasted on boards, and hung up and affixed and continued on the front or other conspicuous part of every wharf or station belonging to the company, according to the nature or subject matter of such by-laws, respectively, and so as to give public notice thereof to the parties interested therein or affected thereby; and such boards shall from time to time be renewed, etc.; and no penalty imposed by any such by-law shall be recoverable unless the same shall have been published and kept published in manner aforesaid." And s. 111 enacts that, "for proof of the publication of any such by-laws, it shall be sufficient to prove that a printed paper or painted board, containing a copy of such by-laws, was affixed and continued in manner by this act directed," etc. A by-law imposed a penalty not exceeding 40s. upon a passenger getting into or out of a carriage whilst in motion. Upon a summons before justices for a breach of this by-law, *held* (*dissentiente Williams, J.*), that it was sufficient to show that the by-laws were affixed at the stations at which the party entered and quitted the train, without showing publication at every station on the line. *Motteram v. Eastern Counties R'y Co.*, 7 Common Bench (N. S.), 58; 97 E. C. L., 58. 1859.

23. Personal injury. Where plaintiff sets up a claim against a railroad corporation for penalty incurred for excessive fare taken on one trip, and damages for personal injuries for unlawful ejection from defendant's cars on a subsequent trip, and defendant demurs to the complaint on the ground that two causes of action have been improperly

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united, *held*, that under § 488 of the New York Code of Civil Procedure a cause of action for penalty cannot be joined with a cause of action for personal injuries, even where they are claims arising out of the same transaction. But § 448 should be construed to refer to cases of two or more "good causes of action" well pleaded; and the claim for a penalty in this case being insufficient in form and substance, the complaint contains but one cause of action, and that for personal injuries, and the demurrer should, therefore, be overruled, and the irrelevant matter in reference to the penalty should be stricken out. *Sullivan v. N. Y., New Haven and Hartford R. R. Co.*, 11 Federal Reporter, 848. 1881. See, also, *Sullivan v. New York, New Haven and Hartford R. R. Co.*, 1 N. Y. Civil Procedure Reports, 285. 1881.

24. Pleading. A petition under the act of April 20, 1874, against a corporation, for demanding and receiving excessive fare in the sale of a passenger ticket to a person desirous of traveling on its road between the points named on the ticket, is not bad, on demurrer, for want of an averment that the purchaser of the ticket was, in fact, transported on the ticket for which excessive fare was exacted. *Cincinnati, Sandusky and Cleveland R. R. Co. v. Cook*, 37 Ohio St., 265, 1881; 6 Amer. & Eng. R. R. Cases, 317.

25. Repeal of statute. After the repeal of ch. 273 of 1874 (the Potter Law), no recovery could be had in any action then pending under the penal provisions of that act, either by virtue of § 33, ch. 119, R. S., or by virtue of the clause in the repealing act (ch. 57 of 1876), which provided that nothing therein contained should "in any manner affect any litigation" then pending in any of the courts of this state or of the United States. *Rood v. Chicago, Milwaukee and St. Paul R'y Co.*, 43 Wis., 146. 1877.

26. — In this action, originally brought to recover, for an exaction of overcharges for the carriage of goods, the statutory penalty of three times the excess, it was determined that such an action would not lie, by reason of a repeal of the statute. The prayer of the complaint was then amended so as to demand only the illegal excess. This was held to be in effect an amendment of the com-

plaint itself; and that the question whether the action will lie under such an amended complaint is not *res adjudicata*. That, as the excessive charges are alleged to have been made "wrongfully and fraudulently," the action may be regarded as still one in tort, and the amendment was allowable. That the cause of action at common law, now stated in the complaint, was not repealed or suspended by the statute. *Smith v. Chicago and Northwestern R'y Co.*, 49 Wis., 443, 1880; 1 Amer. & Eng. R. R. Cases, 303; *Graham v. Chicago, Milwaukee and St. Paul R'y Co.*, 49 Wis., 532, 1880.

27. — In an action for three times the excess over legal rates of the charges made by a railway company for carriage of goods, plaintiff, after a repeal of the statute giving such an action, cannot, without amendment of the complaint, recover as in a common law action for the simple excess of such charges above reasonable rates. *Streeter v. Chicago, Milwaukee and St. Paul R'y Co.*, 44 Wis., 383, 1878; 18 Amer. R'y Rep., 338.

28. — The act of 1849 required a bell of at least thirty pounds' weight or a steam whistle to be placed on each locomotive, and that the same should be rung or whistled at least eighty rods from the place where the railroad crossed any other road or street, and be kept ringing or whistling until such other road or street was crossed, "under a penalty of \$50 for every neglect," etc. The act of 1869 so amended the law in respect of the penalty for this neglect of duty as to read "under a penalty of not exceeding \$100." *Held*, that, as the latter act allowed a latitude of discretion in respect to the penalty from one cent to \$100, it was inconsistent with, and repugnant to, that of 1849 directing an absolute and fixed penalty of \$50, and repealed the former by implication. *Wilson v. Ohio and Mississippi R'y Co.*, 64 Ill., 542. 1873.

PERSONAL INJURIES.

See CONTRACTORS; DAMAGES; INJURIES TO EMPLOYEES; INJURIES TO PASSENGERS; INJURIES TO PERSONS ON THE TRACK; INJURIES TO PERSONS GENERALLY; MUNICIPAL CORPORATIONS; PARTIES TO ACTIONS; PLEADING; RELEASE.

Bonds — Injunction.

PLEDGE.

1. **Bonds.** S. H. borrowed of H. certain railroad bonds, giving in pledge as collateral security for the return thereof two notes and an acceptance made by himself and indorsed by one McD. and by T., the defendant, as accommodation indorsers. H. demanded the bonds of the agent of S. H. on the day on which they were by agreement returnable, tendering the securities in exchange for them, and, after failure on the part of S. H. to return them, sold said securities at public auction at Providence, pursuant to a notice published in a Providence newspaper. They had all fallen due before the notice of sale was given. The plaintiff purchased them at said sale and brought suit against the defendant T. as indorser thereof. *Held*, that the said notes and acceptance having matured, H., the pledgee, had a right to sell them at auction for his reimbursement. *Potter v. Thompson*, 10 R. L., 1. 1871.

2. — *Held*, further, that the sale was not invalid for want of personal notice to the pledgor, it appearing that in the absence of the pledgor (the said S. H.) in Europe, notice of the sale was given at his place of business in New York to one McD., who had been appointed his agent during his absence, with full power to do all things that the said S. H. might do if personally present—the notice given in the absence of the principal to an agent having such unlimited powers being of the same effect as if given to the principal. *Ib.*

3. — *Held*, further, that the sale was not invalid because made in Providence rather than in New York, inasmuch as the contract of hypothecation purported to be a Rhode Island contract, and it did not appear that the agent of the defendant, or the defendant himself, who saw the notice of sale, objected to the place of sale previously thereto, when, if it was an improper one, the objection should have been made. *Ib.*

4. — *Held* further, that the sale was not invalid because made after the defendant had offered to redeem, such offer not being accompanied by a tender of the money to pay for the bonds, or of the bonds themselves, and the money to pay for their depreciation. *Ib.*

5. — *Held*, further, that the pledgee of such securities, selling for the default of the pledgor, sold to the plaintiff all the right or interest which the pledgor could empower him to sell at the time the pledge was given, although the sale was made after the maturity thereof. *Ib.*

6. **Earnings of railway.** A railroad company pledged its earnings for advances obtained by its president to pay its semi-annual interest. *Held*, that this pledge of the earnings was made for the security of the president, and did not prevent him from paying other debts with such earnings, if he found it expedient and for the company's interest to do so. *Duncan v. Mobile and Ohio R. R. Co.*, 3 Woods (U. S. C. C.), 567. 1877.

7. **Stock.** Where stock in a corporation has been pledged for the "redemption of certificates of debt," and the certificates bound the debtor for the payment of "the sum therein mentioned and the interest thereon," the stock is bound for the payment of the interest itself, and a foreclosure may be decreed on default in payment of any instalment of interest. *Swasey v. North Carolina R. R. Co.*, 1 Hughes (U. S. C. C.), 17, 1874; also reported in 71 N. C., 571.

8. **To officers of corporation of corporate assets.** Any attempt by the directors of a corporation to make a pledge of the assets of the corporation in favor of themselves will be scrutinized by a court of equity with the most rigorous and jealous observation. *Chouteau v. Allen*, 70 Mo., 290. 1879.

9. **Wrongful pledge.** The pledgee holding bonds and stock as collateral security for a loan, the securities belonging to several persons, and the loan being made to a person in possession who wrongfully pledged them, should proceed *pari passu* in applying the securities to the payment of the debt. *Gould v. Central Trust Co.*, 6 Abbott's New Cases (N. Y.), 381. 1870.

PIPE LINES.

1. **Injunction.** An injunction refused where it was asked to prevent the construction of pipe lines for the conveyance of oil. A railway company has no right to prevent competition by enjoining the laying of such

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a line. *Central R. R. Co. of N. J. v. Standard Oil Co.*, 33 N. J. Eq., 127, 1880; 1 Amer. & Eng. R. R. Cases, 36; *United N. J. R. R. and Canal Co. v. Standard Oil Co.*, 33 N. J. Eq., 123, 1880; 2 Amer. & Eng. R. R. Cases, 286.

2. — After the court had refused a preliminary injunction for the removal of an oil pipe, and to prevent its use by defendants, and had discharged an *ad interim* order staying the defendants in the premises, and an appeal therefrom had been taken and was pending, an application to this court to continue such *ad interim* order, merely on the ground of the appeal, was denied. *Central R. R. Co. of New Jersey v. Standard Oil Co.*, 33 N. J. Eq., 372. 1881.

PLANK-ROADS.

1. **Crossing.** In case of the failure of a railway company to erect a suitable crossing within a reasonable time an action will lie at the instance of the company owning a plank-road. *Streetsville Plank-Road Co. v. Hamilton and Toronto R'y Co.*, 13 Upper Canada (Queen's Bench), 600. 1856.

PLAT OF TOWN.

1. **Error of railway company's engineer.** A railway company is not responsible for the error in a town plat on which the location of its right of way is incorrectly represented, merely because the persons who prepared and filed it were its engineer and local agent. To make it responsible, there should be proof that these persons were in that respect authorized to act for the company. *Hannibal and St. Joseph R. R. Co. v. Green*, 68 Mo., 169. 1878.

PLEADING.

1. **Amendment.** The complaint on a former trial of an action was upon an alleged contract of defendant to collect, through its agent at M., a bill against D. of goods consigned to the care of said agent, and to carry and deliver to plaintiff at R. the moneys so collected. After a judgment

for plaintiff had been reversed, plaintiff was allowed to amend his complaint so as to allege a cause of action for money had and received. *Held*, no abuse of discretion. *Wells v. American Express Co.*, 49 Wis., 224, 1880; 6 Amer. & Eng. R. R. Cases, 298.

2. — **damages to real estate.** When a party brings an action to recover damages for an injury to real estate, and upon the trial it appears that he has no title to the property, the court will not, under the acts of May 4, 1852, or April 12, 1858, allow an amendment by inserting the name of the real owner in his stead, especially when it appears that the plaintiff has no merit in his case, independent of the defect in his title. *Freeland v. Pa. R. R. Co.*, 2 Pearson (Pa.), 73. 1870.

3. — **name of station.** Where a declaration against a carrier alleged that the defendant received sheep of plaintiff, and contracted to transport them to "Elwood, Kan.," and the proof showed an agreement to transport to "Ellinwood, Kansas," it was held no error to allow an amendment of the declaration, by striking out the word "Elwood" and inserting the word "Ellinwood," even after overruling a motion for a new trial, when the motion to amend was made before deciding the motion for a new trial, the words being so nearly alike in sound that the proof could create no surprise. *McColom v. Indianapolis and St. Louis R. R. Co.*, 94 Ill., 534. 1880.

4. **Appeal bond of corporation.** Where an appeal bond of a railway company is sued on, and there is no plea under oath denying it is the bond of the company, and it purports on its face to be the bond of the company, and is signed by its president and secretary, with the corporate seal attached, no other proof of its being the bond of the company is necessary. *Keithsburg and Eastern R. R. Co. v. Henry*, 90 Ill., 255. 1878.

5. **Appearance by corporation.** In an action of *assumpsit* against a railroad company, to which the defendant appeared "in its own proper person," and pleaded want of jurisdiction, setting out the facts, it was held that the plea was bad on demurrer, as a plea by a corporation aggregate, which is incapable of personal appearance, must pur-

Bankruptcy — Carriage of Merchandise.

port to be by attorney. *Nispel v. Western Union R. R. Co.*, 64 Ill., 311. 1872.

6. Bankruptcy. An action was brought upon a conditional promise to pay money to the order of a railway company. The promise was in writing, and was filed with the justice as the sole cause of action. Upon it was indorsed the name of a person who added to his name the word "assignee." The defendant pleaded the general issue, and went to trial. It was shown on the trial that the payee in the promise had been put in bankruptcy, and the indorser of the paper was assignee in bankruptcy thereof. *Held*, that the objection that the plaintiff did not by its declaration aver its right to recover as assignee would not be sustained on the final submission of the case. *Wilcox v. Toledo and Ann Arbor R. R. Co.*, 43 Mich., 584, 1890; 21 Amer. R'y Rep., 161.

7. Bill of lading. In a suit against a carrier to recover damages for non-delivery of goods in proper time, if the action be brought on bills of lading, none will be admissible in evidence on the trial except those set out in the declaration. *Illinois Central R. R. Co. v. Cobb*, 64 Ill., 148. 1872.

8. Bond of corporation; assignee. Corporation bonds payable to bearer may be sued in the name of the holder; they are not within the act of 1715. *Bunting's Adm'r's v. Camden and Atlantic R. R. Co.*, 81 Pa. St., 254, 1876; 15 Amer. R'y Rep., 570.

9. By corporation. The answer of a municipal corporation to a bill in chancery need not be signed by an officer thereof. Where the name of the corporation is written to such an answer, and there is nothing to show that it is unauthorized, it will be sufficient. *Larrison v. Peoria, Atlanta and Decatur R. R. Co.*, 77 Ill., 11, 1875; 8 Amer. R'y Rep., 67.

10. Corporation. An allegation that the plaintiff is a corporation duly organized and engaged in building a railroad implies that it has assumed the responsibilities of a common carrier. *Chicago, Newton and Southwestern R. R. Co. v. Newton*, 38 Ia., 299. 1873.

11. — The allegation, in a complaint, that the defendant is a common carrier doing business under the style and firm name of The Adams Express Co., implies that the de-

fendant is a corporation, and not a copartnership. *Adams Express Co. v. Hill*, 43 Ind., 157. 1873.

12. — An averment in a declaration, that the defendant is a corporation, created by the laws of this state, and engaged in operating a railroad, and carrying corn and grain in cars furnished by itself, upon its own and other roads, is equivalent to an averment that it is a common carrier. *Toledo, Wabash and Western R'y Co. v. Roberts*, 71 Ill., 540. 1874.

13. — Where a suit is brought against a defendant by a name implying a corporation, and in that name such defendant forms an issue by general denial, and goes to trial, it is not necessary for the plaintiff to introduce any evidence of the existence of the corporation. *Adams Express Co. v. Hill*, 43 Ind., 157. 1873.

14. — In an action against a railroad company, it is not necessary to aver in the declaration that it is a corporation, nor is it necessary to prove on the trial that the defendant is a corporation, unless with the plea there is filed an affidavit denying that it is. The court will *ex officio* take notice of the fact. *Baltimore and Ohio R. R. Co. v. Sherman*, 30 Grattan (Va.), 602. 1878.

15. — The existence of a corporation plaintiff is not put in issue by a general denial of an alleged cause of action. *Dietrichs v. Lincoln and Northwestern R. R. Co.*, 13 Neb., 43. 1882.

16. — In an action against a corporation sued by the name of the Montgomery and Mobile Railroad Company, an appearance by attorney and pleadings filed in the name of Montgomery and Mobile Railway Company are a conclusive admission, in a subsequent action on the judgment, of the identity of the two corporations. *Mobile and Montgomery R'y Co. v. Yeates*, 67 Ala., 164. 1880.

17. — Where suit in the justice's court was against "D. McG., President Davis Avenue R. R. Co.," a complaint in the circuit court against "Davis Avenue R. R. Co." is a departure, and cannot be allowed, as it would introduce an entirely new party. *Davis Avenue R. R. Co. v. Ma'lon*, 57 Ala., 168, 1876; 20 Amer. R'y Rep., 405.

18. Carriage of merchandise. Evidence that a railway company received and was

Corporate Existence—Injury to Employee.

paid for carrying property, and that after its transportation it was placed by it in its depot, and was not delivered upon a proper demand, will support a declaration alleging that the company received the property, that it agreed to deliver it, and neglected and refused to do so. *Lane v. Boston and Albany R. R. Co.*, 112 Mass., 455. 1873.

19. Corporate existence. Where the complaint alleges a corporate existence in the plaintiff, and no facts or circumstances appear upon the face of the complaint showing in plaintiff a want of corporate authority, or of capacity to sue, a demurrer to the complaint under the Code cannot be sustained. *Cheraw and Chester R. R. Co. v. White*, 14 So. Car., 51. 1880.

20. Debt; mortgage; bonds. Where the declaration alleged that the defendant was indebted to the plaintiff in the sum of \$340, being semi-annual interest on certain mortgage bonds (describing the bonds and coupons), which the defendant, though often requested, had refused to pay, whereby an action had accrued to the plaintiff to have and demand of the defendants said sum of \$340, it was held to be a good declaration in debt. *New London City Bank v. Ware River R. R. Co.*, 41 Conn., 542. 1874.

21. Defective machinery. An answer in an action for injury to an employee, which alleges that the plaintiff assumed the risk incident to the use of the machinery complained of, is affirmative in its character, and such defense cannot be proved under a general denial. *Louisville and Nashville R. R. Co. v. Orr*, 84 Ind., 50, 1882; 8 Amer. & Eng. R. R. Cases, 94.

22. Defective roadway. The particular defects in the defendant's roadway, relied upon as the basis of recovery, should be set up in the pleadings. *Madden v. Minneapolis and St. Louis R'y Co.*, 30 Minn., 453. 1883.

23. Demurrer; affidavit of corporation. An affidavit to a plea on demurrer put in by a corporation is insufficient if made by an attorney or agent in the suit, unless it shows that the officers of the company are absent. *McTague v. Pennsylvania and New England R. R. Co.*, 44 N. J. Law, 62. 1882.

24. False estimates. The complaint alleged that the plaintiff entered into a contract with the S. and M. R. R. Co. (afterward

merged into and consolidated with the defendant) for the construction of a tunnel,—the contract price to be paid upon estimates of the chief engineer; and that the engineer, by collusion with the company, and for the purpose of defrauding the plaintiff, omitted certain work from his estimates. Upon the trial the plaintiff offered to prove that he did extra work, on the promise of the engineer (subsequently ratified by the president of the company) that he should be paid for it, as for similar work under the contract. *Held*, that as the plaintiff had not sued for extra work, but for work done under the original contract, the evidence was not admissible. *Hinkle v. San Francisco and North Pacific R. R. Co.*, 55 Cal., 627. 1880.

25. — The court in effect instructed the jury that, if the estimates of the chief engineer were honestly made, they were conclusive, but the bill of exceptions did not contain the contract, or any of the evidence to which the instruction related. *Held*, that it could not be said that there was any error in the ruling. *Ib.*

26. Fraud. The pleadings considered in an action to set aside a conveyance to a railway company for fraud in procuring the same. *Silvers v. Junction R. R. Co.*, 43 Ind., 435. 1873.

27. Injury causing death; parent and child. In an action for the death of a child to enable the parent to recover full damages for the services of the child during his minority, such damages must be specially alleged and demanded in the complaint. *Pennsylvania Co. v. Lilly*, 73 Ind., 252, 1881; 4 Amer. & Eng. R. R. Cases, 540.

28. — Where, in such a case, the complaint did not allege and demand damages for the loss of the future services of the child, and there was no evidence tending to show a loss of such services to the parent, a verdict assessing his damages at \$1,800 is excessive. *Ib.*

29. Injury to employee; amendment. This action was brought by Margaret Salmon as administratrix of the estate of Daniel Salmon, deceased, against the Kansas Pacific R'y Co., under § 422 of the Civil Code, for damages resulting from the death of said Daniel, claimed to have been wrongfully

Injury to Team — Negligence.

caused by the said company. In the original petition it was alleged that Salmon was killed through the negligence of defendant while he was being transported by it as a passenger, but afterwards the petition was so amended as to make it allege that Salmon was killed through the negligence of defendant while he was being transported as an employe of the company. *Held*, that the court below did not err in allowing said amendment to be made. A pleading may be amended by inserting allegations *material* to the case, and every material amendment of a petition must of necessity change more or less the nature of the cause of action. *Kansas Pacific R'y Co. v. Salmon*, 14 Kans., 512. 1875.

30. Injury to team. The pleadings in an action for injury to a team at a crossing examined and held sufficient. *Gibbs v. Mo. Pacific R'y Co.*, 11 Mo. App., 459. 1882.

31. Insane person. An action may be brought in the name of an insane person unless a conservator or guardian has been appointed. *Chicago and Pacific R. R. Co. v. Munger*, 78 Ill., 300. 1875.

32. Interpleader. The amount due from a plaintiff cannot be the subject of controversy in an action of interpleader; the action can only be maintained where plaintiff admits liability for the full amount claimed to one or the other of the claimants. *Baltimore and Ohio R. R. Co. v. Arthur*, 90 N. Y., 234. 1882.

33. Joinder. The rule in respect to uniting, in the same complaint, several causes of action arising out of the same transaction, heretofore adopted by this court, approved and followed. Applied to the joining of a law action and equitable suit in the same proceeding, the complainant having sued for an account of the profits of a railway, and for its possession. *St. Paul and Pacific R. R. Co. v. Rice*, 25 Minn., 278. 1878.

34. — On motion in arrest of judgment, where it was agreed that the mother of a child that had been killed should be bound by the verdict, the suit being brought by the father, *held*, that the judgment would not be arrested because an action for the killing of a horse was also joined by the plaintiff. *Pennsylvania R. R. Co. v. Bock*, 93 Pa. St., 427, 1850; 6 Amer. & Eng. R. R. Cases, 20.

35. Labor contract. In suing a railway company for a labor debt under Comp. L., §§ 2393-95, a declaration on the common counts in *assumpsit*, with mere allusions to the act and a statement of plaintiff's title by assignment, is not enough; the existence of the facts upon which the statute bases the right of action must be averred. *Chicago and Northeastern R. R. Co. v. Sturgis*, 44 Mich., 538. 1880.

36. Negligence. A declaration for negligent injury must allege the fact and the manner of negligence; and plaintiff should be confined to what is set forth in his declaration. *Marquette, Houghton and Ontonagon R. R. Co. v. Marcott*, 41 Mich., 433, 1879; *Flint and Pere Marquette R'y Co. v. Stark*, 38 Mich., 714, 1878.

37. — The defendant is called upon to disprove only the acts of negligence sought to be established. Thus, if the plaintiff relies upon a failure to ring a bell or sound a whistle, the defendant is not bound to show that its fences or cattle-guards were in good condition. *Chicago and Alton R. R. Co. v. Robinson*, 8 Bradwell (Ill.), 140. 1880.

38. — A declaration in an action on the case for injury sustained by the plaintiff through the negligence of the defendant, which does not show that the negligence averred contributed in some degree to the injury complained of, is bad on demurrer. *McGanahan v. East St. Louis and Carondelet R'y Co.*, 72 Ill., 557. 1874.

39. — A passenger in alleging negligence may do so in general terms. *Clark v. Chicago, Burlington and Quincy R'y Co.*, 4 McCrary (U. S. C. C.), 360. 1883.

40. — An allegation in a petition that a railway company "carelessly, negligently, wrongfully and unlawfully" ran its cars over and killed the plaintiff's intestate does not amount to an allegation that the carelessness and negligence were wilful, and the recovery must be confined to compensatory damages. *Jacobs v. Louisville and Nashville R. R. Co.*, 10 Bush (Ky.), 263. 1874.

41. — Negligence is the ultimate fact to be pleaded, and forms a part of the act from which an injury arises. It is the absence of the care in the performance of an act, and not the result of such absence. It is not, therefore, a conclusion of law, and may be

Overflow — Personal Injuries.

pleaded generally. *Louisville and Nashville R. R. Co. v. Wolfe*, 80 Ky., 82, 1883; 5 Amer. & Eng. R. R. Cases, 625.

42. — Whatever is the real ground of complaint ought to be distinctly stated in the petition. Hence, in an action against a railroad company to recover for injuries alleged to have been sustained through the company's negligence, if the negligence consisted in having a defective sand-box on the engine and in keeping a defective frog in the track, the petition should not charge negligence in running the cars. *Edens v. Hannibal and St. Joseph R. R. Co.*, 72 Mo., 212, 1890; 5 Amer. & Eng. R. R. Cases, 459.

43. — Where neglect of co-employees is charged, their names and employment should be averred. *Fraker v. St. Paul, Minneapolis and Manitoba R'y Co.*, 30 Minn., 103. 1882.

44. — contributory negligence. A complaint for personal injury caused by the negligence of the defendant's servants, averring that the plaintiff "was without fault or negligence," sufficiently shows that the negligence of the plaintiff did not contribute to the injury, unless it otherwise appears by the complaint. *Louisville, New Albany and Chicago R'y Co. v. Head*, 80 Ind., 117, 1881; 4 Amer. & Eng. R. R. Cases, 619.

45. — The allegation of due care on the part of the plaintiff is sufficient, unless the facts show that there was contributory negligence. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Wright*, 80 Ind., 182, 1881; 5 Amer. & Eng. R. R. Cases, 628.

46. — In an action to recover for an injury caused by negligence, whether it be an injury to the person or an injury to property, the complaint must show by direct averment, or it must appear from the facts therein alleged, that the plaintiff or party injured was himself guilty of no negligence which contributed to the injury. *Louisville, New Albany and Chicago R'y Co. v. Boland*, 58 Ind., 398, 1876; *Gormley v. Ohio and Mississippi R'y Co.*, 72 Ind., 31, 1880; 5 Amer. & Eng. R. R. Cases, 581; *Hathaway v. Toledo, Wabash and Western R'y Co.*, 46 Ind., 25, 1874; 6 Amer. R'y Rep., 399.

47. — In an action against a railroad company for injuries to the person, occasioned by its negligence, it is not necessary to aver

that the plaintiff was in the exercise of reasonable care or without fault; these are matters of defense. *Government St. R. R. Co. v. Hanlon*, 53 Ala., 70, 1873; *Robinson v. Western Pacific R. R. Co.*, 43 Cal., 409, 1874; 7 Amer. R'y Rep., 244; *Houston and Texas Central R'y Co. v. Cowser*, 57 Tex., 293, 1882.

48. **Overflow; ditches.** A petition in an action for flooding the plaintiff's land stated that defendant "failed to keep its road in such condition as to prevent injury to plaintiff; but negligently and carelessly failed to make and keep open proper ditches for the purpose of leading the water off of plaintiff's land." There was no averment of any fact showing that defendant was under any legal obligation to maintain ditches. *Held*, that for want of such averment the petition was fatally defective. *Field v. Chicago, Rock Island and Pacific R'y Co.*, 76 Mo., 614. 1892.

49. **Personal injuries.** In a suit against a railway company, to recover damages for a personal injury, it is not sufficient for the plaintiff to prove the injury, but he must also prove the negligence alleged. If it is alleged that a whistle was not sounded, the burden of proving that fact rests upon the plaintiff, and the defendant is not bound to prove that the whistle was sounded. *Illinois Central R. R. Co. v. Cragin*, 71 Ill., 177. 1873.

50. — Plaintiff's complaint contained three counts; the first alleged in substance that on October 30, 1877, he got upon the rear platform of one of defendant's cars, as a passenger; that the conductor, without asking him for his fare or giving him an opportunity to pay it, violently threw him off from the car in front of a car passing upon an adjoining track, and he was run over and injured, "to his damage \$10,000." The other two counts relate to the same accident, alleging that it occurred through defendant's negligence, each closing "to his damage \$10,000." In the prayer for relief plaintiff asked damage to the amount of \$20,000. Upon the trial the court ruled in substance that plaintiff could only recover under the first count; he obtained a verdict for \$15,000. Defendant claimed that as said count only alleged \$10,000 damages, the verdict was un-

Railway in Streets — Variance.

authorized. *Held*, untenable; that the general prayer for damages at the close of the complaint controlled; but that if, in order to sustain the recovery, the first count should have alleged \$15,000 damages, the defect was one that could be amended on appeal. *Schultz v. Third Avenue R. R. Co.*, 89 N. Y., 242; 9 Amer. & Eng. R. R. Cases, 412. 1832. See *Same v. Same*, 46 N. Y. Superior Ct., 211. 1830.

51. — An order requiring the plaintiff, in a personal injury case, to divide his petition into separate counts, *held* improper. *Hammer v. Chicago, Rock Island and Pacific R'y Co.*, 10 Amer. & Eng. R. R. Cases (Ia.), 772. 1883.

52. — An averment that defendant negligently drove a certain engine upon the railway up to, upon and across a certain public highway crossing, without giving the necessary statutory signals, viz.: ringing a bell or sounding a whistle, is a sufficiently specific statement of defendant's negligence when taken in connection with the allegation of consequential injury, and it would entitle plaintiff to support it by evidence, under defendant's plea to the general issue. *Chicago and Northeastern R'y Co. v. Miller*, 46 Mich., 532, 1881; 6 Amer. & Eng. R. R. Cases, 89.

53. **Railway in streets.** An action to recover damages for the diminution of the value of adjacent property, occasioned by the location and use of a railway in a public street, is not an action of trespass *quare clausum fregit*, but at the common law would have been an action on the case. *Jeffersonville, etc., R. R. Co. v. Esterle*, 13 Bush (Ky.), 667. 1878.

54. **Recoupment; sale of railroad ties.** In an action to recover the price of a quantity of ties sold and delivered by the plaintiff to the defendant, it was pleaded that a certain portion of the ties were, by some person to the defendant unknown, cut and removed from land granted to the defendant by its charter and remaining unsold, and after receiving the same it became, for the first time, apprised of the fact that the ties were taken from its own land; it was held the plea contained no matter of recoupment, as it did not aver possession of the ties in the vendor at the time of the sale, so that a

warranty of title could be implied therefrom, nor did it aver any affirmation of title. In the absence of both these elements, the purchaser buys at his own peril. *Illinois Central R. R. Co. v. Leidig*, 64 Ill., 151. 1872.

55. **Release; infant.** A release of damages by an infant having been pleaded, but no proper denial thereof set up under § 448 of the Code, the testimony was admitted, without objection, to show that the infant was incompetent to make the release. *Held*, that the admissibility of the evidence could not be raised on appeal. *Crowley v. City R. R. Co.*, 60 Cal., 628. 1882.

56. **Residence of corporation.** In an action against a corporation, an affidavit of claim, filed with the declaration, stating the amount due from defendant to plaintiff, and that the principal office of defendant is in the county where the suit is brought, is sufficient to show that the defendant is a resident of that county, within the meaning of the act providing for the filing of such affidavits. *Bank of North America v. Chicago, Danville and Vincennes R. R. Co.*, 82 Ill., 493. 1876.

57. **Specific performance.** A bill for specific performance of a contract for conveyance of right of way, held insufficient for want of certainty in the description of the land which complainant claimed. *New York, Susquehanna and Western R. R. Co. v. Lawton*, 35 N. J. Eq., 386, 1882; 11 Amer. & Eng. R. R. Cases, 406.

58. **Variance.** If the plaintiff, though needlessly, describe the tort, and the means adopted in effecting it, with minuteness and particularity, and the proof substantially varies from the statement, there will be a fatal variance. *Lake Shore and Michigan Southern R'y Co. v. Beam*, 11 Bradwell (Ill.), 215. 1882.

59. — Where the declaration charges that the injury was caused by defendant propelling its cars at an immoderate and dangerous rate of speed, and does not call in question the right of defendant to use steam as a motive power, the latter question cannot be insisted upon as ground for recovery. Plaintiff must be confined to the case made by the declaration. *Springfield City R'y Co. v. De Camp*, 11 Bradwell (Ill.), 475. 1882.

60. — A declaration for negligent injury

Contract — Evidence.

to a brakeman while uncoupling cars set forth that it was occasioned by a deep hole between the rails. The evidence was that it was between the rails of a side-track. *Held*, that the declaration would naturally be construed to refer to the main track, and that the variance was material, especially when taken in connection with other variances as to the nature of the hole and the extent of the injury. *Batterson v. Chicago and Grand Trunk R'y Co.*, 49 Mich., 184, 1883; 8 Amer. & Eng. R. R. Cases, 123.

61. Various matters of pleading and practice. Pleadings in various actions considered, together with the matters of practice. *Sargent v. Railroad Co.*, 32 Ohio St., 449, 1877; *Lane v. Burlington and South-western R. R. Co.*, 52 Ia., 18, 1879; *Hannibal and St. Joseph R. R. Co. v. Knudson*, 62 Mo., 569, 1875; *South and North Ala. R. R. Co. v. Seale*, 59 Ala., 603, 1877; *Louisville and Nashville R. R. Co. v. Hall*, 12 Bush (Ky.), 131, 1876; *Pennsylvania Co. v. Sedwick*, 59 Ind., 336, 1877; *Pittsburgh and Steubenville R. R. Co. v. Clarke*, 2 Pittsburgh, 48, 1859; *Powers v. Rome, Watertown and Ogdensburg R. R. Co.*, 5 Thompson & Cook (N. Y. Supreme Ct.), 449, 1874; 3 Hun (N. Y.), 285, 1874; *Murray v. Fitchburg R. R. Co.*, 130 Mass., 99, 1880; *McCormick v. Northern Central R. R. Co.*, 48 Md., 404, 1877; *Miller v. Burlington and Missouri River R. R. Co.*, 7 Neb., 227, 1878; *Mason v. Hartford, etc., R. R. Co.*, 10 Federal Reporter, 334, 1882; *Town of Essex v. New York and Canada R. R. Co.*, 8 Hun (N. Y.), 361, 1876; *Des Moines and Minnesota R. R. Co. v. Alley*, 16 Federal Reporter, 732, 1882; *Indianapolis Manufacturing Union v. Cleveland, etc., R'y Co.*, 45 Ind., 281, 1873; *Cairo and Vincennes R. R. Co. v. Dodge*, 72 Ill., 253, 1874; *Chicago, Rock Island and Pacific R. R. Co. v. Todd*, 91 Ill., 70, 1878; *Jack v. Des Moines and Ft. Dodge R. R. Co.*, 49 Ia., 627, 1878; *Jaques v. Bridgeport Horse R. R. Co.*, 43 Conn., 32, 1875; *Cairo and St. Louis R. R. Co. v. Wiggins Ferry Co.*, 82 Ill., 230, 1876; *Cairo and St. Louis R. R. Co. v. Easterly*, 89 Ill., 156, 1878; *Colorado Central R. R. Co. v. Blake*, 3 Colo., 417, 1877; *Nickerson v. Atchison, Topeka and Santa Fe R. R. Co.*, 1 McCrary (U. S. C. C.), 383, 1880; *Northern R. R. Co. v. Ogdensburg, etc., R.*

R. Co., 18 Federal Reporter, 815, 1883; *Fleming v. Reading R. R. Co.*, 12 Philadelphia, 342, 1878; *New York, Lake Erie and Western R. R. Co. v. McHenry*, 12 Amer. & Eng. R. R. Cases (U. S. C. C.), 370, 1883; *Brock v. South and North Ala. R. R. Co.*, 65 Ala., 79, 1880; *Barkley v. Rensselaer and Saratoga R. R. Co.*, 2 N. Y. Civil Procedure Reports, 409, 1883; *Adams v. West Shore, etc., R. R. Co.*, 65 Howard's Practice (N. Y.), 329, 1883; *Hendrickson v. Pennsylvania R. R. Co.*, 43 N. J. Law, 464, 1881; 8 Amer. & Eng. R. R. Cases, 368; *Watson v. San Francisco and Humboldt Bay R. R. Co.*, 50 Cal., 523, 1875.

62. Work and labor. A complaint in the general form for work and labor done on a railway is not demurrable because it sets out the facts with unnecessary particularity, when the facts stated do not show a special contract, or increase the liability of the defendant beyond such general employment. *Fort Wayne, Jackson and Saginaw R. R. Co. v. McDonald*, 48 Ind., 241. 1874.

POOLING CONTRACTS.

1. Contract. The B. and M. and E. railroads entered into a contract or arrangement whereby each should retain sixty per cent. of its gross earnings between all competing points of their respective routes and Boston, to pay running expenses, and the remaining forty per cent. of such gross earnings should constitute a common fund, to be equally divided between said roads. *Held*, that such contract came within the prohibition of the act of 1867, ch. 8, entitled "An act to prevent railroad monopolies." *Morrill v. Boston and Maine R. R. Co.*, 55 N. H., 531, 1875; 11 Amer. R'y Rep., 484.

2. Evidence. Upon a bill in equity for an injunction, authorized by Laws of 1867, c. 8, to restrain directors of railroads from "pooling" certain earnings of the roads, it is not necessary to prove the election of the directors by the corporate records. The testimony of one of the defendants, in a deposition, that he is an acting director, is competent evidence. *Morrill v. Boston and Maine R. R. Co.*, 58 N. H., 68. 1877.

Miscellaneous.

POSSESSION OF RAILWAY.

1. Action to recover. A railway is a public work, the possession of which is necessarily attended by the right and duty to employ the franchises granted by the sovereign in connection with it; an action of unlawful detainer will not lie for the recovery of possession of a part thereof, as this involves the right to and the public duty of exercising these franchises. The term "railroad" embraces more than the words "lands and tenements," as used in the statute. *Gibbs v. Drew*, 16 Fla., 147. 1877.

POWDER.

1. Explosion. The Delaware, Lackawanna and Western R. R. Co., having legislative authority to construct a tunnel through Bergen Hill, contracted with M. to do the work. The tunnel was driven through a rock, was begun in 1873, and completed in 1877. M. constructed near the eastern end of the tunnel, and within the limits of Jersey City, a magazine for the explosive materials which he used in blasting. In 1876, at night, the materials exploded, doing great damage to property, and injuring, among the property, some houses belonging to C. A suit was brought to recover damages for the injury. *Held*, that the legislative authority to a private corporation, or an individual, to do a work for its or his own profit, does not include authority to use, at whatever hazard to the persons or property of others, dangerous materials, even though they are necessary to the convenient prosecution of the work. They will be liable for the injury, although no negligence or want of skill in executing the work is proved, and liable for actual damages, even though they show that they have done the work in the most careful manner. *McAndrews v. Collard*, 42 N. J. Law, 189. 1880.

PRACTICE.

See PLEADING.

1. Agreed statement of facts. Agreed statement of facts construed. *Kansas City,*

Fort Scott and Gulf R. R. Co. v. Hines, 29 Kans., 695, 1883; 10 Amer. & Eng. R. R. Cases, 770.

2. Equity. Practice on demurrer in chancery considered. *Memphis and Vicksburg R. R. Co. v. Owens*, 60 Miss., 227. 1882.

3. Various questions of practice considered. *Campbell v. Cincinnati Southern R'y Co.*, 80 Ky., 585, 1882; *Field v. Chicago, Danville and Vincennes R. R. Co.*, 68 Ill., 367, 1878; *Chicago, Burlington and Quincy R. R. Co. v. Watson*, 105 ib., 217, 1883; *Cincinnati, Sandusky and Cleveland R. R. Co. v. Belt*, 35 Ohio St., 479, 1880; *Railroad Co. v. Belt*, 36 ib., 93, 1880; *Republican Valley R. R. Co. v. McPherson*, 12 Neb., 480, 1882; *Hastings and Grand Island R. R. Co. v. Ingalls*, 13 ib., 279, 1882; *Republican Valley R. R. Co. v. Sayer*, ib., 280, 1882; *Dietrich v. Lincoln and Northwestern R. R. Co.*, ib., 500, 1882; *Grand Rapids and Indiana R. R. Co. v. Wright*, 32 Mich., 491, 1875; *Fries v. Pennsylvania R. R. Co.*, 98 Pa. St., 142, 1881; *Danville, Hazleton and Wilkesbarre R. R. Co.'s Appeal*, 81½ ib., 326, 1876; *Peninsular R. R. Co. v. Jones*, 48 Ind. 416, 1874; *Lexington and Big Sandy R. R. Co. v. Ford Plate Glass Co.*, 84 Ind., 516, 1882; *Louisville, New Albany and Chicago R'y Co. v. Coyle*, 85 ib., 516, 1882; *Indianapolis, etc., R'y Co. v. Ferguson*, 53 ib., 445, 1877; *Same v. Kostanzer*, ib., 446, 1877; *Same v. Bailey*, ib., 471, 1877; *Indianapolis, Peru and Chicago R'y Co. v. Beam*, 63 ib., 490, 1878; *Same v. Same*, 64 ib., 597, 1878; *Evansville and Crawfordsville R. R. Co. v. Barbee*, 59 ib., 592, 1877; *Walls v. Anderson, Lebanon and St. Louis R. R. Co.*, 60 ib., 56, 1877; *Indianapolis, Peru and Chicago R'y Co. v. Negley*, 62 ib., 178, 1878; *State ex rel. v. Terre Haute and Indianapolis R. R. Co.*, 64 ib., 297, 1878; *Louisville, New Albany and Chicago R'y Co. v. Francis*, 64 ib., 39, 1878; *Logansport, etc., R'y Co. v. Braden*, 65 ib., 123, 1878; *Cleveland, etc., R'y Co. v. Bowen*, 70 ib., 478, 1880; *Louisville, New Albany and Chicago R'y Co. v. Head*, 71 ib., 176, 1880; *Indianapolis, Peru and Chicago R. R. Co. v. Collingwood*, 71 ib., 476, 1880; *Louisville, New Albany and Chicago R'y Co. v. Jackson*, 64 ib., 398, 1878; *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Flew*, 71 ib., 601, 1880; *Louisville, New Albany and*

Regulation — Contract — Damage by Railway.

Chicago R. R. Co. v. Wunderlich, 81 ib., 105, 1881; *Same v. Murdock*, 82 ib., 381, 1882; *Baltimore, Ohio and Chicago R. R. Co. v. Johnson*, 83 ib., 57, 1882; *Same v. Crissman*, 83 ib., 167, 1882; *Indianapolis and Vincennes R. R. Co. v. McCaffery*, 72 ib., 294, 1880; *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Curr*, 50 ib., 175, 1875; *Louisville, New Albany and Chicago R'y Co. v. Boland*, 70 ib., 593, 1880; *Louisville, New Albany and Chicago R. R. Co. v. Nicholson*, 56 ib., 261, 1877; *Logansport, etc., R'y Co. v. Braden*, 53 ib., 234, 1876; *Logansport, etc., R. R. Co. v. Groniger*, 51 ib., 383, 1875; *Louisville, New Albany and Chicago R'y Co. v. Hagen*, 87 ib., 30, 1883; *Hatch v. Indianapolis and Springfield R. R. Co.*, 11 Bissell (U. S. C. C.), 138, 1882; *Newhall House Co. v. Flint and Pere Marquette R'y Co.*, 47 Wis., 516, 1879; *Johnson v. Chicago, Milwaukee and St. Paul R'y Co.*, 43 ib., 431, 1877; *Everdell v. Sheboygan and Fond du Lac R. R. Co.*, 40 ib., 303, 1876; *McHugh v. Chicago and Northwestern R'y Co.*, 41 ib., 79, 1876; *Bonin v. Green Bay and Minnesota R'y Co.*, 43 ib., 210, 1877; *Kelly v. West Wisconsin R'y Co.*, 37 ib., 357, 1875; *Lederer v. Chicago, Milwaukee and St. Paul R'y Co.*, 38 ib., 244, 1875; *Hawkins v. Northwestern Union R'y Co.*, 34 ib., 302, 1874; *Kelly v. New York and Manhattan Beach R'y Co.*, 19 Ill. (N. Y.), 363, 1879; *Bonnell v. Rome, Watertown and Ogdensburg R. R. Co.*, 12 ib., 218, 1877; *Brooklyn and Rockaway Beach R. R. Co. v. Reid*, 28 ib., 273, 1880; *Brooklyn and Rockaway Beach R. R. Co. v. Reid*, 21 ib., 213, 1880; *Baltimore and Ohio R. R. Co. v. Arthur*, 12 Amer. & Eng. R. R. Cases, 25, 1883; 90 N. Y., 234; *Seely v. New York Central and Hudson River R. R. Co.*, 25 Hun (N. Y.), 280, 1881; *Mayor of New York v. Broadway and Seventh Avenue R. R. Co.*, 12 ib., 571, 1873; *Harrold v. New York Elevated R. R. Co.*, 28 ib., 263, 1880; *Harrold v. New York Elevated R. R. Co.*, 21 ib., 263, 1880; *Young v. Grand Trunk R'y Co.*, 9 Federal Reporter, 343; 10 Bissell (U. S. C. C.), 550, 1881; *Hatch v. Indianapolis and Springfield R. R. Co.*, 9 Federal Reporter, 856, 1882; *Junction City and Fort Kearney R'y Co. v. Wingfield*, 16 Kans., 217, 1876. See, also, *Mo., Kans. and Tex. R'y Co. v. Roach*, 18 ib., 592, 1877; *Missouri and Kans. Transportation*

Co. v. Palmer, 19 ib., 471, 1877; *Connelly v. Central Branch Union Pacific R. R. Co.*, 22 ib., 635, 1879; *Green v. Railroad Co.*, 6 So. Car., 342, 1875; *Charlotte, Columbia and Augusta R. R. Co. v. Thompson*, 12 ib., 53, 1879; *Elder v. C., C. and A. R. R. Co.*, 15 ib., 610, 1881; *International and Great Northern R. R. Co. v. Scott*, 58 Tex., 187, 1882; *Sabine and East Texas R'y Co. v. Joachimi*, 53 ib., 452, 1883; 11 Amer. & Eng. R. R. Cases, 539; *Baltimore and Ohio R. R. Co. v. Vanderwarker*, 19 W. Va., 235, 1881.

PRIVATE RAILROAD.

See CHARTER; LATERAL RAILWAYS.

1. Regulation; gates. A private railway, on private property, made and used exclusively for the proprietor's own purposes, and not for passenger traffic, is not subject to the regulations as to gates and persons in charge at level crossings imposed by the railway statutes; nor are the proprietors bound at common law to erect such gates. *Matson v. Baird*, Law Reports, 3 Appeal Cases, 1082, 1878; 24 Eng. (Modk.), 676.

PRIVATE WAYS AND CROSSINGS.

See EMINENT DOMAIN; INJURIES TO DOMESTIC ANIMALS.

1. Contract. Where a railway company agrees to maintain, and does maintain, two "farm crossings" on a single farm, its obligation in respect to both, as to keeping them in a condition to afford a reasonably safe crossing for the occupants of the farm, is the same as it would be in the case of the single crossing required by the statute (Laws of 1872; ch. 119, § 30). *Grasse v. Milwaukee, Lake Shore and Western R. R. Co.*, 36 Wis., 582, 1875.

2. Damage by railway. Judgments refer to the situation of the parties at the commencement of the suit, and, as a general rule, damages are allowed in personal actions only to that date. In the case of continuing injuries, compensation for subsequent loss must be sought in another suit after the damage is sustained. *Brewster v. Sussex R. R. Co.*, 40 N. J. Law, 57, 1878.

Agent.

PROCESS.

See GARNISHMENT; HIGHWAY; SUBSCRIPTIONS BY INDIVIDUALS.

1. Agent. In a suit against an incorporated company, citation may be served upon a local agent representing the company in the county in which such suit may be brought (R. S., 1223). A petition alleged that a defendant incorporated company had an office "for the transaction of business as a common carrier in the city of Austin, Travis county, Texas, at which place the agent of said company is." The suit was brought in Travis county. *Held*, that the service of citation was sufficient to hold the defendant to answer the petition, and that no judicial ascertainment of the agency was required to authorize a judgment by default. *Houston and Texas Central R. R. Co. v. Burke*, 55 Tex., 323, 1881; 9 Amer. & Eng. R. R. Cases, 59.

2. — In an action against a railroad company, service of the summons upon a local agent of the company is sufficient to bring the defendant into court. *Katzenstein v. Raleigh and Gaston R. R. Co.*, 78 N. C., 286, 1878.

3. — Where the return of the officer states that he read the process to a station agent (naming him) of the defendant, the president and secretary not being residents of the county, it is defective, both because it shows attempted service by reading instead of by copy, and because it does not show that the president could not be found in the county; the fact that he was not a resident of the county does not exclude the idea that he might have been found therein at the time of service. *Cairo and Vincennes R. R. Co. v. Joiner*, 72 Ill., 520, 1874.

4. — Where the receivers of a foreign railway operated a connecting line in Georgia as part of a through line, under a contract by which they were to operate the Georgia branch under the laws of Georgia, furnish their own rolling stock, for which the Georgia line should pay a certain amount, that each road should contribute its proportion of the expenses, and the net proceeds should be divided *pro rata*, a depot agent on the line of the Georgia corporation was such an agent of the Georgia company as could

be served with process against it, though he might have been employed by the receivers and made remittances to them, by whom the proceeds were afterwards distributed under the contract. *Georgia Southern R. R. Co. v. Bigelow*, 68 Ga., 219, 1881.

5. — In a suit against a corporation created by act of congress, not residing or doing business in Illinois, and having no office or place of business there, service of process upon an agent appointed by the land commissioner of the corporation and its trustees, whose business it is merely to receive and transmit offers for lands and to assist in making sales, will not give the court jurisdiction, such person not being an agent of the corporation in the sense of the statute. *Union Pacific R. R. Co. v. Miller*, 87 Ill., 45, 1877.

6. — Under the statute (Tay. Stats., 1355, § 20), in all actions for damages against a railway company, summons may be served on any station or depot agent of the company; and this applies to an action on contract for labor and services. *Ruthe v. Green Bay and Minnesota R. R. Co.*, 87 Wis., 844, 1875.

7. — Where a declaration in a justice's court sets out fully a cause of action against a railroad company for damages to personalty, and a summons and a copy of the declaration, attached thereto and referred to therein, were served on the agent of the road, the action against the company was not fatally defective because the summons was directed to the agent as such, instead of being to the road itself. *Western and Atlantic R. R. Co. v. Kirkpatrick*, 66 Ga., 86, 1880.

8. — An assistant secretary of a foreign railroad company, whose duty consists in making such records as he may be expressly directed to make, is not a managing agent within the meaning of subd. 3 of § 432 of the Code of Civil Procedure, authorizing service upon the corporation by the delivery of a summons to a managing agent. *Sterett v. Denver and Rio Grande R'y Co.*, 17 Hun (N. Y.), 816, 1879.

9. — One Treat, the president of a street railway in Auburn, was, on June 1, 1876, employed by the president of the defendant, a steam railroad company, to superintend the running of horse cars on a portion of de-

Amendment — Foreign Corporation.

defendant's road not yet completed. Treat had no authority to make contracts for the defendant, except to purchase horses and feed; nor had he any control over or knowledge of the affairs of the defendant, or its books; his employment was to continue during the president's pleasure. *Held*, that a summons, in an action against the defendant, could not be served upon him as its "managing agent." *Emerson v. Auburn and Owasco Lake R. R. Co.*, 13 Hun (N. Y.), 150. 1878.

10. Amendment. Where a summons fails to name the form of action, an amendment by inserting the words "in an action of *assumpsit*," is properly allowed, and is merely formal. *Chester and Tamaroa Coal and R. R. Co. v. Lickiss*, 72 Ill., 521. 1874.

11. — Judgment by default against a railway company, the summons and return naming it as a railroad company; at the same time the default and judgment were set aside and the plaintiff permitted to amend the summons and return by inserting the name of the defendant as a railway company, and judgment then again taken on default. *Held*, on appeal, that no error was committed in setting aside the defaults and judgment and permitting the amendment of the writ and service, the record showing that the proper representatives of the company had due notice of the action by such summons. *Chicago and Indianapolis R'y Co. v. Johnston*, 89 Ind., 88. 1883.

12. — Substituted service must show facts conferring jurisdiction upon a corporation. *Caro v. Oregon and California R. R. Co.*, 10 Oreg., 510. 1882.

13. Constitutional law. A statute which prescribes a mode of serving process upon railroad companies different from that provided for in a charter previously granted to a particular company does not impair the obligation of the contract between such company and the state. *Railroad Co. v. Hecht*, 95 U. S., 168. 1877.

14. Extinct corporation. Where certain persons were served with process as the representatives of an alleged corporation, the plaintiff cannot preclude them from pleading in their own names the extinction of such corporation. *Kelley v. Mississippi Cen-*

tral R. R. Co., 1 Federal Reporter, 564. 1880.

15. Federal courts. Where foreign corporations engage in business in a state whose laws provide that they may be summoned by process served upon an agent in charge thereof, they are "found" in the district in which such agent is doing business, within the meaning of the act of congress of March 3, 1875 (18 St. at Large, 470), and may be served in that manner in suits brought in the United States courts. *McCoy v. Cincinnati, etc., R. R. Co.*, 13 Federal Reporter, 3. 1882.

16. — Where a defendant in a state court has lost by his inaction the right to object to the defective service of the complaint, and thereafter removes the cause to the circuit court of the United States, he cannot be permitted in such circuit court to plead in abatement such defective service. *Wertheim v. Continental R'y and Trust Co.*, 13 Federal Reporter, 689. 1882.

17. Foreign corporation. The defendant was a Scotch corporation, with running powers over an English railway to Carlisle, and its only officer in England was a booking clerk at a station at Carlisle, whose sole duty was to issue tickets to travelers. The station at Carlisle was wholly under the control of the English company, but the defendant had use of it at a rental payable to that company. The defendant's head office was in Scotland. *Held*, that the booking clerk was not a head officer or clerk of the defendant, who could be properly served with a writ issued against the defendant. *Mackereth v. Glasgow and South Western R'y Co.*, Law Reports, 8 Exchequer, 149; 5 Eng. (Moak), 342. 1873.

18. — Where a foreign corporation does business and has agents in Illinois with property, service may be had upon such corporation through such agents or officers, the same as upon domestic corporations. *Midland Pacific R'y Co. v. McDermid*, 91 Ill., 170. 1878.

19. — But where a foreign corporation does not transact its business in such state, and has no office or agents located there, service of process upon one of its officers or agents while temporarily in the state on private business, or passing through it, will

Issued by De Facto Officer — Return.

confer no jurisdiction on the courts over such corporation. *Ib.*

20. — Foreign corporations doing business in Illinois are liable to be sued, the same as a domestic corporation or citizen, and process may be served upon its agent in the state; and the word "process" in the Practice Act embraces process of every kind, including garnishee process. *Hannibal and St. Joseph R. R. Co. v. Crane*, 102 Ill., 249. 1882.

21. — Under the statutes of New York, service within the state on the proper officer of a foreign corporation is equivalent to personal service on a non-resident natural person. If such personal service cannot be made, service may be made by publication against corporations in the same cases in which it can be made against non-resident individuals. *Barnett v. Chicago and Lake Huron R. R. Co.*, 4 Hun (N. Y.), 114. 1875.

22. — Service upon a non-resident director found within the state was claimed sufficient, because the corporation had property within the state. The property consisted of a few maps and books of trifling value, used in selling the bonds of the company. *Held*, that these things did not constitute such property as to give jurisdiction. *Barnes v. Mobile and North Western R. R. Co.*, 12 Hun (N. Y.), 126. 1877.

23. — Proof of service of process upon the "agent" of a foreign corporation in a suit begun before a justice is sufficient under Comp. L., § 1624, which provides for making service in such cases upon some one authorized by power of attorney to receive it. *American Express Co. v. Conant*, 45 Mich., 642. 1881.

24. Issued by de facto officer. A clerk who held over from the day of a general election, to wit, the first Tuesday in August, until the first Monday in the ensuing September, when his successor was installed, was at least clerk *de facto*; and his acts cannot be collaterally impeached, and are valid as between third parties. *Threadgill v. Carolina Central R'y Co.*, 73 N. C., 178. 1875.

25. Justice's court. The legal service of summons in a justice's court includes, as a necessary part of such service, service of the complaint. *Southern Pacific R. R. Co. v.*

Superior Court of Kern County, 50 Cal., 471. 1881.

26. — *fros.* In an action before a justice of the peace, for setting fire to plaintiff's property, the constable's return, showing that he served the writ by reading it to the agent, etc., is not sufficient. The service of process, as provided for in § 9, art. I. of the statute affecting justices (Wagn. Stat., 810, § 9), is authorized in suits for killing stock. But in the case supposed it should be made conformably to the statute relating to corporations, by service on the chief officer, or by leaving a copy with the agent. *Jordan v. Missouri, Kansas and Texas R'y Co.*, 61 Mo., 53. 1875.

27. Lessee. Leaving a copy of a declaration and process with a depot agent is not sufficient service on an individual lessee of the railroad. *Jones v. Ga. Southern R. R. Co.*, 66 Ga., 558. 1881.

28. — Service upon an agent of a lessee, appointed under the statutes of Vermont for the purpose of receiving service of process, held sufficient. *Brownell v. Troy and Boston R. R. Co.*, 18 Blatchford (U. S. C. C.), 243, 1880; 3 Federal Reporter, 761, 1880.

29. Plea in abatement. A plea in abatement for want of sufficient service of a writ should contain a direct averment of what the service was, and that no other service was in fact made. An averment that "it appears that the only service of said writ was," etc., is not sufficient. *Perry v. New Brunswick R'y Co.*, 71 Me., 359. 1880.

30. Receiver. For service upon a railroad corporation to be effective by reason of service upon an agent, the agent must, at the time of the service, be its agent. An agent of the state, under a receiver who has possession of the road in consequence of a seizure by the governor for non-payment of interest on bonds which the state has indorsed, is not the agent of the corporation. *Cherry v. North and South R. R. Co.*, 50 Ga., 446, 1877; 62 ib., 178, 1878.

31. Resignation of officer. An officer of a corporation may resign to prevent service of process upon him. *Ervin v. Oregon Steam Navigation Co.*, 23 Hun (N. Y.), 598. 1880.

32. Return. The return on a summons was: "Served the within named railroad

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company, by reading the same and delivering a copy thereof to O., cashier of said railroad company, this 24th day of March, 1875; the president of said company could not be found in my county, this 5th April, 1875." *Held*, the last date is evidently the date of the return of the writ, and that the return shows that, on the 24th of March, the day the writ was served, the president could not be found. The service and return of the summons were sufficient and in strict conformity to the statute. *Chicago and Pacific R. R. Co. v. Kehler*, 79 Ill., 354. 1875.

33. — A sheriff's return of service of summons against a railway corporation, indorsed on the writ, was: "September 4, 1872, served by reading to, and delivering a true copy to, C. D., a director of the defendant, the president of the defendant not residing or being found in my county." *Held*, on bill to enjoin the collection of the judgment recovered in the suit, that the return was sufficient and gave the court jurisdiction. It sufficiently appeared *what* was served and of *what* a copy was delivered. *Cairo and St. Louis R. R. Co. v. Holbrook*, 92 Ill., 297. 1879.

34. — The return of service of process on a corporation under the statute (Wagn. Stat., 294, §§ 26, 27), made by leaving a copy at a business office of the company, with the person having charge thereof, in order to be valid must recite that the chief officer is absent from, or cannot be found in, the county, and not merely and generally that he is absent. The proper inference from the latter recital is that he was absent from his office. *Hoen v. Atlantic and Pacific R. R. Co.*, 64 Mo., 531. 1877.

35. — Under a statute providing that a summons against a corporation may be served on the president, chairman of the board of trustees, or other chief officer; or if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent, etc.; when the service is not upon the chief officer, the return must show that he could not be found in the county, also upon whom the summons was served, naming the person and his office. *Cairo and Fulton R. R. Co. v. Trout*, 32 Ark., 17, 1877; *Same v. Rea*, *ib.*, 29, 1877.

36. — Service of process upon the president of a corporation must be made by leaving

with him "a true and attested" copy thereof; and a return by the sheriff that he gave him "a copy" renders the service void. But under the act of February 19, 1849, process may be served upon the directors as well as the president of a railroad company, even when the latter officer can be found. *Commonwealth v. Wilmington and Reading R. R. Co.*, 2 Pearson (Pa.), 403. 1876.

37. — The sheriff's return on a summons that he served it on a certain person, the superintendent of a certain corporation, is conclusive as to the existence of the company and the official position of the person served, and the party will not be allowed to contradict it. *Commonwealth v. Catawissa, etc., R. R. Co.*, 1 Pearson (Pa.), 341. 1863.

38. — Where a foreign corporation is served with summons under a statute providing that service in such cases may be by delivering a copy of the writ and petition to any officer or agent of such company "in charge of any office or place of business" that it may have, the return of service should state that a copy of the writ and the petition were delivered to an officer or agent in charge of an office or place of business of the defendant. *Kiufelke v. Merchants' Dispatch Co.*, 11 Federal Reporter, 282; 3 McCrary (U. S. C. C.), 547. 1882.

39. *Service on corporation.* The act of April 15, 1846, entitled "An act for the relief of creditors against corporations," and the supplement thereto of March 22, 1865, refer only to the mode of serving process in the higher courts, and not when issued by a justice of the peace. *Delaware, Lackawanna and Western R. R. Co. v. Ditton*, 36 N. J. Law, 361. 1873.

40. — Service upon a railway company must be made upon one of the officers or in the manner named in §§ 68a, b, and c, ch. 80, §§ 3591-4, Comp. Laws 1879; § 13, ch. 81, § 4285, Comp. Laws 1879; and a return upon a summons that it was served upon M., an agent of the defendant, is of itself no sufficient evidence of service. The service must be upon an agent or officer named in the statute. *Union Pacific R'y Co. v. Pillsbury*, 29 Kans., 652. 1883.

41. — The act of the general assembly of the state of Indiana of March 29, 1879 (relating to foreign express companies, defining

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their duties, etc.), providing for the service of process, in actions against such companies, on the officers or agents of such companies within the state, is *limited* to actions on claims or demands arising out of transactions in the state of Indiana with their agents or employes, and embraces actions in tort as well as in contract, but does not apply to causes of action arising outside the state of Indiana. *Grover v. American Express Co.*, 11 Federal Reporter, 888. 1883.

42. — Under a proper construction of §§ 3049, 3369 and 3406 of the Code, when considered together, an action cannot be brought in the superior court against a railroad company by merely serving the written notice and filing the same in the clerk's office without other pleadings. *Hodges v. Atlantic and Gulf R. R. Co.*, 51 Ga., 244. 1874.

43. — Under the act of February 19, 1849, in a transitory action process may be served on the principal officers of a corporation, chartered by the commonwealth of Pennsylvania, in any county in the state, wherever they may be found, although the company had neither an office or any part of its works within that county, nor did any of its officers reside there. It is otherwise in local actions, or in the case of a foreign corporation. *Hughart v. Bedford and Bridgeport R. R. Co.*, 2 Pearson (Pa.), 116. 1871.

44. — The statute provides that service may be made upon a corporation by leaving a copy of the summons with the president, secretary, etc., if either can be found in the county; if not, then by leaving a copy of the summons with any director, clerk, etc., of such company found in such county. These constitute two classes, and service upon one class is primary to service upon the other; and before service upon persons of the second class will confer jurisdiction upon the courts, it must appear affirmatively that service could not be had upon persons in the first class. *St. Louis, Vandalia and Terre Haute R. R. Co. v. Dawson*, 3 Bradwell (Ill.), 118. 1878.

45. — A probate judge can direct how service of notice of appeal from commissioners on a decedent's estate shall be served upon a corporation; and may name the officer, agent, etc., on whom service shall be

made. *Simpson v. Mansfield, etc., R. R. Co.*, 38 Mich., 626. 1878.

46. **Waiver by appearance.** An appearance of a defendant by an attorney and consenting to a continuance of the cause is a substantial act, and dispenses with the service of process. *St. Louis, Iron Mt. and Southern Ry Co. v. Barnes*, 35 Ark., 95. 1879.

47. **Writ of error.** In a judgment rendered in favor of the "Southern Pacific R. R. Co.," in suit filed September 6, 1871, held, under the various statutes on the subject, that a petition for writ of error filed July 10, 1873, and directed to the "Texas and Pacific R. R. Co.," was properly directed, and the writ will not be dismissed for want of proper parties. *Stephenson v. Texas and Pacific R. R. Co.*, 42 Tex., 162. 1875.

PUBLIC LANDS.

See EMINENT DOMAIN; LAND GRANTS.

1. **Location.** The facts considered and determined involving the entry of certain public land in Texas. *Houston and Texas Central R. R. Co. v. McGehee*, 49 Tex., 481, 1878; *Keyes v. Houston and Great Northern R. R. Co.*, 50 ib., 169, 1878; *Snider v. International and Great Northern R. R. Co.*, 52 ib., 806, 1879.

2. **Patents; lines.** Patents, by the general government, of public lands bordering on streams, are not limited by the meander lines. *St. Paul, Stillwater and Taylor's Falls R. R. Co. v. St. Paul and Pacific R. R. Co.*, 26 Minn., 81. 1879.

3. **Right of way.** The grant which the act of July 28, 1866, ch. 212 (14 Stat., 210), makes to the St. Joseph and Denver City R. R. Co., "to the extent of one hundred feet in width on each side of said road where it may pass through the public domain," is absolute and *in presenti*, and a party subsequently acquiring a parcel of such lands takes it subject to that right. *Railroad Co. v. Baldwin*, 103 U. S., 426, 1880; 2 Amer. & Eng. R. R. Cases, 510.

4. **Right of way; Grand Canon of the Arkansas.** An act entitled "An act granting the right of way through the public lands to the Denver and Rio Grande Ry

Removal of Causes—Corporation Office—Jury Trial.

Co.," approved June 8, 1872 (17 Stat., 339); an act amendatory thereto, approved March 3, 1877 (19 Stat., 405); and an act entitled "An act granting to railroads the right of way through the public lands of the United States," approved March 3, 1875 (18 Stat., 482), considered with reference to the conflicting claims of the Denver and Rio Grande R. R. Co. and the Cañon City and San Juan R'y Co., to occupy and use the Grand or Big Cañon of the Arkansas for railroad purposes. *Held*, that said act of 1872 granted an immediate beneficial easement in a particular way over which the routes designated in the charter of the Denver Company lay, capable, however, of enjoyment only when such way should actually and in good faith be appropriated for the purposes contemplated by that charter, and then the title thereto would take effect by relation as of the date of the act. *Railway Co. v. Alling*, 99 U. S., 463. 1878.

5. — *Held*, that both companies should be allowed to proceed with the construction of their respective roads through said cañon where it is broad enough for them to do so without interfering with each other; but where, in the narrow portions of the defile, this is impracticable, the court below, while recognizing and enforcing the prior title of the Denver Company, should, by proper orders, secure upon just and equitable terms the right of the Cañon City Company, under the act of 1875, to use, in common with the Denver Company, the same road-bed and track, after the same shall have been completed. *Ib.*

PROHIBITION.

1. **Removal of causes.** When the removal of a cause into the federal court is sought, and is improperly refused by the state court in which the cause is pending, the party has an adequate remedy under the act of congress of March 3, 1875, and is not entitled to a writ of prohibition or other extraordinary writ from this court. *Mobile and Ohio R. R. Co., Ex parte*, 63 Ala., 349. 1879.

2. **Writ of.** A writ of prohibition lies, not for the correction of errors in the exercise of a rightful jurisdiction by a court,

but to prevent usurpation, or the exercise of powers beyond and outside of its lawful jurisdiction; and it is only awarded when there is no other appropriate and adequate remedy. *Ib.*

QUO WARRANTO.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; CHARTER; MANDAMUS.

1. **Corporation office.** The office of engineer of the Western North Carolina R. R. Co. is not a public office, and the right to perform its duties cannot be tested by *quo warranto* proceedings. *Eliason v. Coleman*, 9 Amer. & Eng. R. R. Cases (N. C.), 433. 1881.

2. **Dissolution of corporation; debts.** In case of dissolution by *quo warranto* the personal property of a corporation will not go to the state, and the real property revert to the original owners, leaving the creditors of the corporation without a remedy; but the mode of procedure will be the same as in the case of a voluntary dissolution of a corporation, and as provided in §§ 8 and 9, ch. 78, R. S. *State v. West Wisconsin R'y Co.*, 34 Wis., 197, 1874; 6 Amer. R'y Rep., 242.

3. **Injunction.** The pendency of a proceeding by a prosecuting attorney, in the nature of a *quo warranto*, against a railway company, to procure the forfeiture of its franchises on the ground that it has been organized to do an illegal act, cannot affect or delay the decision in a prior proceeding to enjoin such company from further prosecuting the purpose for which it has been organized. *Aurora and Cincinnati R. R. Co. v. City of Lawrenceburgh*, 56 Ind., 80, 1877; 18 Amer. R'y Rep., 136.

4. **Jury trial.** An action in the nature of a *quo warranto*, brought by the attorney-general in the name of the people of the state, under the provisions of the Code (§§ 432, 440), to try the title to a corporate office to which there are several claimants, is one of legal, not equitable, cognizance, and the issues therein are strictly legal ones. *People v. Albany and Susquehanna R. R. Co.*, 57 N. Y., 161, 1874; 6 Amer. R'y Rep., 73.

5. — The trial of such issues, therefore, by a jury, is the constitutional right of the parties. *Ib.*

Average Rates — Charter.

6. Legality of corporation. The legality of a corporation, which exists under the form of law, can only be impugned by an application for a writ of *quo warranto* or by an information in the nature thereof, instituted by the attorney-general. *West Jersey R. R. Co. v. Cape May and Schellenger's Landing R. R. Co.*, 34 N. J. Eq., 164. 1881.

7. Practice. An information in the nature of a *quo warranto* should be filed and entered at the law term. *State v. Portland and Ogdensburgh R. R. Co.*, 58 N. H., 118. 1877.

8. — The granting of leave to file an information in the nature of a *quo warranto* is a matter of sound discretion in the court or judge. *People ex rel. v. North Chicago R'y Co.*, 83 Ill., 537, 1878; 21 Amer. R'y Rep., 359.

9. — Practice on filing informations in the nature of a writ of *quo warranto* stated. When the attorney-general files such an information *ex officio*, no leave of the court is requisite. *Attorney-General v. Delaware and Bound Brook R. R. Co.*, 38 N. J. Law, 282. 1876.

10. — Such informations are not prohibited by paragraph 9, art. I, of the constitution of New Jersey. *Ib.*

11. — It is a general rule that when the statute provides a remedy to test the right to exercise a franchise or office, it is exclusive of all other remedies. An action for the usurpation of an office or franchise is a civil action under the Code of this state, and must be governed by the rules applicable thereto; must be instituted by filing a complaint and issuing a summons, and proceeded with the same as any other action. *Atchison, Topeka and Santa Fe R. R. Co. v. The People*, 5 Colo., 60, 1879; 9 Amer. & Eng. R. R. Cases, 542.

12. Street railway. Where leave was asked to file an information against a horse railway company, requiring it to show its right to extend the line of its road, and to use steam power over a part of the same, and it did not appear that the relator was either specially, as an individual, or in common with all other citizens of the town, injured by the construction and operation of the road, and it was shown by affidavit that the relator acquired his land, abutting upon

the road, long after its construction, and that it was almost the universal desire of the people of the town, and those traveling over the road, that it be operated by steam, and the facts disclosed seemed to show the application was not asked for the public good, but rather for selfish purposes, it was held that leave was properly refused. *People ex rel. v. North Chicago R'y Co.*, 83 Ill., 537, 1878; 21 Amer. R'y Rep., 359.

RATES.

See CARRIAGE OF MERCHANDISE; CARRIAGE OF LIVE STOCK; CONNECTING LINES; DISCRIMINATION; INTERJUNCTION; PENALTY; REGULATION OF RAILWAYS.

1. Average rates. "Average charges" are charges at a mean rate, ascertained by dividing the entire receipts by the whole quantity of tonnage, reduced to a common standard of tons moved one mile. *Hersh v. Northern Central R'y Co.*, 74 Pa. St., 121, 1873; 6 Amer. R'y Rep., 531.

2. — By a statute it was provided that "rates for toll and transportation may be regulated in such manner as the company may deem most advisable, provided that the maximum charges for toll and transportation shall not exceed four cents per ton per mile for freight." A subsequent act amended the proviso so as to read "average charges for toll and transportation." *Held*, that the company might impose more than four cents per mile on some charges, so that by making others less, the general average should not exceed four cents. *Ib.*

3. Charter. Clauses in acts empowering companies to levy a charge upon the public, as in railway acts, for example, must, where the meaning is doubtful, be construed favorably for the public. *Stockton and Darlington R'y Co. v. Barrett*, 11 Clark & Finnelly (House of Lords), 590. 1844.

4. — A railway act imposing tolls and duties upon the company is to be construed against the company and in favor of the public. *Stockton R'y Co. v. Barrett*, 7 Manning & Granger, 870; 49 E. C. L., 869, 1844; *Barrett v. Stockton R'y Co.*, 2 Manning & Granger, 134; 40 E. C. L., 528, 1840.

5. — The statute in relation to rates of fare on the Baltimore and Yorktown Railway

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construed. *Baltimore and Yorktown Turnpike Co. v. Boone*; 45 Md., 344. 1876.

6. — Where a railroad corporation sets up as a defense that its charter was a grant by the state, giving to the railroad company, without any qualification, the right to prescribe upon what terms and at what rates freight should be transported on the road, and that this grant was protected by the constitution of the United States, and that a subsequent statute of the state upon the subject impairs the validity of such grant in violation of the constitution, such defense involves a question arising under the constitution of the United States, and the case is removable from a state court under § 2 of the act of 1875. *State v. Chicago, Burlington and Quincy R. R. Co.*, 16 Federal Reporter, 706, 1883. See, also, *People ex rel. v. Ill. Central R. R. Co.*, ib., 881. 1883.

7. Classification. An action against a common carrier for the conversion of a part of goods shipped as first-class freight, but which were proved to be double first-class, and defendant is entitled to receive double rates and to be credited therefor. *Rice v. Indianapolis and St. Louis R. R. Co.*, 3 Mo. App., 27. 1876.

8. Competing points. The Railway and Canal Traffic Act does not prevent railway companies from having special rates of charge to a terminus to which traffic can be carried by other modes of carriage with which theirs is in competition. *Foreman v. Great Eastern R'y Co.*, 2 Neville & McNamara, 202. 1875.

9. Connecting lines. A sending company having two alternative routes for through traffic, one eight miles longer than the other, proposed, for the purpose of a through rate, to carry by the longer one at a double cost and labor in working and maintaining the junctions, with the object of making its own mileage more and the mileage of the forwarding company less; held, that such longer route was not a reasonable route within the meaning of § 11 of the Regulation of Railways Act, 1873. *East and West Junction R'y Co. v. Great Western R'y Co.*, 1 Neville & McNamara. 331. 1874.

10. — Iron ore was sent from B. to South Wales by alternate routes, one of which was by the N. W. Railway to Southwick, and

the other by the E. Railway to Stratford, the continuation in each case being by the G. W. Railway. The G. W. Company refused to agree to a lower through rate between B. and South Wales by the Stafford route than that charged by the Southwick route, although the distance by the former was twenty miles shorter; the G. W. mileage being practically equal in both cases. Upon an application to the commissioners by the company to allow the proposed through rates, which gave the G. W. Company about $\frac{1}{4}$ d. per ton per mile, held, that the apprehension of the G. W. Company that a reduction of the rates by the shorter route would entail a similar reduction of the rates by the longer route, and so render the traffic carried by the latter unprofitable, did not justify it in raising the rates by the shorter route above their natural and proper level; and, as the G. W. Company carried the like traffic under similar circumstances for about $\frac{1}{4}$ d. per ton per mile, the court allowed the rates proposed by the E. Company, on condition that the latter company should maintain a traffic by its route averaging five hundred tons a week. *East and West Junction R'y Co. v. Great Western R'y Co.*, 2 Neville & McNamara, 147. 1875.

11. — It appeared that the S. D. Co., in conveying goods from the B. R'y to a line leading from its own railway, were compelled, though not having any siding or other accommodation at the junction, to convey goods three miles beyond the junction, to a station on its line, and then to send them back to the junction by another train, and it claimed in such cases to credit itself with the mileage one way, namely, the three miles, in estimating the mileage proportion between the two companies; held, that it was entitled to do so. *Buckfastleigh, Totnes and South Devon R'y Co. v. South Devon R'y Co.*, 1 Neville & McNamara, 331. 1874.

12. — An announcement of a rate over a connecting line, made by the general freight agent of the first line, will not bind the connecting line. *Hill v. Burlington, Cedar Rapids and Northern R'y Co.*, 9 Amer. & Eng. R. R. Cases (Ia.), 21. 1882.

13. — Under the provisions of ch. 273, Laws of 1874 (generally known as the "Potter Act"), where timber was shipped at

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Oshkosh, Wisconsin, by the C. and N. W. R'y Co., consigned to Oconomowoc via Watertown Junction, where the road of said company intersects that of the C., M. and St. P. R'y Co., running thence to Oconomowoc (said C. and N. W. Co. having no road between the last named place and said junction), the highest price which the owner could be compelled to pay for the delivery of it at Oconomowoc (there being no reshipment at Watertown Junction, but the same cars running through from Oshkosh to the place of consignment) was \$15 per car-load, although the C. and N. W. Co. would have been entitled to charge the same price for conveying it to Watertown Junction, if it had been consigned to that place. *Ackley v. Chicago, Milwaukee and St. Paul R'y Co.*, 36 Wis., 252, 1874; 9 Amer. R'y Rep., 112.

14. — Where goods are shipped by one railway company in Wisconsin for delivery at some point on the line of a connecting road of another company, and charges at the rates allowed by law for the whole distance are collected by one of the companies, the sum should be divided between the two companies upon some equitable principle, to be determined by the courts in case the companies invoke their aid for that purpose. *Id.*

15. **Constitutional law.** The act of May 2, 1878, to prevent extortion and unjust discrimination in railroads, is a constitutional enactment, and is not in violation of the contract between the state and railroad companies growing out of the granting and accepting their charters containing power to establish such rates of toll for the conveyance of persons and property as they shall, from time to time, direct and determine in the by-laws. *Illinois Central R. R. Co. v. The People*, 95 Ill., 813, 1880; 1 Amer. & Eng. R. R. Cases, 188.

16. — The act of 1871, ch. 84, entitled "An act to regulate the carrying of freight and passengers on all railroads in this state," and fixing a maximum rate of toll for such carriage, is not unconstitutional. *Blake v. Winona and St. Peter R. R. Co.*, 19 Minn., 418, 1872.

17. — The constitution of 1876, in regard to the carriage of freight by railway companies, left in force the common law rules affecting common carriers, as applicable to

such companies, until the act of 1879, which was passed in obedience to art. X, § 2, of that constitution. *Houston and Texas Central R. R. Co. v. Rust*, 58 Tex., 98, 1882; 9 Amer. & Eng. R. R. Cases, 128.

18. — The repeal of the act under which the aid and credit of the state were extended to railroads, upon conditions therein recited, does not have the effect to release them from the restraints imposed by s. 15 of that act as to tolls and charges; nor to release the Mobile and Montgomery R. R. Co., to whose rights the appellants succeeded, from the restrictions imposed by s. 8 of the special act under which the Mobile and Montgomery R. R. Co. obtained state aid. *Mobile and Montgomery R. R. Co. v. Steiner*, 61 Ala., 559, 1878.

19. — The provision in a railway charter that the company shall fix rates of toll, etc., held not to prevent the regulation of rates by the state. *Ruggles v. Illinois*, 108 U. S., 526, 1883; *Illinois Central R'y Co. v. People*, *ib.*, 541, 1883.

20. **Contract.** A letter from the agent of a railway company to certain shippers contained the following statement of rates: "The rate on iron, from Rising Fawn to Chattanooga, shall be \$6 to Chattanooga, and \$5 to any point on or beyond the Nashville, Chattanooga and St. Louis Railroad, per car-load of two thousand two hundred and sixty-eight pounds." Held, that the reasonable construction of this contract was that the rate should be \$6 per car-load when shipped from Rising Fawn only to Chattanooga, and \$5 when shipped to any point beyond Chattanooga. The low rate did not apply to iron shipped at Chattanooga. *Alabama Great Southern R. R. Co. v. Cureton*, 68 Ga., 824, 1882.

21. — A board of directors of a railway company may make lawful contracts for rates of carriage of freights during a fixture future time. *C. and M. R. R. Co. v. Hamrod Furnace Co.*, 87 Ohio St., 484; 3 Amer. & Eng. R. R. Cases, 471, 1881.

22. — Carriers can change their rates of freight so as to operate upon future contracts, but they cannot increase them so as to affect existing contracts. *Toledo, Wabash and Western R'y Co. v. Roberts*, 71 Ill., 540, 1874.

Cross Railways — Discrimination.

23. — Where a shipper applies to the local freight agent of a railroad company to get the rates of freight upon a proposed shipment of a certain amount of grain to a given point, and the agent, acting by authority, gives him the rate, and he agrees to ship at that rate, and then goes to the master of trains of the company, and makes an arrangement with him for the requisite number of cars per week, for the purpose of making such shipment, this amounts to a special contract on the part of the company to make the shipment at the rates named by the freight agent, and to furnish the cars in the manner agreed upon by the shipper and master of trains. *Ib.*

24. — A firm of loggers agreed to build a tram railway and contracted with the company controlling it to carry their lumber at certain rates. The corporation afterward assigned, and its assets went into the hands of one of the parties with whom the agreement to build was made, and through him became the property of a railway company in which he was a principal stockholder. This company refused to fulfil the agreement for carriage, and the loggers sued out a preliminary injunction restraining it from running over so much of the road as they had built except on condition of carrying their lumber at the rates agreed on. *Held*, that the contract was no more than an ordinary executory contract, was not enforceable in equity, and gave complainants no more control than other contractors over the road-bed; that the preliminary injunction was a final order and void, and that *mandamus* would lie to set it aside. *Tawas and Bay County R. R. Co. v. Iosco Circuit Judge*, 44 Mich., 479, 1880; 11 Amer. & Eng. R. R. Cases, 584.

25. Cross railways. It is not an illegal discrimination to charge a higher rate per mile upon a cross-line than is charged upon the main line of a railway. *Finnie v. Glasgow and South Western R'y Co.*, 2 McQueen, House of Lords, Scotch App., 177, 1855; 3 ib., 75, 1857; *Same v. Same*, 1 Patterson, 520, 1855.

26. Discrimination. The plaintiff was a brewer at B., where the defendant, a railway company, and the M. Company, another railway company, had stations.

Three firms of brewers also carried on business at B., and their premises respectively were connected with the M. Railway. The plaintiff's were not connected with either the M. Railway or the defendant's railway. In order to prevent the traffic of the three firms from passing wholly over the M. Railway and to divert some portion of it to its own line, the defendant agreed to cart goods gratuitously between its station at B. and the premises of the three firms respectively, and it also allowed certain deductions from the rates charged to the three firms for the carriage of their goods, the effect of which was that their goods were loaded and unloaded by the defendant gratuitously. The defendant did not cart gratuitously for the plaintiff between his premises and the station, and it did not allow to him deductions similar to those allowed to the three firms. After carting the goods for the three firms gratuitously and allowing them the deductions before mentioned, the defendant derived a profit from the traffic, and it had not any intention to prejudice the plaintiff. *Held*, affirming the judgment of the queen's bench division, that the gratuitous carting, loading and unloading of the goods for the three firms was an inequality in favor of them and an undue preference granted to them by the defendant, and was in contravention of 8 and 9 Vict., c. 20, s. 90, and 17 and 18 Vict., c. 31, s. 2, and that the plaintiff was entitled to maintain an action to recover the amounts paid by him to the defendant, which represented the cost of carting his goods between his premises and the station at B., and of loading and unloading the same. *Evershed v. London and North Western R'y Co.*, Law Reports, 3 Queen's Bench Division, 184, 1877; *Same v. Same*, 2 ib., 254, 1877; 20 Eng. (Moak), 823; *London and North Western R'y Co. v. Evershed*, Law Reports, 3 Appeal Cases, 1029, 1878; 24 Eng. (Moak), 625.

27. — The act incorporating a railway company authorized the company to levy only such tolls as might be fixed by a by-law of the company, to be sanctioned by the governor, and that the same tolls should be charged at all times equally to all persons. The company, from the circumstance that a firm agreed to furnish certain quantities of

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lumber for transportation, contracted to give the firm a reduced rate, but no by-law to this effect was passed by the company. *Held*, that the contract was illegal. *Attorney-General v. Ontario, etc., R. R. Co.*, 6 Grant Ch. (Upper Canada), 446. 1858.

28. — By statute the railroad companies of this state are given the exclusive privilege to carry freight and passengers over their respective roads, "provided that the charge for transportation or conveyances shall not exceed thirty-five cents per one hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every hundred miles, and five cents a mile for every passenger." *Held*, that the intention of the legislature was to confer upon each company the right to charge, as a common carrier, for freight and passengers carried over its road, or any part of it; that the intent was not to proportion the charges by any unit of distance, but to fix a maximum beyond which the company could not go, and to leave the tariff of charges, within that limit, to the company, subject to the rule of the common law that the charges should be reasonable, and to the regulating power of the courts and the legislature. *Ragan v. Aiken*, 9 Lea (Tenn.), 609, 1882; 9 Amer. & Eng. R. R. Cases, 201.

29. — A common carrier is bound to carry at equal rates for all customers in like condition, but may discriminate in rates of freight between customers not in like condition, if the discrimination be fair and reasonable, and not inconsistent with the public interest. *Ib.*

30. — A common carrier may discriminate in favor of persons living at a distance from the end of the route, where the object is to secure freight which would otherwise reach its destination by a different route, and other customers not in like condition will have no right of action because of the discrimination, if the charges made against them are reasonable. *Ib.*

31. — Railway companies, independent of the act of 1879, and before its enactment, were, in the carriage of freight, subject to the following rules: They were held to the strictest impartiality in the conduct of their business, in withholding all privileges or preferences from one customer which were not

extended to all others. But the above rule is subject to the qualification, that where a rate of freight is reasonable for all customers, contracts for a less rate might be made in special cases, when, under all the circumstances, the discrimination is reasonable and just. The discrimination must not subject others to unreasonable disadvantages, nor must it be made in order to give one individual a preference to the disadvantage of another; or one to give preference and advantage to one locality to the prejudice of another locality. A mere discrimination in favor of a customer was not unlawful unless it was an unjust discrimination. *Houston and Texas Central R'y Co. v. Rust*, 53 Tex., 98, 1892; 9 Amer. & Eng. R. R. Cases, 123.

32. **Equality.** The Allegheny Valley Railroad crosses the Pennsylvania Railroad at Allegheny Junction. To compete more successfully with the river transportation, the Allegheny Valley R. R. Co. carried crude oil to the refineries at Pittsburgh, and the manufactured product back to Allegheny Junction, at a uniform rate, thus giving to the refiner at Pittsburgh as favorable terms as if located at Allegheny Junction, and thereby securing a uniform rate on oil from the oil regions to the sea-board. *Held*, that to deny the right to make such an arrangement would be an unwarranted interference with the management of the business of the railway and deprive the public of the benefit of the competition to which it is justly entitled. *Munhall v. Pennsylvania R. R. Co.*, 92 Pa. St., 150, 1879; 5 Amer. & Eng. R. R. Cases, 337.

33. — Railway companies have an undoubted right to enter into a just and fair arrangement with a corporation or association whereby their business will be increased, although the effect of the arrangement may be to take business from others. With a view of increasing their business they may extend more favorable terms to all shippers, although others engaged in the same business may be incidentally injured thereby. The fact that the public patronize those lines of transportation which give the most favorable terms constitutes no ground of complaint. *Ib.*

34. **Leased lines.** A railway company in whose act there was an equal-rates clause,

Loading and Unloading — Passengers.

that it should charge "equally to all persons, etc., in like circumstances," leased another line whose act contained no such clause. By the lease the lessor was to pay to the lessee a certain sum on all minerals carried entirely by the latter. *Held*, that it was not illegal for it to charge for goods taken up by the main line and forwarded by the other, and goods carried entirely by the lessees, according to different rates. *Finnie v. Glasgow and South Western Ry Co.*, 2 Stuart (Milne & Peddie, House of Lords, Scotch App.), 195, 1853; 18 Scotch Session Cases (2d series), 31, 1855.

35. Loading and unloading. A railway company was required, by its special act, to carry as common carriers for hire, and to afford to all persons, conveying or sending goods upon its railway, every reasonable convenience or facility for loading or unloading goods. The act also authorized the company, for carriage of goods, to demand a toll not exceeding three pence per ton per mile. *Held*, that the company was not entitled to charge an additional sum for services performed, accommodation afforded, and expense and risk incurred in and about the receiving, loading, unloading and delivering the goods. *Pegler v. Monmouthshire Ry Co.*, 6 Hurlstone & Norman (Exchequer), 644. 1861.

36. Local freight; Alabama. The rate on freight "carried over the whole line of its road," which furnishes the basis for the additional fifty per cent. allowed by statute for the transportation of "local freight," is the rate charged on freight taken on at one terminus and discharged at the other, and not the rate for freight brought from or carried to a point beyond the *termini* of the road. The rate which furnishes the basis on which local freight charges must be graduated is the rate prevailing at the time of the shipment; and rates at any particular time in the past furnish no reliable guide for ascertaining present rates. *Mobile and Montgomery R. R. Co. v. Steiner*, 61 Ala., 559. 1878. See, also, *State ex rel. v. Mobile and Montgomery R. R. Co.* 59 ib., 321. 1877.

37. Overcharges. The nature of the business considered, the shipper does not stand on equal terms with the carrier in contracting for charges for transportation; and if

the shipper pays the rates established in violation of law by the carrier, rather than forego his services, such payment is not voluntary, in the legal sense, and the shipper may maintain his action for money had and received, to recover back the illegal charge.

Mobile and Montgomery R. R. Co. v. Steiner, 61 Ala., 559. 1878. But if paid voluntarily it cannot be recovered back. *DuBose v. Ga. R. R. and Banking Co.*, 50 Ga., 304. 1873.

38. — The measure of plaintiff's damages in case of illegal overcharges is the amount paid in excess of the rates allowed by law, with interest at least from the commencement of the action. *Graham v. Chicago, Milwaukee and St. Paul Ry Co.*, 53 Wis., 473, 1881; 3 Amer. & Eng. R. R. Cases, 289.

39. — The rate for freight to which the Southern Pacific R. R. Co. is limited by its charter has no reference to any road except that which the company is authorized to build and operate in Texas; and a charge of freight, in excess of the limits prescribed by its charter, over a road which the company owns and operates out of Texas, would be no violation of the provisions of its charter. A charge for freight from Shreveport, La., to the Texas line, in excess of the limits of the charter of the Southern Pacific R. R. Co., is not a violation of such charter, nor does an action arise from such overcharge. *Knight v. Southern Pacific R. R. Co.*, 41 Tex., 406. 1874.

40. Passengers. Where by an act of parliament it was provided that "every carriage conveying passengers" was to be charged at a rate not exceeding 6d. per ton per mile, *held*, that the proper construction is, that the tonnage is to be taken upon the carriage with the passengers upon it, and that the words "conveying passengers" are not merely descriptive of the carriages, but indicative of the matters and things which are to be the subject of weighing, and to be in that respect subjected to tonnage. *Edinburgh and Dalkeith Ry Co. v. Wauchope*, 3 Eng. R. R. & Canal Cases, 232. 1842.

41. — overcharge; penalty. The issuance of a ticket for change made on the cars, instead of paying the difference in money, is not an overcharge rendering the company liable to a penalty, even although upon a

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subsequent trip the company's employes refused to accept this ticket as money. In this case there was no allegation that the ticket was not good for the sum named, or that its requirements were unreasonable. *Sullivan v. New York, New Haven and Hartford R. R. Co.*, 19 Blatchford (U. S. C. C.), 388. 1881.

42. — payment on train. A railway company has the legal right to discriminate between the amounts of fare where a ticket is purchased and where the fare is paid upon the train, and to demand and receive a higher fare in the latter case than the ticket rate; and, when a passenger refuses to pay the fare demanded, the conductor of a train has the right to put such passenger off his train at any time and at any place on the line of the road, without reference to stations and without actual danger to his life or person. When he refuses to pay his fare, the passenger becomes an intruder and trespasser, and he has only the rights of a trespasser. *Toledo, Wabash and Western R'y Co. v. Wright*, 68 Ind., 586. 1879.

43. — Railway companies may discriminate between the amount of fare where a ticket is purchased and where the fare is paid upon the train. *Indianapolis, Peru and Chicago R'y Co. v. Rinard*, 46 Ind., 293, 1874; 6 Amer. R'y Rep., 328; *Louisville, Nashville and Great Southern R. R. Co. v. Guinan* 11 Lea (Tenn.), 98, 1883.

44. — refusal to sell ticket. A person having duly applied for a ticket, and being refused without just cause, has the same right to be carried upon paying or offering to pay the ticket rate of fare as if he had previously purchased a ticket. *Indianapolis, Peru and Chicago R'y Co. v. Rinard*, 46 Ind., 293, 1874; 6 Amer. R'y Rep., 328.

45. — season tickets. A., who was a student over twenty years of age, paid to a railway company the regular price of a season ticket entitling him to transportation over its road, between two stations, for three months. The directors of the company had authorized its president, upon special application, and in his discretion, to allow season tickets to be sold to students over twenty years of age, for the same term, between the same stations, for one-half the price A. paid, and such tickets had been

sold. *Held*, in an action by A. to recover of the corporation one-half of the amount paid by him, that there was no violation of the St. of 1874, ch. 872, § 138, and that the action could not be maintained. *Spofford v. Boston and Maine R. R. Co.*, 128 Mass., 826. 1880.

46. Purchased lines. Where the railroad of one company is purchased by another company, in pursuance of a statute authorizing the purchase, in the absence of any provision of law to the contrary, the road passes to the vendee subject to the same limitations as to rates chargeable for transportation as attached to it in the hands of the vendor. *Campbell v. Marietta and Cincinnati R. R. Co.*, 23 Ohio St., 168, 1872; *Mobile and Montgomery R. R. Co. v. Steiner*, 61 Ala., 559, 1878. See, also, *State ex rel. v. Mobile and Montgomery R. R. Co.*, 59 ib., 321. 1877.

47. Railway operated by an individual. The bill alleged that a particular railroad, with all its property, effects and franchises, was sold under proceedings by the state against delinquent railroads, and subsequently resold by the purchaser to an individual named, and by him to the defendant, who had continued to operate the road under the charter of the original corporation, and had charged and received from the complainants excessive freight. *Held*, upon demurrer, that the defendant was not the corporation, and that the bill was properly filed against him as an individual. *Ragan v. Aiken*, 9 Lea (Tenn.), 609. 1882.

48. Reasonableness. Reasonableness does not depend upon the profit of the company, but upon what is reasonable to be charged to the person making the payment. *Canada Southern R'y Co. v. International Bridge Co.*, Law Reports, 8 Appeal Cases, 728. 1883.

49. — Where a railway company is authorized to charge for transportation of property "not exceeding five cents per ton per mile, when the same is transported a distance of thirty miles or more, and in case the same is transported for a less distance than thirty miles, such reasonable rate as may be from time to time fixed by the company," it is unreasonable, as a matter of law, that the company should fix a greater rate for a less distance than thirty miles than the maximum allowed for full thirty miles. *Camp-*

May Be Contradicted.

bell v. Marietta and Cincinnati R. R. Co., 23 Ohio St., 168. 1872.

50. — A railway company received goods for carriage from S. to L. In the course of the journey it carried the goods from a point C. on the line to N., and back again to C., and thence on to L., but this was its usual and reasonable way of carrying goods, there being a large goods station at N. By the act of incorporation of the company it was provided that it should not charge for the carriage of goods of the kind in question more than 8d. per ton per mile. *Held*, that the company was entitled to charge 3d. per ton per mile for the distance from C. to N. and back, in addition to the distance in the direct line from S. to L. *Myers v. London and South Western R'y Co.*, Law Reports, 5 Common Pleas Cases, 1. 1869.

51. Rebates. Where the plaintiff, having sold a large lot of corn, to be delivered in Boston at a certain price, the purchaser agreeing to advance the regular freight, which was eighty and one-half cents per hundred pounds, as a part of the price, made a special contract with a railroad company to allow him a rebate of five and one-half cents per hundred, which the company was to pay him, and the corn was shipped, a part at eighty and one-half cents, as agreed, and on which the company paid the plaintiff back five and one-half cents per hundred, and a part was billed through at seventy-five cents per hundred without the shipper's consent, *held*, that the company was liable to the shipper for five and one-half cents per hundred on the latter portion of the corn. *Toledo, Wabash and Western R'y Co. v. Elliott*, 76 Ill., 67. 1875.

52. Repeal of statute. Rights of action, whether sounding in tort or in contract, which are not granted by a statute, but, while connected with the existence of the statute, result from the application of common law principles, are not lost by the repeal of the statute. *Graham v. Chicago, Milwaukee and St. Paul R'y Co.*, 53 Wis., 473, 1881; 3 Amer. & Eng. R. R. Cases, 239.

53. — Thus, where, during the existence of a statute which made it unlawful for a railway company to charge for the carriage of goods higher rates than those prescribed in the act, plaintiff was compelled by the

defendant railway company to pay higher rates, and paid them under protest, the subsequent repeal of the statute will not prevent his recovering damages for defendant's unlawful act. *Ib.*

54. Tolls. Tolls at common law are in the nature of fixed rights, and cannot be lawfully exceeded, and are generally, if not universally, connected with some franchise which involves duties as well as privileges of a general or public nature, such as those which belong to fairs, markets, mills, turnpikes, ferries and bridges. *McKee v. Grand Rapids, etc., R'y Co.*, 41 Mich., 274. 1879.

55. — carriage of manure. The company gave notice that it would not act as a carrier of manure and other specified articles, but would, at the request of parties and at agreed rates, provide cars or locomotive power, or both, to persons desiring the use of the railway to forward the above mentioned articles, and claimed to charge under the clauses for such articles carried on its railway. *Held*, by the commissioners, affirmed by the court of session in Scotland, that notwithstanding such notice, the company in fact acted as a carrier of such articles, and was not entitled to charge under the toll clauses. *Aberdeen Commercial Co. v. Great North of Scotland R'y Co.*, 3 Neville & McNamara, 205. 1878.

56. Through rates. The delay in unloading cars at a particular station is not a cost that ought to make the through rate to that station. *Belfast Central R'y Co. v. Great Northern R'y Co.*, 4 Railway Commissioner's Reports, 159. 1882.

57. Weights and measurement. Whether cotton should be charged for in transit by weight or measurement is a question of fact for the jury, under the statute of South Carolina. The jury having found that it should be regulated by weight, instead of measurement, the supreme court refused to disturb the finding. *Bonham v. Railroad Co.*, 16 So. Car., 633. 1881. See *Same v. Same*, 3 Amer. & Eng. R. R. Cases, 302.

RECEIPTS FOR FREIGHT.

1. May be contradicted. Receipts for freight, given by a consignee to the carrier, stating the goods to be in order, are evidence

Action by — Actions Against Receiver.

in favor of the latter that the freight was delivered in good order. But, as between the parties, they are not conclusive on the question. Where it appears that the carrier demanded that the receipts should be put in that form, as a condition to the delivery of the goods, and that the receipts were signed under a protest that the goods were not in good order, it is a fair question of fact for the jury, on the evidence, and cannot be disposed of in favor of the carrier, as a question of law. *Monell v. Northern Central R. R. Co.*, 67 Barbour (N. Y.), 581, 1877; *Tierney v. N. Y. Central and Hudson River R. R. Co.*, ib., 538, 1877.

2. — Where the parties to a contract met, at night, and one of them handed the other, through a car window, a receipt, and requested him to sign it, which he did, and thereupon the one taking the receipt handed the one signing it a package of money containing a certain amount, and told him that was all he could pay, to which the one receiving the money replied that he was not satisfied with the amount and would bring suit the next day, it was held that there was no such final settlement made as would bar all further investigation into the state of the accounts between the parties. *Rockford, Rock Island and St. Louis R. R. Co. v. Rose*, 72 Ill., 183, 1874.

RECEIVER.

See APPEALS; CARRIAGE OF MERCHANDISE; FRAUD; HIGHWAYS; INJURIES TO DOMESTIC ANIMALS; INJURIES TO PASSENGERS; MORTGAGE; STOCK.

1. Action by. A complaint by a receiver, appointed in a proceeding supplementary to execution, must allege that the court appointing him authorized him to sue in his own name in matters concerning his receivership. *Garver v. Kent*, 70 Ind., 428, 1880.

2. — Unless the law of the state, or the order appointing him, authorizes a receiver to sue in his own name, he can sue only in the name of the person in whom the right of action existed before his appointment. *Id.*

3. Action against corporation. Notwithstanding the property and franchises of a railroad company may be in the hands of a receiver appointed by the court, it is discre-

tionary in the court to permit a suit to be brought against the company and prosecuted to final judgment, for the purpose of fixing the rights of the parties. *Wyatt v. Ohio and Mississippi R. R. Co.*, 10 Bradwell (Ill.), 289, 1881.

4. — The defendant, a railway company, cannot plead either in bar or abatement that the company was in the hands of a receiver, and that the action was brought without leave of the court in which such receiver was appointed, though by bringing such suit without leave the plaintiff may have been guilty of a contempt. *Ohio and Mississippi R'y Co. v. Nickless*, 71 Ind., 271, 1880.

5. Actions against receiver. It is not essential to the jurisdiction of a court of law in an action for damages against a defendant corporation which is in the hands of a receiver, or against the receiver, that leave to prosecute should first be obtained of the court appointing the receiver. *Allen v. Central R. R. Co. of Ia.*, 42 Ia., 688, 1876; *Wyatt v. Ohio and Mississippi R. R. Co.*, 10 Bradwell (Ill.), 289, 1881; *St. Joseph and Denver R. R. Co. v. Smith*, 19 Kans., 225, 1877. *Contra*, *Thompson v. Scott*, 4 Dillon (U. S. C. C.), 508, 1876; *Barton v. Barbour*, 104 U. S., 126, 1881.

6. — The rule that a receiver cannot be sued without leave of the court of equity which appointed him applies to suits against him on a money demand or for damages, as well as to those the object of which is to recover property which he holds by order of that court. The fact that, by such order, he is in possession of a railroad, and engaged in the business of a common carrier thereon, does not so take his case out of the rule as that an action will lie against him for an injury caused by his negligence or that of his servants in conducting that business. If the adjustment of a demand against him involves disputed facts, that court may, in a proper case, either of its own motion or on the prayer of the parties injured, allow him to be sued in a court of law, or direct the trial of a feigned issue to settle the facts. *Barton v. Barbour*, 104 U. S., 126, 1881; *Kennedy v. I., C. and L. R. Co.*, 3 Federal Reporter, 97; 2 Flippin (U. S. C. C.), 704, 1880.

7. — A receiver cannot be sued for the

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assets placed in his hands, or be disturbed in the possession or management thereof, without first obtaining leave of the appointing court. *De Groffenried v. Brunswick and Albany R. R. Co.*, 57 Ga., 22. 1876.

8. — A court of equity has no jurisdiction of a suit involving a question of unliquidated damages arising from a tort. It will not entertain a bill filed to recover damages for the death of a person through negligence of a railroad company, although the road, at the time of the injury, was in the hands of a receiver and under his entire control, and he has conveyed the road to purchasers, subject to all liabilities incurred by the receiver in operating the road. *Brown v. Wabash R'y Co.*, 96 Ill., 297. 1880.

9. — A person having a legal cause of action sounding merely in tort against a receiver appointed by the court of chancery has a right to pursue his redress by an action at law. Such action cannot be brought without the permission of the chancellor, but such permission cannot be refused unless the claim preferred be manifestly unfounded and vexatious. The power of the chancellor in this respect considered. *Palys v. Jewett, Receiver*, 32 N. J. Eq., 302. 1880.

10. — As the right of the chancellor to sanction the bringing of the action conferred a *scintilla* of jurisdiction over the case, and the parties proceeded to try the cause before the vice-chancellor, *held*, that the court of appeals could lawfully exercise its jurisdiction by way of review, and the decree being reversed, the complainant's damages were ascertained and adjudged to him on this appeal. *Ib.*

11. — The defendant railroad company was in possession and management of receivers appointed by the court of chancery. The petitions to recover for the injuries were properly brought to that court. *Merrill v. Central Vt. R. R. Co.*, 54 Vt., 200. 1881. *Contra, Wabash R'y Co. v. Brown*, 5 Bradwell (Ill.), 590. 1879.

12. — The courts of Vermont have the right to restrain parties within their jurisdiction from prosecuting suits in foreign courts. *Vermont and Canada R. R. Co. v. Vt. Central R. R. Co.*, 46 Vt., 792. 1873.

13. — If a receiver appointed by one court is in possession of property he is not amena-

ble to suit in another court in respect thereto; and if the property has passed beyond his control, he would not in any event be a necessary party in a proceeding to adjudicate a lien on such property still subsisting, notwithstanding the proceedings in the court wherein he was appointed receiver. *Massachusetts Mutual Life Insurance Co. v. Chicago and Alton R. R. Co.*, 13 Federal Reporter, 857. 1882.

14. — A county treasurer filed his petition in the district court against a railroad company, and the receiver of said company appointed by the circuit court of the United States, to recover the taxes levied upon said company for the year 1874. The petition alleged the appointment of the receiver and his possession and control of the road. Without, so far as the record discloses, the issue or service of any process, the company and receiver filed a joint answer, in which they admit that a portion of the taxes are properly chargeable against the company, and consent that judgment may be rendered against them in the action for that amount, and also allege the appointment of the receiver by the United States circuit court, that he is not amenable to the process of the district court, and pray that as to him the suit may be dismissed. *Held*, that the district court had jurisdiction, and properly rendered judgment against the receiver. *St. Joseph and Denver R. R. Co. v. Smith*, 19 Kans., 225. 1877.

15. Abatement of former suits. The appointment of a receiver furnishes no ground for the continuance of a suit regularly brought against the corporation prior to such appointment. Putting the property into the hands of a receiver will not abate, continue or bar such pending action. *Toledo, Wabash and Western R'y Co. v. Beggs*, 85 Ill., 80. 1877.

16. Accounting. Order of court construed, requiring the receivers of a railroad to account before a master. *Farmers' Loan and Trust Co. v. Central R. R. Co. of Iowa*, 2 Federal Reporter, 751; 1 McCrary (U. S. C. C.), 352. 1880.

17. Advancements by officers of corporation. A director of an insolvent railroad company is entitled to reimbursement out of the funds in the hands of a receiver, for

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advances made by him to save the property against an unquestionable lien. To the amount of such advances, his claim is paramount to that of mortgagees whose incumbrances are subordinate to the lien. *Coe v. New Jersey Midland R'y Co.*, 27 N. J. Eq., 110. 1876.

18. — The right of subrogation cannot be enforced until the whole debt is paid. And until the creditor be wholly satisfied, there ought and can be no interference with his rights or his securities, which might, even by bare possibility, prejudice or embarrass him in any way in the collection of the residue of his claim. *Receivers New Jersey Midland R'y Co. v. Wortendyke*, 27 N. J. Eq., 658. 1876.

19. **Appeal.** Where, in the progress of a suit for the foreclosure of a mortgage, a receiver was appointed, against whom, after the foreclosure and sale of the mortgaged premises, a decree was rendered directing him to pay into court \$18,776.25, the balance found due from him on the settlement of his accounts, *held*, that he had the right to appeal from that decree. *Hinckley v. Gilman, Clinton and Springfield R. R. Co.*, 94 U. S., 487, 1876; 16 Amer. R'y Rep., 217.

20. **Appointment.** The *ex parte* appointment of a receiver, and the *ex parte* granting of an interlocutory injunction to deprive the directors of control, are more than irregular, and are absolutely void, as beyond the power of the court. *People ex rel. v. Judge of St. Clair Circuit*, 31 Mich., 456. 1875. See, also, *Cook v. Detroit and Milwaukee R. R. Co.*, 45 Mich., 453. 1881.

21. — A judge of a state circuit court in Illinois cannot, in vacation, appoint a receiver of a railroad corporation. The possession of a receiver so appointed is not that of the court. *Hammock v. Loan and Trust Co.*, 105 U. S., 77, 1881; 7 Amer. & Eng. R. R. Cases, 465.

22. — A receiver should not be appointed, unless in case of great urgency, without notice. The appointment of a manager of a railway is an extraordinary exercise of power, and such appointment should not be made except in extreme cases clearly justifying such action. *State v. Jacksonville, Pensacola and Mobile R. R. Co.* 15 Fla.,

201, 1875; *Railway Co. v. Jewett*, 37 Ohio St., 649, 1882; 8 Amer. & Eng. R. R. Cases, 702.

23. — Where a suit in equity was properly instituted against a railroad company by a stockholder, a bondholder and the trustees for the bondholders named in the land grant mortgages of the company, in behalf of themselves as well as all other stockholders, creditors or bondholders who might desire and be entitled to intervene, and the bill charged that the officers, agents and directors of the company were squandering and embezzling its property, and the purpose of the suit was that the assets of the company might be preserved and administered, and the relief prayed was proper to be granted, and a decree *pro confesso* had been regularly entered, a receiver properly appointed, an authentic report of the facts made to the court and its judgment passed thereon, individual stockholders were not permitted to intervene in the suit as defendants and file a cross-bill on a general charge of fraud and collusion on the part of the receiver and erroneous judgment on the part of the court in making the order referred to. *Forbes v. Memphis, El Paso and Pacific R. R. Co.*, 2 Woods (U. S. C. C.), 323. 1872.

24. — A court of equity cannot take from the directors of a corporation or vest in a receiver the management and control of the corporate business, except under proceedings under the statutes (Comp. L. 1871, ch. 206, 207) to dissolve the corporation. *People ex rel. v. Judge of St. Clair Circuit*, 31 Mich., 456, 1875; *Cook v. Detroit and Milwaukee R. Co.*, 45 Mich., 453, 1881.

25. — A court of equity will not appoint a receiver of a railroad merely upon a showing that there has been a default in the payment of interest, secured by a mortgage of the properties and income of the company; that upon such default the trustees under the mortgage were entitled to immediate possession; that they have demanded possession, and that the same has been refused. It is necessary, in addition to this, to show that ultimate loss will happen to the beneficiaries under the mortgage by permitting the property to remain in the hands of its owners until final decree and sale, if such decree and sale be made. *Union Trust Co. v. St.*

Attached Property.

Louis, Iron Mountain and Southern R. R. Co., 4 Dillon (U. S. C. C.), 114. 1877.

26. — Without deciding whether a case may not arise in which it would appoint a receiver pending an appeal here, the court declines to do so upon the showing made in this case. *Pacific R. R. of Missouri v. Ketchum*, 95 U. S., 1. 1877.

27. — Proceedings in relation to the appointment and removal of receivers are special proceedings under § 512 of the Code, and an order affecting a substantial right made in such proceeding is a final order, within the meaning of such section, and is appealable. *Cincinnati, Sandusky and Cleveland R. R. Co. v. Sloan*, 31 Ohio St., 1, 1876; 15 Amer. R'y Rep., 376.

28. — A court of equity will not conduct the business of a corporation through a receiver unless the interests of creditors unmistakably require it; and when a railway company, by collusion with a creditor who prays for the appointment of a receiver, allows its property to go into a receiver's hands, not for the purpose of meeting its obligation to the petitioning creditor, but for the purpose of keeping its property from other creditors, the court which appointed the receiver will, upon information of the facts, discharge him of its own motion. *Sage v. Memphis and L. R. R. Co.*, 18 Federal Reporter, 571. 1883.

29. — The office of receiver should not be conferred upon a party to the cause. *Young v. Rollins*, 85 N. C., 485. 1881.

30. — Where a receiver has been appointed by the courts of another state, the courts of Pennsylvania, on the ground of the comity existing between the states, will recognize his appointment, provided his claims thereunder do not come into conflict with the rights of citizens of Pennsylvania. *Bagby v. Atlantic, Mississippi and Ohio R. R. Co.*, 86 Pa. St., 291. 1878.

31. — Where a receiver of a corporation has been properly appointed in another state, a creditor who resides in that state and is bound by the decree of its court appointing the receiver, cannot, in an attachment execution, recover assets of the corporation in Pennsylvania, which the receiver claims. *Ib.*

32. — The record of the appointment of a receiver is conclusive evidence of such ap-

pointment until it is set aside. *Vermont and Canada R. R. Co. v. Vt. Central R. R. Co.*, 46 Vt., 792. 1873. See, also, *Allen v. Central R. R. Co. of Ia.*, 42 Ia., 683. 1876.

33. — Where an order appointing a receiver is rescinded "without prejudice to any party or claimant," and a possessory warrant has been sued out against the receiver, he must respect the same. Should he deliver the property to the company from which he received it, he does so at his own risk. *Peacock v. Pittsburgh Car Works*, 52 Ga., 417, 1874; 7 Amer. R'y Rep., 147.

34. — Where the appointment of a receiver has been properly vacated by the order of a judge at chambers, the validity of such order does not depend on the mere discretion of the court or judge making the appointment. And where the court, without any new showing or change of circumstances calling for judicial action, directs the order to be set aside as a nullity, it assumes authority not warranted by law. *Cincinnati, Sandusky and Cleveland R. R. Co. v. Sloan*, 31 Ohio St., 1, 1876; 15 Amer. R'y Rep., 376.

35. Attached property. Where attachments have been levied on the property of a foreign corporation in this state, and afterwards a receiver is appointed for the corporation in its own state, before he can plead to or defend the attachment suits, he must apply to the courts where they are pending and be made a party. *South Carolina R. R. Co. v. People's Savings Institution*, 64 Ga., 18. 1879.

36. — Where, after the levy of attachments on the property of a foreign corporation in this state, a receiver is appointed in its own state, and takes possession of all the property, including that levied on, subject to the disposition of the attachments, it is not a proper mode of disposing of them for the receiver to petition the court where they are pending to order the property levied on to be turned over to him. *Ib.*

37. — The mere pendency of a bill to foreclose a mortgage on a railroad, and for the appointment of a receiver, in the United States circuit court of South Carolina, could not affect the operation of the attachment laws of Georgia, although some of the plaintiffs in attachment were parties defend-

Attorneys' Fees — Certificates.

ants before any levy was made, and the others were made so afterwards, the bill not being a general creditors' bill, but a bill to foreclose a mortgage, and no receiver having been appointed prior to the levies. *Id.*

38. Attorneys' fees. Where attorneys prosecute a suit for a receiver he may pay them for their services out of the funds realized. But the attorneys cannot intervene in other proceedings and there claim a lien for their compensation. *State v. Edgefield and Ky. R. R. Co.*, 4 Baxter (Tenn.), 92. 1874.

39. — An order appointing a receiver of a railroad company directed him, among other things, to pay debts owing to the laborers and employes "of the company for labor and services actually done in connection with the company's railways." *Held*, that it included a claim of counsel for professional services rendered by him on employment of the company in litigation relating to the railway, its interests and business. *Gurney v. Atlantic and Great Western R'y Co.*, 58 N. Y., 358, 1874; 9 Amer. R'y Rep., 520.

40. — A decree appointing a receiver for a railroad and giving priority to claims for "labor in operation of the road" will be held to include proper compensation for counsel to the receiver for services necessary to the successful management of the road. *Bayliss v. Lafayette, Muncie and Bloomington R'y Co.*, 9 Bissell (U. S. C. C.), 90. 1879.

41. Bankruptcy proceedings. A receiver in possession of mortgaged premises under order of a state court of chancery, in proceedings for foreclosure prior to commencement of proceedings in bankruptcy, cannot be dispossessed by order of the district court in the bankruptcy proceedings. *Davis v. Railroad Co.*, 1 Woods (U. S. C. C.), 661. 1873.

42. Bills and notes. After order passed constituting the officers of a railway company, in effect, receivers of the road, the company continued to conduct its business as before, officers were annually elected, and no separate books were opened by them as receivers. During this time a note was given by the company in its corporate name, signed by the president and treasurer as such, in settlement of an account for running expenses. *Held*, that the existence of the cor-

poration was not interfered with, or its officers displaced, and that the note so given was not made or received with reference to the receiver's fund. *Gibbes v. Greenville and Columbia R. R. Co.*, 17 So. Car., 396; 12 Amer. & Eng. R. R. Cases, 425. 1831.

43. Bonds purchased by receiver. A referee reported \$241,000 of defendant's past-due bonds, secured by the lien of a first mortgage, as still outstanding, to which finding no exceptions were taken, and the report was approved by the circuit court. After the appointment of the receivers, fifty-four of these first mortgage bonds were purchased by the receivers, — some before the report of the referee, and some afterwards, but all before the approval of the report, — and entered upon the books of the company as investments, and not as paid, and for several years reported to the company as still outstanding, and they were then re-issued for value. *Held*, that these fifty-four bonds had not been paid, and in the hands of their purchasers were secured by the lien of the first mortgage. *Gibbes v. Greenville and Columbia R. R. Co.*, 15 So. Car., 304, 1880; *Same v. Same*, *ib.*, 518, 1880.

44. Certificates. A certificate of indebtedness issued by a receiver, under an order of the court appointing him, to pay debts and expenses incurred by his predecessor, not on account of any indebtedness made by the former receiver or for which the receiver issuing it received any benefit from the payee, or any one else, is not entitled to be paid out of any funds in the hands of the receiver, either at the suit of the payee or holder for value. *Turner v. Peoria and Springfield R. R. Co.*, 95 Ill., 134, 1880; 1 Amer. & Eng. R. R. Cases, 348.

45. — Certificates of indebtedness issued by a receiver under an order of a court are wanting in nearly every essential quality of negotiable commercial paper, as they are not payable unconditionally out of any fund. Whether they are payable in full, or only *pro rata*, depends on the fact of the sufficiency of the fund under the control of the court. There is no personal liability on any one for their payment. Only the fund which the court controls is bound, and that only when it is equitable to charge it with the payment of the money evidenced thereby.

Certificates.

Their payment can only be coerced by application to the court having control of the trust property for an order upon its acting officer. *Ib.*

46. — Except under extraordinary circumstances, the power of the court ought never to be exercised in enabling the trustees, where the railroad is unfinished, to borrow money by means of receiver's certificates which create a paramount lien upon the property, in order to complete the work. *Shaw v. Railroad Co.*, 103 U. S., 605, 1879; *Stanton v. Alabama and Chattanooga R. R. Co.*, 2 Woods (U. S. C. C.), 503, 1875.

47. — A court of equity may authorize the receiver of a railroad to issue certificates of indebtedness and make them a first lien upon the road, for the purpose of raising funds to make necessary repairs and improvements, but it is a power to be sparingly exercised; and when the road cannot be kept running without its exercise, except to a very limited extent, the sound practice is to discharge the receiver or stop running the road and speed the foreclosure. *Credit Co. v. Arkansas Central R. R. Co.*, 15 Federal Reporter, 46, 1892.

48. — It is not a judicial duty to build railroads, and the assent of all the parties interested in the property cannot make it one; and there is no difference in principle between a court building a railroad by the issue of receivers' certificates and making extensive and general repairs and betterments, approximating the original cost of construction by like means. *Ib.*

49. — An order of court appointing a receiver of a railway company provided that he should "do and perform all the acts and things necessary to be done and performed to construct and complete said line of railroad," and that he should be authorized to borrow such sums of money as were necessary for the further construction, equipment and final completion of the road, and to issue his debentures or certificates therefor, and that such certificates, "whether for money borrowed, material furnished, labor performed, or on account of contracts made by him on account of the construction of the road," should be treated as receiver's indebtedness, and constitute a first lien on the road. *Held*, that the receiver was not authorized to

issue certificates in payment of material until it had been furnished, and having issued his certificates for material contracted to be delivered, but which in fact never was, such certificates were void. *Bank of Montreal v. C. C. and W. R. R. Co.*, 48 Ia., 518, 1878.

50. — Such certificates reciting upon their face that they were issued under the order of court, the holder was chargeable with notice of the order, and in taking them was bound to inquire whether the receiver had power to issue them in payment for material to be delivered at a future time. *Ib.*

51. — An application by receivers of an insolvent railroad to issue certificates of indebtedness to cover certain expenses, and an order of the court thereon accordingly, does not bind the receivers or the trust fund to pay particular items of such expenses, the propriety of which was not before the court. *Coe v. New Jersey Midland R'y Co.*, 27 N. J. Eq., 37, 1876.

52. — The court should not authorize the issue of receivers' certificates of indebtedness, unless a detailed statement is first made out specifying the items of the sum needed and the purposes to which it is to be applied, supported by clear proof of the correctness thereof, and of the necessity for raising the money, and after proper notice to, and hearing of, the parties interested. *Meyer v. Johnston*, 53 Ala., 237, 1875; 9 Amer. R'y Rep., 451.

53. — negotiability. Obligations in negotiable form issued by a receiver held valid. *Langdon v. Vermont and Canada R. R. Co.*, 53 Vt., 228, 1880; 4 Amer. & Eng. R. R. Cases, 33; *Humphreys v. Allen*, 101 Ill., 490, 1882; 4 Amer. & Eng. R. R. Cases, 14; *Stanton v. Ala. and Chattanooga R. R. Co.*, 2 Woods (U. S. C. C.), 506, 1875.

54. — Where a court orders a receiver to issue certificates of indebtedness for a specific purpose, to be made payable to the persons to whom delivered or order, and one is issued to A. B. or bearer, which is negotiated by mere delivery, the holder will take the same subject to all equitable defenses against the payee, and the printed order of the court on its back is notice to him that it was made payable to bearer contrary to the order of the court authorizing the issue.

Change of Line of Railway — Compensation.

Turner v. Peoria and Springfield R. R. Co., 95 Ill., 184, 1880; 1 Amer. & Eng. R. R. Cases, 348.

55. — A court of chancery has power, after proper notice to and hearing of interested parties, to authorize the issue even of negotiable certificates of indebtedness creating a first lien, displacing other liens to that extent, on the property of a railroad which it is operating through its receiver, whenever it is necessary to raise money for the economical management and conservation of the property. *Meyer v. Johnston*, 53 Ala., 237, 1875; 9 Amer. R'y Rep., 454.

56. — Where a receiver of a railroad was, by order of court, authorized to issue receivers' certificates to a certain amount, the proceeds to be used in operating the road, and to be paid out of the receipts of the road, an issue of certificates in excess of the amount ordered was beyond the power of the receiver, and, as to such excess, the certificates were void even in the hands of an innocent holder, and constituted no claim upon the money in the hands of the receiver. *Newbold v. Peoria and Springfield R. R. Co.*, 5 Bradwell (Ill.), 367. 1879.

57. — Receivers' certificates are not ordinarily negotiable. Where a receiver, acting under a special order of the court, issued a certificate and placed it in the hands of the payee named therein for negotiation and sale, and the same subsequently came into the hands of the petitioner, who purchased it of a third party for forty per cent. of its par value, and with notice of the order under which it was issued, *held*, that he took it subject to all equities between the receiver and the payee, and that, as it appeared that the latter had never accounted to the receiver for the certificate or its proceeds, the petitioner was not entitled to payment. The negotiation and sale of certificates is a trust personal to the receiver; he cannot delegate it to another and relieve himself from responsibility. *Union Trust Co. v. Chicago and Lake Huron R. R. Co.*, 7 Federal Reporter, 513. 1881.

58. — **usury.** The chancellor has no power to disregard the laws against usury by authorizing a receiver to borrow money by selling interest-bearing receivers' certifi-

cates of indebtedness at less than their face value. *Meyer v. Johnston*, 53 Ala., 237, 1875; 9 Amer. R'y Rep., 454.

59. **Change of line of railway.** An order for the change of a part of the line of a railway, and the building of a bridge, out of the earnings of the road, should not be made upon the recommendation of the receiver and report of an engineer, but should be done only upon the report of the master, showing the necessity for the change. *Hand v. Railroad Co.*, 10 So. Car., 406. 1878.

60. **Change of receiver.** A change of incumbent in the office of railroad receiver does not affect the *status* of claims against the property arising during the receivership. *Gibbes v. Greenville and Columbia R. R. Co.*, 15 So. Car., 518. 1880.

61. **Compensation.** In case the duties of a receiver prove to be more arduous than he or the court expected, or in case he performs duties in addition to those ordinarily required of a receiver, in either case, provided he has faithfully administered his trust without intentional error or fraud, he is entitled to compensation in addition to that fixed by the order under which he was appointed. *Farmers' Loan and Trust Co. v. Central R. R. of Iowa*, 8 Federal Reporter, 60; 2 McCrary (U. S. C. C.), 318. 1881.

62. — Compensation of receivers of an insolvent railroad company determined. *McArthur v. Montclair R'y Co.*, 27 N. J. Eq., 77. 1876.

63. — Under the act of 1869-70, ch. 8 (T. & S.'s Statutes, § 1124), providing for the appointment of the president of a delinquent railroad company as its receiver, — his salary as president to be his compensation as receiver, — such compensation was a part of the expense of operating the road, and should have been allowed and retained in the monthly reports of the receiver to the comptroller, required by the act. If the receiver neglected to retain his salary, paying it into the treasury, then the state became his debtor for that amount, but the governor had no authority to order the comptroller to issue his warrant therefor. Relief could be afforded only by a legislative proceeding. *Mabry v. Brown*, 12 Heiskell (Tenn.), 597. 1873.

64. — A. was appointed a receiver of a

Connecting Lines — Contempt.

railroad: first, under a suit instituted by the stockholders; and second, under a suit brought by the bondholders of a railroad company in a state court. The bondholders' suit was subsequently removed to the federal court, where certain questions connected with the compensation of the receiver were referred to a special master, who found a balance due from the receiver, which he was ordered to pay. Upon appeal this order was affirmed by the United States supreme court. Thereupon the stockholders' suit, which had been stricken from the docket of the state court, was reinstated, and the question of the compensation of the receiver referred to a master by the state court, who found a large amount due to the receiver for compensation and necessary expenditures. The bondholders took no part, however, in these proceedings in the state court. *Held*, under the circumstances of this case, that, where the receiver had paid into the federal court the amount decreed as due from him in the bondholders' suit, he could not, upon petition to the federal court, have such amount appropriated in part payment of what had been found due to him in the stockholders' suit by the state court. *Hinckley, Receiver, In re*, 3 Federal Reporter, 556. 1880.

65. — The appointment of a receiver having been determined by the supreme court to be utterly void for want of jurisdiction, it was lawful and proper for the court which made the appointment to order the property of which the defendants had thus been unlawfully deprived to be restored to them, that they might be placed as nearly *in statu quo* as the nature of things would permit; and it was competent for the court to enforce such order by proceedings as for contempt. *People ex rel. v. Jones*, 33 Mich., 303. 1876.

66. — One whose appointment as a receiver has been thus finally determined by the court of last resort to be void for want of jurisdiction, is not entitled, when ordered to account for and make restoration of the property which thus came unlawfully into his hands, to retain anything for his services as such officer. *Ib.*

67. Connecting lines. Claims on a railway company for through fares and freight,

for which it may have been accountable, in part, to connecting lines, are nothing more than open accounts, which stand on the same footing as other unsecured debts. *Jesup v. Atlantic and Gulf R. R. Co.*, 3 Woods (U. S. C. C.), 441. 1879.

68. — Payments made by receivers while operating a railroad, to connecting roads, for freights received belonging to them, "according to a necessary usage in the business of connecting railroads," are properly allowed to them as a credit. *Meyer v. Johnston*, 64 Ala., 605, 1879; 8 Amer. & Eng. R. R. Cases, 584; *Meyer v. Johnston*, 53 Ala., 237, 1875; 9 Amer. R'y Rep., 454.

69. Construction of railway. A receiver was authorized by a consent order, without a reference, to construct an extension of a railway at a cost not to exceed an amount stated, to be paid for out of surplus income, and the extension to stand pledged for such payment. The extension was built at a greater cost and then sold as a part of the entire road. *Held*, that the receiver acted only as agent of the consenting bondholders, but that the extension was covered by a lien, superior to existing liens, in favor of those who furnished the money to build it, and that they were entitled to such ratable proportion of the proceeds of sale as the value of the extension bore to the value of the entire road, considered only in reference to the purchase money of the whole. *Hand v. Savannah and Charleston R. R. Co.*, 17 So. Car., 219. 1881.

70. — The court may authorize a receiver to take a lease of another railroad or build another line where it is manifestly for the interest of the creditors and the company. And so, on like conditions, the court may authorize its receiver to contribute, out of the accrued revenues in his hands, to the building of another railroad. *Gibert v. Washington, Va. Midland, etc., R. R. Co.*, 33 Grattan (Va.), 586, 1880; 1 Amer. & Eng. R. R. Cases, 473. But this should only be done in a case of great necessity. *Kennedy v. St. Paul and Pacific R. R. Co.*, 5 Dillon (U. S. C. C.), 519. 1878.

71. Contempt. In proceedings for a contempt, the court can proceed in a summary manner, and the accused is not, of right, entitled to a trial by jury. *King v. Ohio and*

Contracts — Debts and Liabilities.

Mississippi R. R. Co., 7 Bissell (U. S. C. C.), 529. 1877.

72. Contracts. All contracts made by the receiver of a railroad corporation are subject to the control of the chancellor, and he may modify them, or disregard them entirely, as to him may seem best. *Lehigh Coal and Navigation Co. v. Central R. R. Co. of New Jersey*, 85 N. J. Eq., 426, 1832; 9 Amer. & Eng. R. R. Cases, 479.

73. — The receiver of a railroad corporation has no power, without the authority of the chancellor, to make a contract which will bind the trust. *Ib.*

74. — free pass for life. A receiver cannot make a valid contract to give a free pass for life over a railway. *Martin v. N. Y., Susquehanna and Western R. R. Co.*, 36 N. J. Eq., 109. 1882.

75. — right of way. By virtue of an agreement with the owner of certain lands, a railway company, before paying the sum stipulated, entered upon the land, built its road thereon, and included it in a general mortgage of their lands, etc. After its insolvency, and the appointment of a receiver, the owner applied for the payment of the amount. It appearing that the sum agreed upon was grossly exorbitant, the court refused to order its payment, but directed that the compensation justly due the owner be ascertained and paid. *Coe v. New Jersey Midland R'y Co.*, 30 N. J. Eq., 21. 1878.

76. Costs. Pending an appeal from a decree of the circuit court, placing the railroad and other property of defendant in the hands of a receiver, a stipulation for dismissal of the cause, signed by the parties, was filed in this court, and the cause was accordingly dismissed, the order providing that neither party should recover costs as against the other, except that the costs of the appeal should be equally divided between them. Afterward, on motion of the receiver in the circuit court, that court made him an allowance for his services, and ordered that the same be taxed as costs, one-half to be paid by defendant. On appeal from this order, *held*, that if carried into effect, it would annul the former decree of this court as to costs. It was, therefore, reversed. *Morse v. Hannibal and St. Joseph R. R. Co.*, 72 Mo., 583. 1830.

77. — A decretal order of the chancellor ascertaining and declaring the compensation of a receiver appointed in the cause, and his solicitor, and directing its taxation as costs against the complainant in the suit,— the equities of the case not having been settled,— is not such a final decree as will support an appeal. *State v. Ala. and Chattanooga R. R. Co.*, 54 Ala., 139. 1875.

78. — Counsel fees and costs should be adjusted on circuit. The costs and fees of all the attorneys, properly chargeable for successful services, should be paid out of the common fund. *Hand v. Savannah and Charleston R. R. Co.*, 17 So. Car., 219. 1831.

79. Debts and liabilities. While a railway receiver may be protected from an action at law, in respect to the property in the possession of the court, or in his hands as its receiver, or from the consequences of an accident occurring in its management, as to other property the management of which he has assumed under contract and over which the court has no control, he is responsible individually for its control and proper management. *Kain v. Smith*, 80 N. Y., 458, 1880; 2 Amer. & Eng. R. R. Cases, 545.

80. — Receivers of a railroad company are vested with its absolute control, and are liable in their representative capacity for injuries resulting from operating the road, to the same extent that the company itself would be liable. *Ohio and Mississippi R. R. Co. v. Anderson*, 10 Bradwell (Ill.), 813. 1882.

81. — The court may authorize a receiver to contract indebtedness which shall take precedence to the mortgage debt. *Mittenberger v. Logansport R'y Co.*, 12 Amer. & Eng. R. R. Cases, 461; 103 U. S., 283. 1882.

82. — Unless specially authorized by the court to contract debts on the faith of the property, a receiver is restricted to the income and profits of the road. *Hand v. Savannah and Charleston R. R. Co.*, 17 So. Car., 219, 1831; 12 Amer. & Eng. R. R. Cases (So. Car.), 495, 1881.

83. — The purchaser of the Central R. R. of Iowa held liable for the debts of the receiver under the decree confirming the sale. *Sloan v. Central Iowa R'y Co.*, 11 Amer. & Eng. R. R. Cases (Ia.), 145. 1883. See, also, *Klein v. Jewett, Receiver*, 26 N. J. Eq., 474. 1875.

Decree — Discharge.

84. — **negligence.** A receiver operating a railroad under the order of a court of equity, stands, in respect to duty and liability, just where the corporation would, were it operating the road, and the question, whether or not the receiver is liable for negligence, must be tested by the same rules that would be applied if the corporation was the actual party defendant before the court. *Klein v. Jewett, Receiver*, 26 N. J. Eq., 474. 1875.

85. — **personal injury.** A railway receiver is liable, in his official capacity, for injuries inflicted by himself or his employes engaged in operating the road. *Rogers v. Mobile and Ohio R. R. Co.*, 12 Amer. & Eng. R. R. Cases (Tenn.), 442. 1883.

86. — **Passengers over a railway and an employe of the company, when entitled to damages for injuries received while the line is operated by a receiver, should be paid out of the fund in court realized from the earnings of the road during the receivership, in preference to mortgage or other debts existing at the time of action brought.** *Gibbes v. Greenville and Columbia R. R. Co.*, 15 So. Car., 518. 1880.

87. **Decree — consent.** A consent decree construed; and where a receiver was by such decree, and agreement of the parties, continued in possession of the property, it was held that he became simply a managing agent for the parties, and ceased to be receiver in any legal sense of the term. *Vermont and Canada R. R. Co. v. Vt. Central R. R. Co.*, 50 Vt., 500, 1877; 14 Amer. R'y Rep., 497.

88. — **marshaling assets.** When a bill is filed to marshal the assets of an insolvent railroad company, and a receiver is appointed, and the claims against the company are numerous, complicated and conflicting, and they are referred to a master, who reports upon their justness, amount and priority, and on consideration of his report each case is separately considered, a judgment of the court is had upon it fixing its amount, priority and status, in reference to the other claims before the court, and this being done a decree is taken by consent of all parties, fixing their priorities and liens, and for the sale of the road, and that the proceeds shall be brought in for distribution

according to the priorities of the several judgments, held, that it is too late, on the incoming of the proceeds, for one of the claimants, whose claim has been passed upon, to set up new equities, unless in case of fraud, mistake or newly-discovered testimony. *Hazlehurst v. Brunswick and Albany R. R. Co.*, 52 Ga., 248. 1874.

89. **Discharge.** No action can be maintained against the receiver of a railroad after such officer has been discharged and the property transferred to a purchaser under an order of the court in foreclosure proceedings. *Farmers' Loan and Trust Co. v. Central R. R. Co. of Iowa*, 7 Federal Reporter, 537; 2 McCrary (U. S. C. C.), 181. 1880.

90. — Such purchaser, however, takes the property subject to all claims against the receiver when the court has reserved its jurisdiction, upon final decree, to enforce as liens upon the property all liabilities incurred by such receiver. *Id.*

91. — The plaintiff brought this action in March, 1880, against the defendant as receiver of the Erie R'y Co., to recover for services rendered to him from December 1, 1875, to January 31, 1877. More than sixty days prior to the commencement of this action all the property and franchises of the old company had been sold, and the purchasers had, pursuant to ch. 430 of 1874, formed a new corporation, and the defendant had been discharged from his receivership. By these facts the plaintiff was, under § 3 of ch. 446 of 1876, prevented from maintaining the action against the receiver, but the new company was thereby subjected to the same liability as had formerly existed against him. Held, that it was proper to allow the plaintiff to amend the summons and complaint by striking out the name of the defendant and substituting that of the new corporation, although issues had been joined in the action and sent to a referee for trial, but that, as the reference had been ordered by consent, that order should be vacated. *Abbott v. Jewett, Receiver*, 25 Hun (N. Y.), 603. 1881.

92. — An order discharging a receiver is not an appealable order. *Colgate v. Michigan Lake Shore R. R. Co.*, 28 Mich., 288, 1873; *Washington and Point Lookout R.*

Dismissal of Complaint — Eminent Domain.

R. Co. v. Southern Md. R. R. Co., 55 Md., 153, 1880.

93. Dismissal of complaint. Where a complaint has been dismissed the court may direct the disbursement of funds coming into the hands of a receiver appointed in the proceeding, and may direct the payment of claims incurred in the protection and preservation of the property during the action. *State v. Florida Central R. R. Co.*, 16 Fla., 703, 1878.

94. Discretion of the court. An order of sale may be stayed by the order of the court. This is a matter of discretion. *Syracuse Savings Bank v. Syracuse, Chenango and N. Y. R. R. Co.*, 88 N. Y., 110, 1882; 9 Amer. & Eng. R. R. Cases, 585.

95. Discretion of receiver. All outlays of the receiver of a railroad intrusted with its management and operation, made in good faith, in the ordinary course, with a view to advance and promote the business of the road and make it profitable and successful, are fairly within the line of the discretion necessarily allowed him. *Cowdrey v. Railroad Co.*, 1 Woods (U. S. C. C.), 331, 1870.

96. Earnings. The net earnings of a railway, in the hands of a receiver, must be paid upon liens thereon, instead of to the general creditors. *Addison v. Lewis*, 75 Va., 701, 1881; 9 Amer. & Eng. R. R. Cases, 702.

97. — The court in the exercise of a sound discretion may, as a condition of appointing a receiver, impose such terms touching the application of the income arising during the receivership to the payment of outstanding debts for labor, supplies, equipment, or permanent improvement of the property, as, under the circumstances of the case, appear reasonable. *Union Trust Co. v. Souther*, 107 U. S., 591, 1882; 11 Amer. & Eng. R. R. Cases, 707. See *Same v. Walker*, 107 U. S., 596, 1882. See, also, *Calhoun v. St. Louis and Southeastern R'y Co.*, 14 Federal Reporter, 9; 9 Bissell (U. S. C. C.), 330, 1830.

98. — The net earnings of a railroad, while in the possession of a receiver appointed by the court pending the foreclosure of certain mortgages upon the property, cannot be applied to the payment of claims for damages which accrued during the operation of the road by the company, although such company was then in default for the

non-payment of interest upon the mortgage bonds. *Dexterville Manuf'g Co. v. Case, Receiver*, 4 Federal Reporter, 873, 1880.

99. — The earnings of a railroad in the hands of a receiver are chargeable with the value of goods lost in transportation, and with the damages done to property during his management. *Cowdrey v. Galveston, Houston and Henderson R. R. Co.*, 93 U. S., 352, 1876; 9 Amer. R'y Rep., 361.

100. Election of corporate officers. The right of the stockholders of a railway company to elect directors is not affected by the sale of the property of the corporation by a receiver, under an order of court. *State ex rel. v. Merchant*, 37 Ohio St., 251, 1881; 9 Amer. & Eng. R. R. Cases, 516. See, also, *Lehigh Coal and Navigation Co. v. Central R. R. Co. of New Jersey*, 35 N. J. Eq., 349, 1882; 9 Amer. & Eng. R. R. Cases, 512.

101. Elevator; lease. Under a stipulation in a lease executed by a railroad company, requiring the assent of the superintendent of the railroad to any assignment or subletting, where the railroad passes into the hands of a receiver appointed by the court, the superintendent who acts under the direction of the receiver is to be regarded as the superintendent of the railroad company for the purposes of such a contract. *Kansas City Elevator Co. v. Union Pacific R'y Co.*, 3 McCrary (U. S. C. C.), 463, 1881.

102. Eminent domain. A railway company which has never commenced to acquire the lands or construct the railways authorized by its act is not an "undertaking," within the meaning of § 4 of the Railway Companies Act, 1837, of which a receiver can be appointed under that section. *Birmingham and Litchfield Junction R'y Co., In re*, 3 Amer. & Eng. R. R. Cases (Eng. Ch.), 616, 1881.

103. — A receiver was required to report to the court his reasons for seeking, by proceedings under the right of eminent domain, to recover back real estate taken from the corporation under a mortgage. *Lehigh Coal and Navigation Co. v. Central R. R. Co. of New Jersey*, 35 N. J. Eq., 379, 1882.

104. — telegraph lines. When a railroad is in the possession of a receiver of the United States court, a telegraph company can acquire no title to its right of way by

Employees' Wages — Expenditures of Receiver.

condemnation proceedings in a state court. *Western Union Telegraph Co. v. Atlantic and Pacific Telegraph Co.*, 7 Bissell (U. S. C. C.), 367. 1877.

105. Employees' wages. Back pay due the employes of a railway company at the time the company's property was placed in the hands of a receiver, by extending the order appointing the receiver, was ordered to be paid out of the net earnings of the roads which came to the hands of the receiver, and the bondholders at whose instance the receiver was appointed were postponed until the wages of the employes were first paid out of the net earnings in the hands of the receiver. *Douglas v. Cline*, 12 Bush (Ky.), 608, 1877; 18 Amer. R'y Rep., 273.

106. — The mortgagees accepted their securities with knowledge that the company, though technically a private corporation, was under obligations to the state to render certain important public services. The mortgagees knew that the railroads were in a certain sense public highways, and that whoever owned them or held them in pledge was bound to see that they were at all times so operated as to subserve the public convenience. *Ib.*

107. — Wages due employes and past due for eight months, at the time of the appointment of the receiver, were ordered to be paid where the employes were retained in the service of the receiver. But payment of such claims in the hands of third parties was refused. *Skiddy v. Atlantic, Miss. and Ohio R. R. Co.*, 3 Hughes (U. S. C. C.), 320. 1877. See, also, *Duncan v. Chesapeake and Ohio R. R. Co.*, 9 Amer. R'y Rep., 386 (Richmond, Va., Cir. Ct.).

108. — A person who furnishes the labor or services of others, under a contract to do the whole business of a corporation, or a particular branch of it, is not an employe, but a contractor. *Lehigh Coal and Navigation Co. v. Central R. R. Co. of New Jersey*, 29 N. J. Eq., 252, 1878; 18 Amer. R'y Rep., 207.

109. Execution. Property in the hands of a receiver appointed by a court of chancery is not liable to seizure and sale under execution on a judgment at law. *Robinson v. O. and P. R. R. Co.*, 2 Pittsburgh, 257. 1861.

110. — A judgment creditor of a railway

company, with an execution in the hands of the sheriff, is entitled to have a receiver appointed to take charge of the earnings of the road and to apply the profits upon his demand. *Peto v. Welland R'y Co.*, 9 Grant Ch. (Upper Canada), 455. 1862.

111. — At the time a receiver is appointed at the suit of trust creditors to take possession of a railroad and carry it on, there are a number of executions against the company in the hands of the sheriff; and there are funds derived from income and balances due from employes in the hands of or due to the company. *Held*, that the execution creditors are entitled to have these funds and balances applied to the satisfaction of their debts in preference to the trust creditors. If these funds or balances have been applied under the order of the court to other debts, they will be replaced out of the revenues received by the receiver since his appointment. *Gibert v. Washington, Va. Midland, etc., R. R. Co.*, 33 Grattan (Va.), 645, 1881; 1 Amer. & Eng. R. R. Cases, 512.

112. Expenditures of receiver. A court has the power to create claims through a receiver, in a suit for the foreclosure of a railroad mortgage, which shall take precedence of the lien of the mortgage. It may therefore provide that the receiver shall pay the arrears due for operating expenses for a period in the past not exceeding ninety days, and pay indebtedness not exceeding \$10,000, to other connecting lines, for materials and repairs, and for ticket and freight balances, a part of which had been incurred more than ninety days before the order appointing him was made, and purchase rolling stock, and build six miles of road and a bridge, part of the main line of the road, and making such expenditures a lien prior to the lien of the mortgages. *Miltenberger v. Logansport R'y Co.*, 106 U. S., 286; 1882.

113. — A receiver is not authorized, without the previous direction of the court, to incur any expenses on account of property in his hands, beyond what is absolutely essential to its preservation and use, as contemplated by his appointment. Accordingly, the expenditures of a receiver to defeat a proposed subsidy from a city, to aid in the construction of a railroad parallel with the one in his hands, were properly disallowed

Extinct Corporation — Injunction.

in the settlement of his final account, although such road, if constructed, might have diminished the future earnings of the road in his charge. *Cowdrey v. Galveston, Houston and Henderson R. R. Co.*, 93 U. S., 352. 1876.

114. Extinct corporation. When a corporation has become extinct by legislative enactment, and its power and property transferred to a new corporation substituted for it, the courts have no power, on an *ex parte* application, to appoint a receiver of the assets of the defunct corporation. *Young v. Rollins*, 85 N. C., 485; 12 Amer. & Eng. R. R. Cases (N. C.), 455. 1881.

115. Fires. A cause of action against a railroad company for damages for the destruction of property along the line of its road, by fire escaping from defective locomotives, is in no proper sense to be considered such a claim as to constitute part of the operating expenses of the road, and is wholly unlike claims for supplies, new equipment, right of way, and new construction, or any claim falling legitimately under the head of operating expenses, which are sometimes ordered paid from the net earnings in the hands of a receiver, as presenting equities superior to those of the bondholders. *Hiles v. Case*, 14 Federal Reporter, 141; 9 Bissell (U. S. C. C.), 549. 1880.

116. Foreign corporation. Independent of the statute, and simply as a matter of courtesy, the courts of New Jersey may extend their aid to a receiver of a foreign corporation, for the purpose of enabling him to get possession of property which should, in equity, be applied in payment of the debts of the corporation. *National Trust Co. v. Miller*, 33 N. J. Eq., 155. 1880.

117. — The courts of New Jersey may appoint a receiver of a foreign corporation having property in that state, as auxiliary to the proceedings instituted against it in the state which created it, and confer upon him the same powers that they are authorized to grant to the receiver of a domestic corporation, so far as they may be necessary to the recovery and collection of the assets of the corporation. *Id.*

118. Garnishment. If a garnishee, after service of process upon him, delivers property of the principal debtor to a receiver

subsequently appointed in another suit to take charge of all the property of the debtor, he does so at his peril, but will have the right to allege and show that such receiver was entitled to the possession of the property as against the plaintiff in garnishment. *Crerar v. Milwaukee and St. Paul R'y Co.*, 85 Wis., 67. 1874.

119. — A receiver may be garnished. *Phelan, etc., v. Ganabin*, 5 Colo., 14. 1879.

120. Income bonds. After the appointment of a receiver of an insolvent corporation, and proceedings in foreclosure, an agreement among the secured and general creditors of the corporation was entered into, whereby certain income bonds were to be issued, "payable in thirty years, with interest at seven per cent., payable half-yearly," and the interest was to be paid, if the company should "be able to pay it by its income, after paying claims prior thereto, within one year," and the annual interest should not be allowed to accumulate. A committee to arrange the details of the plan was appointed. *Held*, that the committee had authority to consent that the bonds should be made payable, at the option of the company, on or before the expiration of thirty years from the date of their issue; and *held*, also, that the receiver would not be ordered to pay the interest on the bonds while the floating debt of the company remained unpaid. *Lehigh Coal and Navigation Co. v. Central R. R. Co. of New Jersey*, 34 N. J. Eq., 88. 1881.

121. Injunction; contempt. Where an injunction is granted by a state court and served on a railway company, restraining it and its servants from obstructing a public avenue in a city with its trains, etc., the same will be binding upon a receiver of the company subsequently appointed by the United States court, and such receiver, the same as a subsequent purchaser, will be punishable for contempt for disobeying the mandate of the writ. *Safford v. The People*, 85 Ill., 558. 1877.

122. — If the receivers of a corporation disobey an injunction against the corporation, made before their appointment, the fact that they have been removed, at the time they were tried for a contempt, affords no defense whatever. *Id.*

Insolvent Company — Interest.

123. Insolvent company. A receiver cannot be appointed *ex parte* in a proceeding by creditors to wind up an insolvent corporation and pending the decision on a demurrer whereby the right to file the bill is put in issue. *Cook v. Detroit and Milwaukee R. R. Co.*, 12 Amer. & Eng. R. R. Cases (Mich.), 459. 1881.

124. — When a receiver will be appointed for an insolvent corporation considered. *Pond v. Framingham and Lowell R. R. Co.*, 130 Mass., 194, 1881; 9 Amer. & Eng. R. R. Cases, 551; *Kelly v. Ala. and Cincinnati R. R. Co.*, 58 Ala., 489, 1877; 21 Amer. R'y Rep., 138.

125. — The case ought to be one of urgency to justify a court in appointing a receiver to manage and operate the business of a railroad at all; and officers conducting such a business, to whom no fraud or fault is imputed, should not be displaced from the *ad interim* management, pending litigation, merely because the corporation is insolvent. *Meyer v. Johnston*, 53 Ala., 237, 1875; 9 Amer. R'y Rep., 454.

126. — The plaintiff, a judgment creditor, applied for the appointment of a receiver of the defendant, a corporation, which, as a defense, alleged that the judgment was obtained by the collusion and fraud of the president of the corporation. Upon the hearing, time was given to make a motion to open the judgment on that ground, of which opportunity defendant did not avail itself. *Held*, that the court was authorized to infer, from its failure so to do, that the defense was without merit. *Loder v. New York, Utica and Ogdensburgh R. R. Co.*, 4 Hun (N. Y.), 22. 1875.

127. — The plaintiff recovered a judgment against the defendant, upon which execution was issued and returned wholly unsatisfied. Upon an affidavit showing these facts, and that the defendant was insolvent, he then applied, upon motion, eight days' notice of which had been given, for an order appointing a receiver. The motion was granted and a receiver appointed. *Held*, that the proceedings were irregular, as not being authorized by § 3 of ch. 151, Laws 1870, and that the order appointing the receiver should be reversed. *Clinch v. South Side R. R. Co. of Long Island*, 1 Hun (N. Y.), 636. 1874.

128. Injuries to employees. A receiver appointed under § 1101 of the Code is vested with the powers and duties of the board of directors in managing the affairs of the company, and is a public agent of the state. He is responsible for misfeasance in office, but not for non-feasance. He is responsible for *knowingly* using unsafe machinery. *Erwin v. Davenport*, 9 Heiskell (Tenn.), 44, 1871; 19 Amer. R'y Rep., 274.

129. — Prior to February 24, 1870, the defendant Smith and others were appointed receivers of the Vermont Central R. R. Co. by the court of chancery of that state. On February 24, 1870, the said receivers, by the authority of the court, and the Vermont and Canada R. R. Co., leased the road of the Ogdensburgh and Lake Champlain R. R. Co., a New York corporation, for a term of years, at a stipulated rent, agreeing to fulfil all the obligations of the latter road either by statute or at common law, as common carriers or otherwise, and to indemnify it from any claim for any accident that might occur upon the road. This action was brought against the receiver, Smith, individually, to recover damages for injuries sustained by the plaintiff, who was employed on the Ogdensburgh and Lake Champlain Railroad, in consequence of being supplied with inadequate tools and machinery. No personal negligence of Smith was alleged. *Held*, that the action, if maintainable, could be properly brought against one receiver alone, and that the receiver acted officially and as an agent of the Vermont Company in making the lease, and that he was not personally liable for the negligence of his employees. *Kain v. Smith*, 11 Hun (N. Y.), 552. 1877.

130. Interest. A receiver appointed by a state court in a suit which, under the act of March 3, 1875, was subsequently removed to the circuit court of the United States, reported to the latter, stating the amount of the fund in his hands, and asking for an order to pay therefrom certain liabilities. *Held*, that the circuit court had authority to require him to account for the fund, and that he is chargeable with interest on so much thereof as he, on receiving, deposited in a bank to his credit as receiver, and then withdrew and deposited on his private account in another bank, he declining to explain the

Is Agent of the Corporation — Jurisdiction.

transaction, when he was examined as a witness by the master to whom the court had referred his accounts. *Hinckley v. Railroad Co.*, 100 U. S., 153. 1879.

131. Is agent of the corporation. A receiver of a railway company appointed by the court to manage its business is legally the agent of the company, although under the direction of the court appointing him. *Safford v. The People*, 85 Ill., 558. 1877.

132. Judgment against receiver. Pending the foreclosure of a railway mortgage the plaintiff commenced an action against the receiver in charge of the road to recover for personal injuries sustained through the alleged negligence of the receiver's employes between the date of the foreclosure sale and the execution of the sheriff's deed thereon. After the receiver had appeared and answered in the action a sheriff's deed was executed, and the receiver made final settlement and was discharged. Held, that the judgment subsequently rendered in the action against the receiver did not become a lien against the property in the hands of the purchaser at the foreclosure sale. *White v. Keokuk and Des Moines R. R. Co.*, 52 Ia., 97. 1879.

133. — A person who has recovered judgment against the receivers of a railroad for injuries received by him while traveling as a passenger upon the road is not entitled to payment out of the earnings of the road or the proceeds of its sale in preference to the first mortgage bondholders, unless it is so provided by the order of the court placing the road in the possession of the receivers. *Davenport v. Receivers of Ala., etc., R. R. Co.*, 2 Woods (U. S. C. C.), 519. 1875.

134. — A receiver of a railroad appointed in foreclosure proceedings is the agent of the bondholders and trustees, and a judgment rendered against him by a court of competent jurisdiction is binding upon the interests of the bondholders. *Turner v. Indianapolis, Bloomington and Western R'y Co.*, 8 Bissell (U. S. C. C.), 527. 1879.

135. Judgments against corporation. In a case of failure of a railway company to pay, the United States circuit court in equity has jurisdiction at the instance of creditors, and the property is *in custodia legis* from the time of the taking of possession by a

receiver. At the date of registry of plaintiff's judgments, the real estate of the railroad was in the custody of the circuit court, a receiver having been appointed. Judgments recorded after such mortgage has been given and recorded, and after such jurisdiction has vested, do not give rise to a judicial mortgage or lien. *Bell v. Chicago, St. Louis and New Orleans R. R. Co.*, 34 La. An., 785. 1882.

136. — Claims for damages sued against a corporation itself while in the hands of receivers, and reduced to judgment (in one case by consent of its officers, who were also the receivers), and afterwards presented and allowed as original claims against the receiver's fund, are not entitled, as against that fund, to interest, either from the date of the judgments or from the order giving to them the right of payment — such order not having fixed the amounts due. *Gibbes v. Greenville and Columbia R. R. Co.*, 18 So. Car., 87. 1882.

137. — A judgment recovered against the railroad company is no evidence against the public receiver of the railroad. *Connel v. Washington*, 2 Tenn. Ch., 323. 1875.

138. Jurisdiction. If a receiver appointed by another court on bill filed pending this controversy takes prior possession of the *res*, his possession is wrongful and should give way to the prior jurisdiction of this court. *Gaylord v. Ft. Wayne, Muncie and Cincinnati R. R. Co.*, 6 Bissell (U. S. C. C.), 286, 1875; *Union Trust Co. v. Rockford, Rock Island and St. Louis R. R. Co.*, 6 Bissell (U. S. C. C.), 197, 1874.

139. — Where a receiver who has been appointed by a state court in the interest of the creditors of a construction company proceeds with the work of construction by entering into contracts, etc., the fact that a controversy arises between him and a contractor, or between a contractor and other claimants of a common fund, does not entitle the contractor to remove the cause to a federal court, especially after the state court has proceeded, without objection, to adjudicate upon the rights of the parties. *Buell v. Cincinnati, etc., Construction Co.*, 9 Federal Reporter, 351. 1881.

140. — Where a state court, on a petition under the Indiana statutes to dissolve a cor-

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poration, has taken jurisdiction, thereby decreed a dissolution of the corporation, appointed a receiver, and taken the custody of the assets, no national court can take jurisdiction of a bill to call on the receiver to render an account, and to collect the assets under the direction of the United States court. *Conkling v. Butler*, 4 Bissell (U. S. C. C.), 22. 1865.

141. — The fact that the property is being administered upon in proceedings taken in a state court, and that the plaintiff might apply to that court for relief, is no bar to the institution of proceedings in the circuit court of the United States. *Griswold v. Central Vermont R. R. Co.*, 9 Federal Reporter, 797. 1881.

142. — When the state court, on a bill of like character with one pending in the United States court, appoints a receiver inadvertently, and without knowledge of the facts in the federal court, and the circumstances indicate collusion in the state court, the appellate court will not interfere with the judge of the state court in revoking the order appointing his receiver, and turning over the property to the receiver of the United States court. *May v. Printup*, 59 Ga., 128. 1877.

143. — An order was granted by a justice of the supreme court at chambers, in the first district, appointing a receiver of the property, franchise and effects of the defendant. It did not appear that the order had ever been entered in the second department. *Held*, that, being a chamber order, no appeal from it would lie until it had been so entered. *Clinch v. South Side R. R. Co. of Long Island*, 2 Hun (N. Y.), 154. 1874.

144. — This court will not decide a question of great importance except in a case where such decision is necessary to protect some substantial right. Therefore, where a conflicting question of jurisdiction arose between the superior courts of two counties in the matter of the appointment of a receiver for the defendant corporation, who, pending the controversy, was duly elected president thereof, *held*, that this court, without expressing an opinion, should affirm the order below appealed from. *Comm'rs of Craven County v. Atlantic and North Carolina R. R. Co.*, 77 N. C., 297. 1877.

145. Jury trial. The right of trial by jury in a proceeding against a receiver, on a common law cause of action, is not an absolute right, but the granting or withholding thereof lies within the sound discretion of the court. Such a proceeding is not a "suit at law" within the provision of the constitution guarantying the right of trial by jury. So held in a proceeding for damages for a personal injury. *Kennedy v. I., C. and L. R. R. Co.*, 3 Federal Reporter, 97; 2 Flippin (U. S. C. C.), 704. 1880.

146. Lease. The mortgagor held a leased road, under a written lease, providing for rent and for payment for depreciation, and for the payment of a monthly rent by the lessor to the lessee for the use of a part of the road. The successive receivers took possession of the leased road and operated it as a continuation of the mortgaged road. Part of the rent which accrued before C. became receiver was unpaid. C., after he became receiver, paid the rent as it accrued. The successive receivers collected the rent monthly from the lessor for the use of a part of the road. The court allowed to the lessor, as a claim preferred to the first mortgage, a sum based on the actual value of the use of the road by the receivers, and for depreciation, and allowed, with a like preference, claims for supplies and materials furnished for the road while so operated. *Held*, that the allowances were proper, and that the final decree was not erroneous in not requiring the accounts of the receiver to be settled before paying out of the proceeds of sale the debts allowed against him, nor in ordering the sale of the property as an entirety, without separating that acquired by the receiver. *Milttenberger v. Logansport Ry Co.*, 106 U. S., 233. 1882.

147. — A railroad company having, by contract, the right to run over the defendant's road, upon accounting to the defendant by the 15th of each month for the month preceding, and paying the ascertained balance due within ten days thereafter, and being three months in arrears, the receiver of the defendant road severed the connection between the roads. On petition to restore connection, and for damages for interruption of business, *held*, that, under the circumstances, the petitioners were not

Leased Rolling Stock — Liens.

entitled to relief on the ground of oppressive and unwarranted conduct on the part of the receiver. *Elmira Iron and Steel Rolling Mill Co. v. Erie R'y Co.*, 26 N. J. Eq., 284. 1875.

148. — A receiver appointed by the governor has no right to so lease a railway as to vest the lessees with an interest which cannot be taken away by a subsequent act of the legislature. *McMinnville and Manchester R. R. Co. v. Huggins*, 3 Baxter (Tenn.), 177, 1873; 20 Amer. R'y Rep., 173.

149. — The E. and G. R. R. was leased to W., who rented it to the Erie R'y Co. Subsequently J. was appointed receiver of the Erie Co. On application to compel J. to comply with the terms of the lease, the court refused, upon motion, to determine the question whether J. was operating the road under the lease. *People v. Erie R'y Co.*, 54 Howard's Practice (N. Y.), 59.

150. Leased rolling stock. A railroad company in Iowa, after executing a mortgage to secure its bonds, which was duly recorded, covering all the property which it then possessed or might thereafter acquire, entered into a written contract with A., leasing for a specific period and at a stipulated sum, payable monthly, certain cars whereof he was the owner. It also reserved, but did not exercise, the privilege of purchasing them at the original cost at any time during the existence of the contract. A. retained the right to rescind the contract if the company failed to pay the interest on its bonds. While the contract was in force, the mortgagee filed his bill of foreclosure. The court appointed a receiver, who took charge of the road and used the cars in operating it. The contract was never recorded. *Held*, that the contract was binding between the parties thereto, and the failure to record it did not, under the statute of Iowa, render the cars subject to the lien of the mortgage. That A. was entitled to the possession of them and to compensation for their use by the receiver, payable out of the fund to the credit of the suit. *Myer v. Car Co.*, 103 U. S., 1, 1880; 2 Amer. & Eng. R. R. Cases, 375.

151. — Under the construction of the contract and of the order of the court permitting the plaintiff in error to take from the receiver the cars in dispute on his giving up

his right to go upon the general fund for the amount of his debt, reserving his right to claim hire and damages, the court below erred in ruling out testimony as to the value of the rent of the cars, and the damages to the cars over and above the wear and tear. *Dawson Manuf'g Co. v. Brunswick and Albany R. R. Co.*, 51 Ga., 136. 1874.

152. — repairs. A receiver is liable for damages to engines rented by him, arising from omission to make necessary repairs. *Turner v. Indianapolis, Bloomington and Western R'y Co.*, 8 Bissell (U. S. C. C.), 527. 1879.

153. Liability as a common carrier. In the operation and management of railroads by receivers in chancery, they sustain to persons dealing with them the character of common carriers; and though they may at all times invoke the aid of the court of chancery in any matter affecting their duty or liability under their receivership, yet, waiving this, they are amenable in the common law courts to actions for negligence as carriers. *Newell v. Smith*, 49 Vt., 255. 1877.

154. Liability of corporation for receiver's acts. Where a railroad is in the hands of a receiver, the possession of such receiver is antagonistic to the corporation, and the latter is not liable for injuries resulting from the operation of the road by the receiver. *Ohio and Mississippi R. R. Co. v. Anderson*, 10 Bradwell (Ill.), 313, 1882; *Turner v. Hannibal and St. Joseph R. R. Co.*, 74 Mo., 602, 1881; 6 Amer. & Eng. R. R. Cases, 38; *Thurman v. Cherokee R. R. Co.*, 56 Ga., 376 1876; *Bell v. Indianapolis, Cincinnati and Lafayette R. R. Co.*, 53 Ind., 57, 1876; *Rogers v. Mobile and Ohio R. R. Co.*, 12 Amer. & Eng. R. R. Cases (Tenn.), 442, 1883; *Metz v. Buffalo, Corry and Pittsburgh R. R. Co.*, 58 N. Y., 61, 1874; 7 Amer. R'y Rep., 92.

155. Liens. Where, at the instance of bondholders secured by a mortgage lien upon a railroad, a receiver has been appointed to take possession of and preserve the railroad and conduct its business, the proceeds and profits of the business in the hands of the receiver are subject to the charges of administration and management and the liens and trust in behalf of which the receiver was appointed. Neither

Management — Maladministration.

the railroad company itself, nor any party whose claim is based on the company's rights, can demand any of the income in the receiver's hands until the prior liens have been satisfied. *North Carolina R. R. Co. v. Drew*, 3 Woods (U. S. C. C.), 691. 1879.

156. — A railroad company, the fruits of whose labor and expenditures are about to be lost by the failure of its enterprise, cannot, in order to raise money to complete it, create liens upon its property which will displace an older lien, and no prerogative of a court of equity arms it with power to do so. *Meyer v. Johnston*, 53 Ala., 237, 1875; 9 Amer. R'y Rep., 454.

157. — **material and labor.** Claimants for materials furnished an insolvent railroad company are not entitled to payment out of a fund in court arising from a sale of the corporate property at the instance of mortgage bondholders, until the bonds are paid. Such claimants have no specific lien upon the property. *Denniston v. Chicago, Alton and St. Louis R. R. Co.*, 4 Bissell (U. S. C. C.), 414. 1864.

158. — Promises of payment by the receiver do not change their rights; they can only take the surplus after prior specific liens have been discharged. *Id.*

159. — The laws of Georgia give no liens superior to a mortgage lien, except for taxes and to laborers and material men who take the proper steps to perfect their liens. *Held*, therefore, that in distributing the earnings of a mortgaged railroad, while the same were in the hands of a receiver, and the proceeds of its sale, the court would give priority only to those laborers and material men who had perfected their liens according to the state law. *Jessup v. Atlantic and Gulf R. R. Co.*, 3 Woods (U. S. C. C.), 441. 1879.

160. — The net earnings, while the road is in possession of a receiver appointed by the court, may be applied to the payment of claims having superior equities to that of the bondholders. So held, where, from such earnings, payment was made to parties who had, before his appointment, furnished the company with car-springs, and spirals and supplies for its machinery department, which he continued to use in carrying on the business of the road. *Hale v. Frost*, 99 U. S., 389. 1878. See, also, *Williamson v. Wash-*

ington, Va. Midland, etc., R. R. Co., 33 Grattan (Va.), 624, 1881; 1 Amer. & Eng. R. R. Cases, 498; *Taylor v. Philadelphia and Reading R. R. Co.*, 7 Federal Reporter, 377, 1880.

161. — In this case the petitioner paid an indebtedness of the railway company, incurred on account of construction. *Held*, that in order to give him a superior equity to the bondholders, it must be alleged and proved that he acted under such inducements from them, and had such dealings with them in the transaction, as estop them from asserting their liens against his claim. It is not sufficient that the original indebtedness was incurred at the request of the bondholders. *Kelly v. Receiver Green Bay and Minnesota R. R. Co.*, 10 Bissell (U. S. C. C.), 151. 1881.

162. — **vendor's lien.** A person who had sold to a railway company some land over which the railway had been made and opened, obtained a decree ordering specific performance, and declaring his lien for the balance of the purchase money. The company having become insolvent, an order was made, on the petition of the vendor, for sale of the land and payment of the deficiency, and for an injunction restraining the company until payment from running any engine over, or otherwise using or continuing in possession of the land. *Held* (varying the order of James, V. C.), that an injunction was not the proper form of relief, as it would make the land useless to both parties. The order for an injunction was therefore discharged, and an order made for a receiver, with a direction to the company to give him immediate possession. *Munns v. Isle of Wight R'y Co.*, Law Reports, 5 Chancery Appeal Cases, 414. 1870.

163. **Management.** The management and control of the Vermont Central and Vermont and Canada Railways by the receiver of the court examined. *Langdon v. Vermont and Canada R. R. Co.*, 11 Amer. & Eng. R. R. Cases (Vt.), 688. 1881.

164. **Maladministration.** The court will consider specific complaints of maladministration against a receiver, notwithstanding the irregularity of the method by which they are brought to its notice, *e. g.*, by way of petition under an order for leave to answer,

Mandamus — Pleadings.

etc., in the name of the receiver in a foreclosure suit. *Coe v. New Jersey Midland R'y Co.*, 28 N. J. Eq., 81, 1877; 14 Amer. R'y Rep., 9.

165. Mandamus. Where the court of common pleas, having jurisdiction in an action against a railway company, has appointed a receiver, who is in possession of the road, and is proceeding in the execution of the trust under the direction and orders of the court, a *mandamus* will not be issued against such corporation and receiver directing their conduct in operating the road. *State ex rel. v. Marietta and Cincinnati R. R. Co.*, 35 Ohio St., 154. 1878.

166. Mortgage. The court will not, in deference to the mere technical rights of a very small minority of bondholders of a railroad corporation, appoint a receiver, where it appears that such action would imperil, if not destroy, the interests of others whose rights are entitled to equal consideration. *Tyson v. Wabash R'y Co.*, 8 Bissell (U. S. C. C.), 247. 1878. See, also, *Newport and Cincinnati Bridge Co. v. Douglass*, 12 Bush (Ky.), 673. 1877.

167. — The appointment of a receiver is generally within the sound discretion of the court. But it is a power only to be exercised in strong cases. In no case of a mortgage ought a receiver to be appointed if it is clear that on a foreclosure the mortgaged property will bring enough money to pay the debt, interest and cost. *Pullan v. Cincinnati and Chicago R. R. Co.*, 4 Bissell (U. S. C. C.), 35. 1865. See, also, *Rice v. St. Paul and Pacific R. R. Co.*, 24 Minn., 464. 1878.

168. — A receiver may be appointed in an action to foreclose a mortgage "where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed," etc. (Civil Code, § 329.) *Newport and Cincinnati Bridge Co. v. Douglass*, 12 Bush (Ky.), 673, 1877; 18 Amer. R'y Rep., 221.

169. — Line in several states. For proceedings upon separate foreclosures of a mortgage upon a railway in several states, see *Taylor v. Atlantic and Great Western R. R. Co.*, 55 Howard's Practice (N. Y.), 275, 1877; 57 ib., 9, 1878; 57 ib., 26, 1878; U. S.

Rolling Stock Co., In re, 55 ib., 286, 1878; 57 ib., 16, 1878.

170. Nuisance. The superior court of one county will not order the abatement of a nuisance erected by a railroad corporation (such nuisance caused in the defective construction of a certain trestle and culvert on the line of the road) when all the corporate property is in the hands of a receiver appointed by the superior court of another county. *Brown v. Carolina Central R'y Co.*, 83 N. C., 128. 1880.

171. Operation by direction of the court. Where a court has been compelled to take possession by its receiver of a railroad, its whole power over it is confined to making necessary repairs and protecting the property. As, from the nature of the property, it must be continued in operation and sold as a going concern, to prevent serious injury and impairment in value, the court may continue the running of trains and the usual business of the road with a view to its economical conservation; and if the income is insufficient for that purpose, may provide the requisite means by creating charges upon the property. *Meyer v. Johnston*, 53 Ala., 237, 1875; 9 Amer. R'y Rep., 451.

172. Order; modification. The appointment of a receiver is an administrative and not a judicial order. It can be changed with the consent of the parties. *Savannah and Charleston R. R. Co., In re*, 8 So. Car., 297. 1875.

173. Parties. The court will interfere on an interlocutory application to appoint a receiver, notwithstanding grave doubts as to the propriety of the frame of the suit, and the necessity of making additional parties. *Fripp v. Chard R'y Co.*, 21 Eng. Law & Equity, 53; 17 Jurist, 887; 22 Law Jour. Rep. (N. S.), Chanc., 1009. 1853.

174. Payments. Where a receiver has paid out money upon the order of the court, which order has been appealed from, but without a *supersedeas*, the receiver is protected by the order, notwithstanding its subsequent reversal upon the appeal. *Florida Central R. R. Co. v. Bisbee*, 18 Fla., 60. 1881.

175. Pleadings. *Semble*, that motions in relation to the complaint should be heard

Possession — Prohibition.

before the motion for the appointment of a receiver. *People v. Manhattan R. R. Co.*, 9 Abbott's New Cases (N. Y.), 448. 1881.

176. — The pleadings in a creditor's action to set aside a sale and to distribute certain assets of a corporation examined, and the complaint held insufficient. *Herring v. N. Y. Lake Erie and Western R. R. Co.*, 63 Howard's Practice (N. Y.), 497. 1882.

177. Possession. The court will not appoint a receiver of property which is in the possession of a person not a party to the suit. *Searles v. Jacksonville, etc., R. R. Co.*, 2 Woods (U. S. C. C.), 621. 1873. See, also, *Fripp v. Chard R'y Co.*, 21 Eng. Law & Equity, 53; 17 Jurist, 887; 22 Law Jour. Rep. (N. S.), Chanc., 1009. 1853.

178. — Where a receiver, under the act of February 12, 1874, is appointed, in behalf of the public, to operate a railroad, the road so taken should, as a general rule, be returned to the company which was in possession when the receiver was appointed. The right of possession cannot be settled between two railroad companies, each claiming such right, in a proceeding of this nature. *Long Branch and Sea Shore R. R. Co. v. Sneden*, 26 N. J. Eq., 539. 1875.

179. — A receiver may be appointed, although the person applying has the legal estate, as against the person whose possession he seeks to oust, where the property is in the nature of a trade. *Fripp v. Chard R'y Co.*, 21 Eng. Law & Equity, 53; 17 Jurist, 887; 22 Law Jour. Rep. (N. S.), Chanc., 1009. 1853.

180. — Property in the custody of a receiver is not subject to attachment. Any interference with it is a contempt of court. *Gest v. New Orleans, St. Louis and Chicago R. R. Co.*, 30 La. An., 28, 1878; *Secor v. Toledo, Peoria and Warsaw R. R. Co.*, 7 Bissell (U. S. S. C.), 513, 1877; *Russell v. East Anglian R'y Co.*, 1 Eng. Law & Equity, 101; 14 Jurist, 1033, 1850.

181. — Powers of receivers considered. *Gray v. Davis*, 1 Woods (U. S. C. C.), 420, 1871; *Schreven v. Clark*, 48 Ga., 41, 1873; *Birmingham and Litchfield Junction R'y Co., In re*, Law Reports, 18 Chancery Division, 155, 1881.

182. Preferred claims. Where a railway company was in financial trouble, and its

employees threatened a strike, and certain of its bondholders, at the request of its officers, advanced money to pay the wages of such employees, on the agreement that the money was to be refunded out of the first net earnings of the company, and afterwards the road went into the hands of a receiver, held, that the advances must be paid out of the income accruing while the road is in the custody of the court. *Atkins v. Petersburg R. R. Co.*, 3 Hughes (U. S. C. C.), 307. 1879.

183. Priority of claims. Where a receiver is appointed over a railway, the court has jurisdiction to control expenditure in the management and repairs of the railway, though the directors individually are not parties to the suit. The remuneration of directors is a proper expenditure and should be allowed, though the company is insolvent. Repairs and improvements of the line or stations, wire fencing, gas-fittings, and the like, are expenses properly paid out of revenue, if there be no capital immediately available for those purposes. *Belfast and County Down R'y Co. v. Belfast, Holywood, etc., R'y Co.*, 3 Irish Eq., 581. 1869.

184. — For money borrowed by a corporation to pay interest on coupon bonds, the lender is not entitled to be paid out of funds in the hands of the receiver appointed at the instance of the mortgagees. *Newport and Cincinnati Bridge Co. v. Douglass*, 12 Bush (Ky.), 673, 1877; 18 Amer. R'y Rep., 221.

185. Proceedings supplemental to execution. Appointment of receivers in supplemental proceedings considered. *Garver v. Kent*, 70 Ind., 428, 1880; *Clinch v. South Side R. R. Co.*, 4 Thompson & Cook (N. Y. Supreme Ct.), 224, 1874. See *Same v. Same*, ib., 483. 1874.

186. Process. Under the Code (sec. 37), service upon the agent of the receivers of a foreign corporation held sufficient. *Ganebin v. Phelan*, 5 Colo., 83. 1879.

187. Prohibition. The Sacramento and Placerville R. R. Co. executed a mortgage or deed of trust upon its property to two trustees to secure the payment of the principal and interest of certain bonds, and it was provided that upon default in the payment of the principal of the bonds, or upon default for one year in the payment of the interest, the trustees should take possession of the

Purpose of Receivership — Removal of Receiver.

property and apply the net income to the payment of the principal and interest of the bonds. Default having been made, an action was brought by the surviving trustee to enforce the lien and trust and to obtain possession of the property, and a receiver was appointed. *Held*, upon an application of the successor in interest of the mortgagor for a writ of prohibition, that the case came within the provision of subd. 6, § 564, of the Code of Civil Procedure, and that the court had the jurisdiction to make the order. *Sacramento and Placerville R. R. Co. v. Superior Court of San Francisco*, 55 Cal., 453. 1890.

188. Purpose of receivership. The court's custody of railroad property, which has been placed in the hands of receivers, is only for the temporary preservation of the property during foreclosure proceedings, and the road should pass with as little delay as is reasonably practicable into the possession of owners, who will best be able to determine how it should be managed. *Taylor v. Philadelphia and Reading R. R. Co.*, 9 Federal Reporter, 1. 1881.

189. Reference. Consent will not authorize a master in chancery to act as referee at law. *Farmers' Loan and Trust Co. v. Central R. R. Co. of Iowa*, 2 Federal Reporter, 656; 1 McCrary (U. S. C. C.), 332. 1880.

190. — Exceptions to a master's report on the accounts of a receiver, involving his management and disposal of the trust property, and the amount of his compensation, considered and overruled. *Woolsey v. Cummings Car Works*, 33 N. J. Eq., 432. 1881.

191. Refusal to supply water; board of public works. A board of public works of a city is not justified in refusing to supply water for the use of the engines, etc., of a railroad being operated by a receiver under the direction of the court, on the ground that certain water rents, which were due when the railroad was declared insolvent, are unpaid. *Coe v. New Jersey Midland R'y Co.*, 80 N. J. Eq., 440. 1879.

192. Removal of causes. The petition of intervention is in the nature of a suit for relief as against defendants therein named, and the right of removal is not affected by the fact that a receiver had been appointed

by the state court to wind up the affairs of the corporation. *Iowa and Minnesota Construction Co., In re*, 10 Federal Reporter, 401; 3 McCrary (U. S. C. C.), 310. 1882.

193. — The existence of a suit by stockholders of a railroad company, and even possession by trustees under the order of the state court therein, do not affect the right to remove into the federal court a suit brought by bondholders under a deed of trust, which is paramount to the rights of the stockholders; and the possession must follow into the federal court. *Scott v. Clinton and Springfield R. R. Co.*, 6 Bissell (U. S. C. C.), 529. 1876. Seizure of *res* by a state court does not affect the case, for that is necessarily transferred with the case. *Osgood v. Chicago, Danville and Vincennes R. R. Co.*, 6 Bissell (U. S. C. C.), 330. 1875.

194. Removal of receiver. A receiver of a company, who had been one of its directors, was charged with having known of and acquiesced in the mismanagement for which the suit was begun, and with being improperly interested in contracts made by the company. Facts were shown tending to prove these charges, many of which were not denied. *Held*, that he was not a proper person to exercise the powers of a receiver, and that his appointment should be revoked. *Held*, also, that the fact that the suit was instituted for his benefit would not justify his being continued as a receiver. *Keeler v. Brooklyn Elevated R. R. Co.*, 9 Abbott's New Cases (N. Y.), 166. 1830.

195. — Neither a non-resident receiver of a railway corporation, nor more than one receiver, should ordinarily be appointed. Where two receivers were originally appointed as the representatives of different interests which became hostile, leading to dissensions and unnecessary expense, both were removed and a single disinterested resident receiver appointed. *Meier v. Kansas Pacific R'y Co.*, 5 Dillon (U. S. C. C.), 476. 1878.

196. — The stockholders of a defendant corporation cannot obtain the removal of a receiver by petition, where it appears from the pleadings that such corporation has a regularly elected board of directors, and that such board is in active sympathy with the petitioners. *Fifth National Bank of*

Repairs — Sale of Property.

Pittsburgh v. Pittsburgh and Castle Shannon R. R. Co., 1 Federal Reporter, 190. 1880.

197. Repairs. The court will authorize a receiver of a railway company to make all necessary repairs, and, if necessary, will charge the expense as a first lien on the property prior to existing mortgages thereon. *Hoover v. Montclair and Greenwood Lake R. R. Co.*, 29 N. J. Eq., 4, 1878; 18 Amer. R'y Rep., 535. See, also, *Mitchell, Ex parte*, 12 So. Car., 83. 1879.

193. Rolling stock; purchase. Rolling stock purchased by the receivers managing the railroad corporation, pending its sale by the court of chancery, is subject to the liens authorized by the court in the order for its purchase, and such liens cannot be superseded or lessened by the trust deed. *Meyer v. Johnston*, 53 Ala., 237, 1875; 9 Amer. R'y Rep., 451.

199. — Where the net earnings of a railway which is in the hands of receivers are amply sufficient to pay for a necessary purchase of additional rolling stock, the court will not authorize the receivers to raise money for the same by the creation of a car trust, in order to allow of the application of the income to the bondholders. *Taylor v. Philadelphia and Reading R. R. Co.*, 9 Federal Reporter, 1, 1881; 3 Amer. & Eng. R. R. Cases, 177.

200. — Application to compel the receivers of an insolvent railroad company to deliver to creditors certain certificates of indebtedness, which the receivers were authorized by this court to issue, and which they had offered to such creditors in payment of rolling stock, and which the creditors had accepted, refused; the creditors having had it in their power to retake their property at any time, and it appearing that it would have been to the disadvantage of the trust fund for the receivers to have paid the contract price. *Coe v. New Jersey Midland R'y Co.*, 27 N. J. Eq., 37. 1876.

201. Sale of property. A receiver in the present case under the supplement of March 17, 1870, to the Act to Prevent Frauds by Incorporated Companies, directed to sell the property, part free from incumbrances, and part subject thereto, and the order and manner of sale specifically directed. *Mid-*

dleton v. New Jersey West Line R. R. Co., 25 N. J. Eq., 306. 1874.

202. — A purchaser, on new and ample consideration, of bonds constituting a part of the assets of a railway company in the hands of a receiver, without knowledge or notice of the trust, is not liable to the creditors of the corporation for the value of the bonds. *Gibbes v. Greenville and Columbia R. R. Co.*, 18 So. Car., 299. 1882.

203. — The indebtedness of the West Line R. R. Co. being more than double its assets, there being no income to meet the expense of the necessary repairs, its property being of such a character as materially to deteriorate in value pending a protracted litigation; and it being clearly for the interest of all concerned in the property that it should be sold as early as possible, and almost all of the first mortgage bondholders, represented by the trustees, asking for the sale, the road and its franchises were ordered to be sold by the receiver, pending proceedings for foreclosure by trustees for the first mortgage bondholders, which disputes about the extent and validity of the mortgage lien threatened greatly to delay. The property was directed to be sold free from all incumbrances, except a mortgage held by the public school fund of the state on lands under water. *Middleton v. New Jersey West Line R. R. Co.*, 26 N. J. Eq., 269. 1875.

204. — A railroad and other property of a railroad company, which had for several years been in the hands of a receiver, was sold by a decree of the court, which directed a sale of the road, the franchises of the company, right of way, depots, rolling stock, tools, and all other property of the company, real, personal and mixed. *Held*, that the purchaser was not entitled to the money, the surplus earnings of the railroad in the hands of the receiver; and that the purchaser was entitled to all cars, engines and other property placed on the railroad by the receiver in the discharge of his duty, to carry on the business of the railroad and keep it in repair. *Strang v. Montgomery and Eufaula R. R. Co.*, 3 Woods (U. S. C. C.), 613. 1879.

205. — It is a proper exercise of the chancery power of the court to surrender the trust property to the purchaser, retaining jurisdiction of the original case, and retain-

Second Suit—State as Party to Proceedings.

ing the authority to enforce the payment of the debts and liabilities incurred by the court's receiver in the operation of the railway. *Farmers' Loan and Trust Co. v. Central R. R. Co. of Iowa*, 17 Federal Reporter, 758, 1883; *Farmers' Loan and Trust Co. v. Central R. R. of Iowa*, 12 Amer. & Eng. R. R. Cases (U. S. C. C.), 461, 1893. See, also, *Brown v. Wabash R'y Co.*, 98 Ill., 297, 1880.

206. — Where a railway receiver was discharged, and the sale of the property confirmed to a newly organized corporation, with the provision in the order of confirmation that the new company should pay all the debts of the receiver and all claims or liabilities in the foreclosure case, *held*, that the new company could not be permitted, after accepting the property, to question the validity of the order. *Id.*

207. Second suit. As a general rule, a receiver appointed in one suit should not be displaced by the appointment of a receiver in a subsequent action. The receivership in the first suit should be extended to the second. But, however, if a different receiver is appointed, and the court has jurisdiction of the subject matter and the parties, and is the same court that made the first appointment, the receiver in the first suit must deliver the property to the second receiver. *State v. Jacksonville, Pensacola and Mobile R. R. Co.*, 15 Fla., 201. 1875.

208. Secured creditors. Secured creditors cannot dictate who shall be appointed a receiver. The court will consider the interests of creditors of every grade. *Richards v. Chesapeake and Ohio R. R. Co.*, 1 Hughes (U. S. C. C.), 28. 1875.

209. Specific performance; contract with express company. A contract between A., a railroad company, and B., an express company, stipulated that B. should lend A. \$20,000, to be expended in repairing and equipping its road, and that A. should grant to B. the necessary privileges and facilities for the transaction of all the express business over the road, the sum found to be due A. therefor, upon monthly settlement of accounts, to be applied to the payment of the loan and the interest thereon. The contract was to continue for one year, when, if the money with interest thereon was not

paid, it was to continue in force until payment should be made. After B. had advanced the money, and entered upon the performance of the contract, A. conveyed all its property, including its franchises, to C. in trust to secure the payment of certain bonds issued by it. Default having been made in their payment, C. brought a foreclosure suit, and obtained a decree placing the road in the hands of a receiver and ordering its sale. The receiver having declined to carry out the contract with B., the latter, with the consent of the court, brought its bill in equity for specific performance against him, A. and C. *Held*, that the receiver is the only necessary party defendant. That the transaction between the companies is not a license, but simply a contract for transportation, creating no lien, the specific performance whereof would be a form of satisfaction or payment which the receiver cannot be required to make. *Express Co. v. Railroad Co.*, 99 U. S., 191. 1878.

210. State as party to proceedings. Where a receiver of a railway company was appointed at the instance of the state and other creditors, and the guaranty of the bonds by the state was declared illegal by the legislature, it was held proper to dismiss said cause so far as the state was concerned therein. *Brunswick and Albany R. R. Co. v. State*, 48 Ga., 415. 1873.

211. — Under action pending in the name of the state for the foreclosure of a mortgage upon the property of a railway company, and the appointment of a receiver, and on the motion of the attorney-general for such appointment, an order was made by the court in the words following: "As the state cannot be required to give security as other plaintiffs, it is ordered that the president and directors of the Greenville and Columbia R. R. Co., under the order of and subject to this court, continue in the possession and management of the property of all kinds of the said company, and in like manner continue to conduct and carry on the business of the said company; that they make report to this court, at such times as this court may require, of the condition of the property of all kinds of the said company, of its earnings and profits and expenditures, to the end that such orders may,

Statutory Receiver — Stock and Stockholders.

from time to time, be moved for, as may be necessary and proper for the protection of the property of the said company, and the interests of all parties concerned, pending litigation." *Held*, that this order constituted the president and directors of the corporation receivers, and that they continued in the management of the road and its business as officers of the court, and not of the company. *Gibbes v. Greenville and Columbia R. R. Co.*, 15 So. Car., 304; 9 Amer. & Eng. R. R. Cases, 739, 1880; 15 South Carolina 518, 1880; 9 Amer. & Eng. R. R. Cases, 723.

212. — In a foreclosure suit pending in the circuit court, the mortgaged property being in possession of its receivers, the state of Georgia presented a petition in which, declining to become a party to the suit, it asked that the receivers be required to withdraw from the possession of a part of the property in their hands, upon some of which executions for state taxes had been levied prior to their appointment. The petition was denied and dismissed. *Held*, that the action of the court could not be reviewed upon the appeal of the state, for the reason, if there were no others, that the order did not conclude any right it had in virtue of the executions, or of the levies made thereunder. *State v. Jesup*, 12 Amer. & Eng. R. R. Cases (U. S. S. C.), 419. 1882.

213. Statutory receiver. A statutory receiver of a delinquent railroad has no power to lease the road. *State v. McMinnville and Manchester R. R. Co.*, 6 Lea (Tenn.), 369, 1880; 4 Amer. & Eng. R. R. Cases, 95.

214. — A payment of rents by the lessees, under a void lease, to an officer of the state, and the reception of such rents by such officer, would be no ratification of the void lease. The legislature alone could ratify such void lease. *Id.*

215. — There can be no recovery for improvements made upon the road by the lessees under such void lease. *Id.*

216. — Statutory receivers are to some extent public agents. They have no power to contract debts, even though the indebtedness is to enhance the value of the property. Though a court of chancery may enlarge the powers of its receiver no such power exists as to a receiver by contract. So held in case of a receiver appointed by

the governor. *State v. Edgefield and Ky. R. R. Co.*, 6 Lea (Tenn.), 353; 4 Amer. & Eng. R. R. Cases, 86. 1880.

217. Stock and stockholders. Where the relief sought is founded upon a disputed equity, a court of equity will with great reluctance and hesitation take the possession from a defendant holding a clear legal title. So, where none of the actual holders of the stock or bonds of a railway company who would be affected similarly with the plaintiff were before the court, the court ought to hesitate before appointing a receiver, on the ground of a possible injury to one holding nothing more than a disputed equitable claim for deferred stock. *Overton v. Memphis and Little Rock R. R. Co.*, 10 Federal Reporter, 866; 3 McCrary (U. S. C. C.), 436. 1882.

218. — September 2, 1873, the Erie R'y Co. declared a dividend of one per cent. upon its stock, and deposited the money to pay the same with Duncan, Sherman & Co. On December 10, 1874, the money then remaining with that firm was withdrawn by the company, and subsequently passed, with its other property, to a receiver of the road. An application was made by the petitioner, who, at the time the dividend was declared, was a stockholder of the company, to compel the receiver to pay to him the amount of his dividend. *Held*, that the fund deposited with Duncan, Sherman & Co. should be regarded as specifically appropriated for the payment of the dividend, and that the stockholders acquired in equity a lien upon such fund to the extent of the amount to which they were respectively entitled, and that such lien followed the fund in the hands of the receiver. *Le Blanc, In re*, 14 Hun (N. Y.), 8. 1878.

219. — The court will not, upon the petition of the company filed in the suit in which receivers were appointed, take jurisdiction of and decide a question as to the propriety of postponing a meeting called for the election of officers, which question has no relation to the objects for which the receivers were appointed. *Taylor v. Philadelphia and Reading R. R. Co.*, 7 Federal Reporter, 381. 1881.

220. — A receiver may, under ch. 403 of 1860, commence separate actions against

Memorandum of Judge — Transcript.

each of the stockholders of a corporation to recover any sum remaining due upon his shares of stock, and he is not bound to bring one action and make all the creditors and stockholders parties thereto. *Van Wagenen v. Clark*, 22 Hun (N. Y.), 491. 1880.

221. Taxation. Proceedings for collection of taxes on railway in hands of a receiver considered. *Perry County v. Selma, Marion and Memphis R. R. Co.*, 65 Ala., 391, 1880; 7 Amer. & Eng. R. R. Cases, 298.

222. Title of receiver. The title of a receiver to the property which is the subject of the receivership attaches from the date of the order of court appointing him; it is not deferred until he gives bond in compliance with the order. *Maynard v. Bond*, 67 Mo., 315. 1878.

223. Torts of employees. The receiver of a delinquent railroad, appointed by the governor of the state under the act of 1852, 151, 5, is a public agent, and, as such, not liable for the wrongs or negligence of his employees, but only for his own wrongful acts or delinquencies. *Hopkins v. Connel*, 2 Tenn. Ch., 323. 1875.

224. Trustees who are state officials. The appointment of a receiver to take and preserve a trust fund is the exercise of a discretion in which all the circumstances are to be taken into consideration. Where the funds are in the hands of trustees, appointed by the legislature, who hold their trust *ex officio* as high public officers of the state, and especially where one part of the trust involves duties of a public character, the court will be very reluctant to take the fund out of their hands, and will not do so except for the most cogent reasons, such as gross fraud and imminent danger of the trust fund. It will resort to every coercive means of compelling the trustees to perform their duty before resorting to this extreme measure. *Vose v. Reed*, 1 Woods (U. S. C. C.), 647. 1871.

225. Two railways controlled by receivers; contracts. Two railroads were in the hands of receivers, appointed by this court under insolvency proceedings. Held, that the court had power, on the application of either receiver, to modify a contract made before their insolvency, so as to equitably readjust the rates agreed upon by them for

terminal facilities, and, also, for the use of part of one road by the other company. *Receivers New Jersey and New York R'y Co., Inc.*, 29 N. J. Eq., 67. 1878.

226. Vacation of order. A receiver has no right to object to an order restoring the property to its owners. An order appointing a receiver should be vacated when all the parties in interest consent thereto. *L'Engle v. Florida Central R. R. Co.*, 14 Fla., 266. 1873.

227. Watercourses; floods. A railway company is liable for injury arising from insufficient culverts and occurring during the time that its property is in the hands of a receiver. *Union Trust Company v. Cuppy*, 26 Kans., 754, 1882; 11 Amer. & Eng. R. R. Cases, 562. See, also, *Kansas Pacific R'y Co. v. Wood*, 24 Kans., 619. 1880.

228. Who may apply for receiver. Those who have guarantied the payment of a debt, for failure to pay which relief is sought under § 57 of the act respecting railroads and canals, authorizing the appointment of a receiver, are, on payment of the debt, entitled to the benefit of that section, as creditors in respect of the debt so paid, notwithstanding the fact that they have guarantied the payment thereof. *Pennsylvania R. R. Co. v. Pemberton and New York R. R. Co.*, 28 N. J. Eq., 338. 1877.

RECORD.

See EMINENT DOMAIN; MORTGAGE.

1. Memorandum of judge. The memorandum of a judge of the superior court, setting forth the grounds of his overruling a motion to set aside an award, is no part of the record; and the remedy of the party aggrieved is by bill of exceptions, and not by appeal. *Standish v. Old Colony R. R. Co.*, 129 Mass., 158. 1880.

2. Process. Practice on substitution of lost process considered. *Mobile and Montgomery R. R. Co. v. Smith*, 51 Ala., 329. 1874.

3. Transcript. Manner of authentication determined. *Union Pacific R. R. Co. v. Simpson*, 11 Kans., 457. 1873.

Expert as Referee—By City Authorities—Commissioners.

REFERENCE.

1. Expert as referee. A point, involving questions of practical science, being in dispute, and the affidavits being conflicting, the evidence was, at the suggestion of the court, and with the consent of both parties, referred to an engineer for his report on the question in dispute, and the conclusion of the engineer, with respect to the facts, was adopted by and made the ground of the order of the court. *Webb v. Manchester and Leeds R'y Co.*, 1 Eng. R. R. & Canal Cases, 576, 1839.

REFUSAL TO CARRY GOODS.

1. Damages. In an action at law against a common carrier for a wrongful refusal to carry property, the party aggrieved is entitled to recover, as damages, the difference between the value of the property at the place where it was tendered to the company and its value at the place to which it was to be taken, less the expenses of transportation. *People ex rel. v. New York, Lake Erie and Western R. R. Co.*, 22 Hun (N. Y.), 533, 1880.

REGULATION OF RAILWAYS.

*See DISCRIMINATION; RATES.

1. By city authorities. A proviso in a city ordinance granting certain privileges to a railroad company, that such company should be subject to all laws and ordinances that might thereafter be passed to regulate railroads in the city, only means that it shall be subject to all reasonable and legal ordinances for the regulation of the road. It has no such scope that the railroad company should remove its track at the bidding of the city council. *Chicago, Rock Island and Pacific R. R. Co. v. City of Joliet*, 79 Ill., 25, 1875.

2. Charter. The operation of a law for regulating "all existing railroad corporations" extends to and controls railroads incorporated after as well as before its passage, unless exception is provided in their charters. *Indianapolis and St. Louis R. R. Co. v. Blackman*, 63 Ill., 117, 1872; 7 Amer. R'y Rep., 56. See, also, *Illinois Central R. R.*

Co. v. The People, 95 Ill., 313, 1880; 1 Amer. & Eng. R. R. Cases, 188.

3. — The state has no power to enact laws fixing rates of transportation upon lines of railway previously chartered. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Bowlers*, 4 Houston (Del.), 506, 1873; 6 Amer. R'y Rep., 105.

4. Commissioners; powers. The railway commissioners, under 36 and 37 Vict., c. 48, made an order requiring the C. and the S. E. Railway Companies to make arrangements and to afford facilities for the transfer of traffic from the line of one company to the other; to arrange the arrivals of their trains at a junction in a particular manner, and directing the C. Company to run trains over a disused branch line; and, upon non-compliance with the order, made a further order imposing penalties upon both companies for their disobedience. *Held*, that the first order was invalid, and that a prohibition must be granted to restrain the commissioners from enforcing it; for, assuming that they had jurisdiction to require each company separately to give facilities according to its powers, they were not entitled to order two companies to act jointly in doing what neither could do separately. *Toomer v. London, Chatham and Dover R'y Co.*, Law Reports, 2 Exchequer Division, 450, 1877.

5. — The railway commissioners, to whom has been transferred the jurisdiction of the court of common pleas under the Railway and Canal Traffic Act, 1854 (17 and 18 Vict., c. 31), have under that act jurisdiction to hear and determine a complaint against a railway company of not, according to its powers, affording all reasonable facilities for receiving, forwarding and delivering passengers and other traffic at and from any of its stations which are used by the company for such passengers or other traffic; and although the commissioners have no jurisdiction to order the company to make a new railway station, or to order any particular works, or otherwise to interfere with the discretion of the company in the mode of performing its obligation to afford such facilities, according to its powers, for the receiving, forwarding and delivering of the traffic, yet they have jurisdiction to order such facilities, even if they doing so would

Constitutional Law.

necessitate the making by the company of some structural alteration of such station. *South Eastern R'y Co. v. Railway Commissioners*, Law Reports, 6 Queen's Bench Division, 588, 1881. But see *Same v. Same*, Law Reports, 5 Queen's Bench Division, 217, 1879.

6. — The mere fact that railway companies make charges for the conveyance of passengers in excess of those authorized by their special acts, but without any undue preference, is not a breach of their obligation under 17 and 18 Vict., c. 81, s. 2, to "afford according to their respective powers all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats and other vehicles." And the railway commissioners have no jurisdiction to grant an injunction to restrain the making of such excessive charges. *Great Western R'y Co. v. Railway Commissioners*, Law Reports, 7 Queen's Bench Division, 182, 1881; 2 Amer. & Eng. R. R. Cases, 617.

7. Constitutional law. The creation of a board of railway commissioners, with authority to regulate the rates for carriage of passengers and freight, held to be constitutional. *Georgia R. R. and Banking Co. v. Smith*, 9 Amer. & Eng. R. R. Cases (Ga.), 885, 1883; *Tilley v. Savannah, Florida and Western R. R. Co.*, 5 Federal Reporter, 641, 1881.

8. — The act of the general assembly of the state of Iowa, entitled "An act to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different roads of this state," approved March 23, 1874, is not in conflict with § 4, art. 1, of the constitution of Iowa, which provides that "all laws of a general nature shall have a uniform operation," and that "the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens;" nor is it a regulation of interstate commerce. *Chicago, Burlington and Quincy R. R. Co. v. Iowa*, 94 U. S., 155, 1876; 16 Amer. R'y Rep., 169.

9. — The Winona and St. Peter R. R. Co.

having been incorporated as a common carrier, with all the rights and subject to all the obligations which that term implies, was bound to carry, when called upon for that purpose, and charge only a reasonable compensation therefor. The state has the right to regulate its rates. *Winona and St. Peter R. R. Co. v. Blake*, 94 U. S., 180, 1876; 16 Amer. R'y Rep., 177.

10. — The Chicago and Northwestern R'y Co. was, by its charter, and the charters of other companies consolidated with it, authorized "to demand and receive such sum or sums of money for the transportation of persons and property, and for storage of property, as it shall deem reasonable." The constitution of Wisconsin, in force when the charters were granted, provides that all acts for the creation of corporations within the state "may be altered or repealed by the legislature at any time after their passage." Held, that the legislature had power to prescribe a maximum of charges to be made by said company for transporting persons or property within the state, or taken up outside the state and brought within it, or taken up inside and carried without. *Peik v. Chicago and Northwestern R'y Co.*, 94 U. S., 164, 1876; 16 Amer. R'y Rep., 418.

11. — Where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. *Id.*; *Peik v. Chicago and Northwestern R. R. Co.*, 6 Bissell (U. S. C. C.), 177, 1874.

12. — A state law to prevent the unjust discrimination in rates for the transportation of passengers or freight from a point within to a point without the state, though it may incidentally affect commerce between states, cannot be said to be a law regulating commerce among the states, within the meaning of the federal constitution, especially when it does not purport to exercise control over any railroad corporation except those that run or operate in the state, and which have domestic relations with the people of the state. *People v. Wabash, St. Louis and Pacific R'y Co.*, 104 Ill., 476, 1882; 7 Amer. & Eng. R. R. Cases, 628.

13. — Section 87 of the railroad act, to prevent unjust discriminations in the rates charged for transporting passengers or

Crossing of Streets.

freight, etc., is not limited to railroads organized under the laws of Illinois, but includes all companies operating railroads in Illinois, regardless of the states in which they may have been organized. *Ib.*

14. — The supreme court of Illinois adheres to the conclusion holding § 87 of the railroad act, to prevent unjust discriminations in the rates charged for carrying passengers or freights, to be free from any constitutional objection, and holding a railway company liable to the penalty imposed for discriminating in the rate of charges as to different contracts for through transportation of freight from points in Illinois to a point in another state, for different distances, charging a greater sum for the less distance of the entire carriage than for the greater distance. *Wabash, St. Louis and Pacific R'y Co. v. The People*, 105 Ill., 236. 1883. *Contra*, see *Kaeiser v. Illinois Central R. R. Co.*, 18 Federal Reporter, 151, 1883. *Carton v. Illinois Central R. R. Co.*, 59 Ia., 148, 1882; 6 Amer. & Eng. R. R. Cases, 305.

15. — The state board of railway commissioners has no power to regulate or interfere with the transportation of persons or merchandise by a steamship company between ports within the state, if they be in transit to or from other states, or when in navigating the ocean the vessel goes beyond a marine-league from the shore. This power has been conferred upon congress, and is exclusive. *Pacific Coast Steamship Co. v. R. R. Commissioners*, 18 Federal Reporter, 10. 1883

16. — So much of the act approved April 19, 1873, entitled "An act regulating the charges for transportation of freight upon railroads" (Sess. Acts 1872-3, p. 62), as relates to the transportation of passengers, is unconstitutional, since the title limits the act to the transportation of freight. *Evans v. Memphis and Charleston R. R. Co.*, 56 Ala., 246, 1876; 18 Amer. R'y Rep., 350.

17. — A state statute requiring railroads to draw the cars of other corporations as well as their own, at reasonable times and for reasonable compensation, to be agreed upon by the parties or fixed by the railroad commissioner, does not conflict with the constitutional provision that congress shall have power to regulate commerce between the states. *Rae v. Grand Trunk R'y Co.*, 14

Federal Reporter, 401, 1882; 9 Amer. & Eng. R. R. Cases, 470.

18. — The states have the power to regulate the operations of elevators receiving grain from railways and other common carriers. *Munn v. Illinois*, 94 U. S., 113. 1876.

19. Crossing of railways. Where, by a clause in an act of parliament, it was enacted "That nothing herein contained shall be construed to prevent any owner or occupier of any ground through which the said railway may pass from carrying, at his or their own expense, any railway or other road, or any cut or canal which such owner or occupier is authorized to make in his or her lands or grounds, across the said main railway, within the respective lands or grounds of such owner or occupier,"—*held*, that the right given by this clause was not confined to the state of the land at the time the act passed, but was intended for the convenience of the occupiers, from time to time, of the land, partly on one side and partly on the other, of the principal railway, and that without reference to the title under which it was held. *Monkland R'y Co. v. Dixon*, 3 Eng. R. R. & Canal Cases, 273. 1842.

20. — Sec. 1118 of the Code provides that "all the railroads of the state have power to construct their roads so as to cross each other, if necessary, by the main tracks or branches, or to unite with each other as with branches." *Held*, that the plain meaning of this section, read by the light of §§ 1118 and 1120, was that various roads might form a homogeneous system, and that these roads, or any future roads, might unite by building tracks from one to the other for the purpose of transporting loaded cars. *Louisville and Nashville R. R. Co. v. State*, 9 Baxter (Tenn.), 522. 1876.

21. Crossing of streets. An ordinance of a city, which required a railroad company to keep a flagman by day and a red lantern by night at a certain street crossing where the company had only a single track, and over which only its usual trains passed, and where it did not appear that such crossing was unusually dangerous, or more so than ordinary crossings, *held*, not to be a reasonable requirement, and, therefore, within the constitutional limitation on the

Gauge — Penalties.

exercise of the police power. *Toledo, Wabash and Western R'y Co. v. City of Jacksonville*, 87 Ill., 87. 1878.

22. Gauge. The Launceston and South Devon Railway Act, 1862, § 84, enacts that "if at any time it shall be made to appear to the board of trade to be requisite for the public service, the company shall, on the requisition of that board, lay down or permit to be laid down, on all or any part of the railway hereby authorized, an additional rail or rails for the passage of engines and carriages adapted to the narrow gauge over the same." *Held*, that "public service" did not mean government service merely, but included any service which would supply wants felt by the public, or which the public might reasonably be desirous of having on its own behalf. The commissioners being of opinion that it was requisite for the public service that the line should be narrow gauged between Launceston and Lidfield Junction, advised the board of trade to require the South Devon Railway Company, the owners of the line, to elect either to lay down an additional rail itself between those places, or permit it to be laid down. *Inhabitants of Launceston, In re*, 3 Neville & McNamara, 187. 1877.

23. Injunction. Ch. 278, Laws of 1874, after fixing the maximum tolls chargeable by railway companies in Wisconsin, gives certain civil remedies against the companies to persons injured by violations of the rates so fixed, and also provides penalties against the agents of the companies who may be guilty of such violations; but it does not provide penalties against the companies themselves. *Held*, that the legal remedies so provided furnish no sufficient ground for denying the relief here sought by injunction against the corporations to restrain them from charging illegal tolls. *Attorney-General v. R. R. Companies*, 35 Wis., 425. 1874.

24. — The maximum rates of toll having been materially changed by chaps. 118 and 834 of 1875, the court holds that the cause is not ripe for judgment, and (being about to close the term) orders its continuance until the next term. *Attorney-General v. Chicago, Milwaukee and St. Paul R'y Co.*, 88 Wis., 69. 1875.

25. Name of corporation; misnomer. Ch. 278, Laws of 1874, in its classification of the railways of Wisconsin, names, among those in "Class A.," the "Milwaukee and St. Paul R'y Co." One of the defendant companies was formerly known by that name, and was so designated in previous acts of the legislature, granting powers here claimed by said company by virtue of such acts, including an act approved March 10, 1874. In February, 1874, however, under a general statute providing for such changes of corporate names, said company had changed its name to the "Chicago, Milwaukee & St. Paul R'y Co.," by which name it is here made defendant. No other company has ever been known in this state by the name first above stated. *Held*, that the provisions of said act relating to the "Milwaukee and St. Paul R'y Co." must be regarded as applying to said defendant. *Attorney-General v. R. R. Companies*, 35 Wis., 425. 1874.

26. Penalties. In an action to recover the statutory penalty for making unjust discriminations in its rates of charges of toll and for freights, the declaration must show that the respective freights mentioned were of like quantity, of the same class, and that, in respect to such freight, there was a higher charge for a less than for a greater distance. The description of the respective freights merely as one car-load of ponies, and one car-load of horses, does not sufficiently show them to be "like quantities of freight of the same class." *Chicago, Burlington and Quincy R. R. Co. v. The People*, 77 Ill., 448, 1875; 8 Amer. R'y Rep., 92.

27. — To hold a railway company liable to the penalties provided in the act to prevent extortion, etc., approved May 2, 1878, on the ground of extortion, it must be shown that it charged more than the maximum rates fixed by the railroad and warehouse commissioners, and, until these rates are fixed, no liability can be incurred, under the statute, for unreasonable and extortionate charges, and when made, the taking of the rates named, or less rates, will not incur the penalty, even though the proof shows them to be more than fair and reasonable rates. *Ib.*

28. — A complaint contained allegations

Quo Warranto — Rates.

against the defendant for having, contrary to the "Act to prevent extortion by railroad companies," passed March 27, 1857, charged the plaintiff thirteen cents extra fare from L. to B. on five hundred and sixty-seven occasions, and asked for judgment for the excess, and \$50 penalty for each violation of the statute. *Held*, that the plaintiff was entitled to recover one penalty of \$50, and the excessive fare paid, but was not entitled to recover five hundred and sixty-six penalties, in addition. *Bissell v. New York Central and Hudson River R. R. Co.*, 67 Barbour (N. Y.), 385, 1872.

29. — A suit was brought to recover of a railroad company for charging a passenger fare exceeding three cents a mile, under the act of April 13, 1871. At the time the railroad commissioners had not assigned the defendant's road to any class, as required, by the act, and there was no proof that the charge made was unreasonable, or to what class the road did belong. *Held*, that the plaintiff could not recover. *Moore v. Illinois Central R. R. Co.*, 68 Ill., 385, 1873.

30. Quo warranto. The attorney-general has the election to proceed against the defendant companies for their alleged violations of legal duty, either by information in the nature of *quo warranto*, or by injunction; but the court will require him to make his election, and not to proceed by both remedies. *Attorney-General v. R. R. Companies*, 35 Wis., 425, 1874.

31. Rates. A power of government which actually exists is not lost by non-user. The fact, therefore, that the power of regulating the maximum rates of fare and freight was not exercised for more than twenty years after the incorporation of that company is unimportant. Nor does it affect the case that, before the power was exercised, the company had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the stipulated rent. It could neither grant nor pledge more than it had, and its pledgee or tenant took the property subject to the exercise by the state of the same powers of regulation which might have been exercised over the company itself. *Chicago, Burlington*

and Quincy R. R. Co. v. Iowa, 94 U. S., 155, 1876; 16 Amer. R'y Rep., 169.

32. — A railroad company in Wisconsin cannot recover for the transportation of property more than the maximum fixed by the act of that state of March 11, 1874, by showing that the amount charged was no more than a reasonable compensation for the services rendered. *Chicago, Milwaukee and St. Paul R. R. Co. v. Ackley*, 94 U. S., 179, 1876; 16 Amer. R'y Rep., 176.

33. — Railroad companies incorporated prior to the adoption of the constitution of 1851, and which avail themselves of § 24 of the general corporation act of 1852 (S. & C. Stat., 281), either by taking leases of the roads of other companies, or by leasing their own roads to other companies, are to be regarded as thereby accepting a "provision" of said act, within the meaning of § 71, and relinquishing all rights under their charters inconsistent with the provisions of said act. The right to demand and take specified rates of fare, free from legislative control or alteration, is one of the rights thus relinquished by such companies, and they, therefore, become subject to legislative control, in that regard, equally as companies formed under said act of 1852. *Cincinnati, Hamilton and Dayton R. R. Co. v. Cole*, 29 Ohio St., 126, 1876.

34. — The charter of a railroad company authorized it "to charge for the transportation of passengers at a rate not exceeding seven and one-half cents per mile, and for the transportation of goods by weight, not exceeding fifty cents per one hundred pounds per one hundred miles;" *held*, that for heavy articles the company could only charge for the actual distance of transportation at a rate not exceeding fifty cents per one hundred pounds per one hundred miles. *Knox v. Railroad Co.*, 5 So. Car., 22, 1873. Rehearing denied. *Knox and Gill v. R. R. Co.*, 5 So. Car., 73, 1873.

35. — The consolidation, pursuant to the statute of Ohio of April 10, 1856 (4 Curwen, 2791), of two or more railway companies works their dissolution. All the powers and franchises of the new company which is thereby formed are derived from that statute, and are subject to "be altered, revoked or repealed by the general assembly," under

Requirement to Stop at County Seats — Statute in Nature of Contract.

§ 2, art. I, of the constitution of that state, which took effect September 1, 1851. *Shields v. Ohio*, 95 U. S., 319. 1877.

36. — The general assembly does not, therefore, impair the obligation of a contract by prescribing the rates for the transportation of passengers by the new company, although one of the original companies was, prior to the adoption of that constitution, organized under a charter which imposed no limitation as to such rates. *Ib.*

37. — The Pacific R. R. Co. of Missouri, under its original charter of 1849, and under the act of 1868, had the power to regulate tolls until the year 1878; and the act of 1872 (Adj. Sess. Acts 1872, p. 69), in attempting meanwhile to fix regulations in conflict with those of the company, was held invalid. One aggrieved by its charges could have his damages in court. But the justice or injustice of the rates cannot be determined by the legislature. *Sloan v. Pacific R. R. Co.*, 61 Mo., 24. 1875.

38. — The statute of 1874, ch. 372, § 140, providing, under a penalty, that "no railroad corporation shall charge or receive for the transportation of freight to any station on its road a greater sum than is at the time charged or received for the transportation of the like class and quantity of freight from the same original point of departure to a station at a greater distance on its road in the same direction," applies to the carriage of freight by such a company as a common carrier over its own line, and not over other railways, for which it charges and receives nothing, except as collecting agent of the corporations owning such other roads. *Commonwealth v. Worcester and Nashua R. R. Co.*, 124 Mass., 561, 1878; 18 Amer. R'y Rep., 418.

39. — A charter of a railway company prescribed a maximum rate of charge for the carriage of heavy articles by the hundred pounds, and of articles of measurement by the cubic foot, without further definition in the act itself; whether cotton in bales should be charged as a heavy article or as an article of measurement depends upon the meaning of those terms as used in the charter, to be ascertained by proof of the custom prevailing at the passage of the act. *Bonham v. C., C. and A. R. R. Co.*, 13 So.

Car., 267, 1879; 3 Amer. & Eng. R. R. Cases, 802.

40. — It was properly left to the jury to determine whether bales of cotton were heavy articles, or articles of measurement, within the meaning which custom had given to those terms at the date of the charter. *Elder v. C., C. and A. R. R. Co.*, 13 So. Car., 279. 1879.

41. Requirement to stop at county seats. A through passenger train, equipped and operated in the same manner as other passenger trains on the same road, carrying passengers and baggage as other trains, and running on the official time-table of the company the same as its other passenger trains do, the only difference being that the other trains stopped at all the stations while this did not, is held to be a "regular passenger train," within the meaning of the act approved May 29, 1879, which requires all such trains to stop at county seat stations a sufficient length of time to receive and let off passengers with safety. *Chicago and Alton R. R. Co. v. The People*, 105 Ill., 657, 1883; *Chicago and Alton R. R. Co. v. Pierson*, 12 Amer. & Eng. R. R. Cases (Ill.), 156, 1883.

42. — This statute is not a regulation of interstate commerce, and therefore inhibited by the constitution of the United States, though the line of road may pass through different states. Such a law is a proper exercise of the police power of the state. *Ib.*

43. Speed. The legislature has the power to regulate the speed of locomotives in passing through cities and towns, and the exercise of such power is no violation of a charter. *Mobile and Ohio R. R. Co. v. The State*, 51 Miss., 137, 1875; *Toledo, Peoria and Warsaw R'y Co. v. Deacon*, 63 Ill., 91, 1872.

44. Statute in nature of contract. The provision in § 12 of the General Railroad Act of February 11, 1849 (S. & C., 273), that no reduction shall be made in the rates of fare and charges for freight allowed to companies organized under said act, unless where their net profits for the previous ten years amount to ten per cent. on their capital, is in the nature of a contract and binding on the state. *Iron R. R. Co. v. Lawrence Furnace Co.*, 29 Ohio St., 208. 1876.

Miscellaneous.

RELEASE.

1. **Effect of.** Where a party having capacity to read an instrument signs it without reading it, and without requesting it to be read to him, he is bound thereby, if no device is used to put him off his guard. *Gulliver v. Chicago, Rock Island and Pacific R. Co.*, 59 Ia., 416. 1882.

2. — The signing of a release and receiving payment for a spoiled hat is not a bar to a suit for a personal injury received at the time of the damage to the hat. *Roberts v. Eastern Counties R'y Co.*, 1 Foster & Finlason (Nisi Prius), 460. 1859.

3. **Fraud.** A release of all claims, which is pleaded as a bar to an action at law, may, in that action, be shown to have been obtained by fraud. The finding of the jury upon this question of fraud has the same force as their verdict upon any other issue in the action. *Bussian v. Milwaukee, Lake Shore and Western R'y Co.*, 56 Wis., 325, 1882; 10 Amer. & Eng. R. R. Cases, 716.

4. — After the plaintiff had commenced her action against a railway company to recover damages for personal injuries, the company's agent obtained a release from her in the absence of her counsel, and when she had no proper adviser. The execution of the release was urged upon her by her attending physician, acting on behalf of the company, when she desired a postponement until she could consult her counsel. She was uninformed as to the amount of charges her attorneys would be entitled to demand for their services, and the defendant's agent represented that the company would probably defeat her in the action, and if it did not, her counsel would probably absorb whatever damages she might recover after an uncertain and protracted litigation. *Held*, that the jury were justified in finding that the release was a fraud upon the plaintiff. *Ib.*

5. — Where a party executed a paper, purporting to be a written release, discharging his right of action against a railroad company for injuries complained of, and at the time of executing the same he was so much under the influence of drugs and opiates taken to alleviate his pains, caused by a broken thigh, that he was mentally incapacitated to contract, *held*, that such a release

is voidable, and not a defense to his cause of action; and also *held*, that in such case it was not necessary for him to pay back nor offer to pay back the money received at the time of signing said paper as a condition precedent to his right to sue on his claim for damages. On the trial, the jury had the right to give the company credit for the money paid at the time the release, so called, was signed. *Chicago, Rock Island and Pacific R. R. Co. v. Doyle*, 18 Kans., 58, 1877; 15 Amer. R'y Rep., 187. See, also, *Schultz v. Chicago and Northwestern R'y Co.*, 44 Wis., 638, 1878; 18 Amer. R'y Rep., 146.

REMITTITUR.

1. **Effect of.** A *remittitur* held not to cure error under the facts of a particular case. *T. and N. O. R. R. Co. v. White*, 55 Tex., 251. 1881.

REMOVAL.

1. **Corporation doing business in the state.** The fact that the petitioner for removal was a corporation doing business in Illinois, or that the general issue had been filed in the cause, will not affect the right of removal. *Terre Haute and Indianapolis R. R. Co. v. Abend*, 9 Bradwell (Ill.), 304. 1881.

REMOVAL OF CAUSES.

See FEDERAL COURTS.

1. **Action for attorneys' fees.** An action by attorneys for compensation in the foreclosure of a mortgage, by which they claim a lien on the railway for their services, is such a suit as may be removed to the federal courts. *Pettus v. Ga. R. R. and Banking Co.*, 3 Woods (U. S. C. C.), 620. 1879.

2. **Action to compel transfer of stock.** A proceeding by *mandamus* in the state court, under the statutes of Kansas (Gen. Stats. 1868, p. 766), to compel the defendant company to register the transfer of certificates of stock held by the plaintiff, is a "suit of a civil nature at law" within the meaning of the removal act of March 3, 1875, and, upon proper application, may be transferred to

Affidavit — Bridges Over Navigable Streams.

the circuit court of the United States. *Washington Improvement Co. v. Kansas Pacific R'y Co.*, 5 Dillon (U. S. C. C.), 489. 1879.

3. Affidavit. The president and, perhaps, the general manager of a railway company are *prima facie* entitled to make the required affidavit to an application for removal. *Minnett v. Milwaukee and St. Paul R'y Co.*, 3 Dillon (U. S. C. C.), 460. 1875. The acting superintendent cannot make the affidavit. *Mahone v. Manchester and Lawrence R. R. Corp.*, 111 Mass., 72. 1872.

4. — In an application for the removal of a case in which a corporation is a party, the affidavit may be made by an agent or employee of the company. *Vankirk v. Pennsylvania R. R. Co.*, 76 Pa. St., 66. 1874.

5. — unverified petition. The mere filing of a petition and bond for the removal of a cause from the state to the federal court, without verification of the petition, or proof as to the residence of the petitioners, will not oust the state court of its jurisdiction. *Delaware R. R. Construction Co. v. Davenport and St. Paul R'y Co.*, 46 Ia., 406. 1877.

6. Amendment. After petition and bond for a removal of a cause to the federal court has been filed, as required by statute, the right to a removal becomes fixed, and cannot be evaded by an amendment reducing the amount claimed to less than \$500. *Louisville and Nashville R. R. Co. v. Roehling*, 11 Bradwell (Ill.), 264. 1882.

7. Amendment of pleadings. After an application for the removal of a cause to the United States court is regularly made, the state court has no further jurisdiction, and cannot allow amendments to the pleadings. *Stanley v. Chicago, Rock Island and Pacific R. R. Co.*, 62 Mo., 508. 1876.

8. Appeal. An appeal may be taken to the state supreme court from an order of the superior court granting the removal of a cause. *Ellis v. Atlantic and Pacific R. R. Co.*, 134 Mass., 338. 1883.

9. — When an appeal is taken from the decree of a state court ordering the removal of the case to the United States circuit court, under the laws of congress, and the appellant himself files the record in the federal court and there moves for the dissolution of the injunction granted by the state

court, there is an acquiescence by the appellant in the judgment appealed from, and the appeal will be dismissed by this court. *New Orleans R. R. Co. v. Crescent City R. R. Co.*, 33 La. An., 1273. 1881.

10. Assignee. In the course of a proceeding, non-residents (assignees of the railroad) voluntarily became parties defendant, and asked for a removal of the case to the federal court. *Held*, that their motion was properly refused. *Gudger v. Western North Carolina R. R. Co.*, 87 N. C., 325. 1882.

11. Bond. A circuit court does not err in refusing to remove a cause to the circuit court of the United States, where no bond is filed other than an incomplete one having no penalty named therein. *Quarrier v. Baltimore and Ohio R. R. Co.*, 20 W. Va., 424. 1882.

12. — The formalities prescribed by the removal act of 1875 are not conditions precedent to the jurisdiction of the federal courts, and a defect in the bond required by that act may be cured by the substitution of a new bond upon motion in the federal court to amend. *Harris v. Delaware, Lackawanna and Western R. R. Co.*, 18 Federal Reporter, 833. 1881.

13. Bridges over navigable streams. A petition for a *mandamus* was filed in one of her courts by the state of Mississippi to compel a railroad company, a corporation existing under the laws of that state, to remove a stationary bridge which it had erected over Pearl river, a navigable stream on the line between Louisiana and Mississippi. Thereupon the company presented its petition, duly verified, praying for the removal of the suit into the circuit court of the United States, and alleging that the right to erect, use and maintain the bridge was vested by the company's charter; that its maintenance over said river was authorized by the act of congress approved March 2, 1868 (15 Stat., 38); that thereunder it became a part of a post-road over which for several years the mails of the United States have been carried, and that therefore the suit impugns the rights, privileges and franchises granted by said act. *Held*, that under the latter act the company was entitled to the removal prayed for. *Railroad Co. v. Mississippi*, 103 U. S., 135. 1880.

Cause Pending on Rehearing in Supreme Court of a State — Citizenship.

14. Cause pending on rehearing in supreme court of a state. A., having in the state court recovered a judgment for \$12,000 against a railroad company, the latter took the case to the supreme court of Iowa, where a judgment was rendered reversing that below and ordering a new trial. Immediately thereafter the company obtained and filed in the office of the clerk of the lower court, the court not being in session, a writ of *procedendo*, together with a petition, under the act of March 3, 1875 (18 Stat., 470), accompanied by the necessary bond, for the removal of the case into the circuit court of the United States. Within the sixty days allowed for that purpose by the laws of Iowa, but after the *procedendo* and petition had been filed, A. presented an application for a rehearing, and obtained from the supreme court an order suspending its judgment until the next term. The company then appeared and moved to dismiss the application, on the ground that, before it was presented, the case had been removed into said circuit court, and that, consequently, the supreme court had no jurisdiction thereof. That motion being denied and a rehearing had, A. consented to a reduction of the amount of his recovery to \$7,000, whereupon judgment therefor was entered in the supreme court in accordance with its opinion. Held, that the supreme court having, after reversing the judgment of the lower court, still retained jurisdiction of the cause for the purpose of a rehearing, the right of the defendant to a new trial had not been perfected when the petition for removal was filed. *Railroad Co. v. McKinley*, 99 U. S., 147. 1878.

15. Citizenship. Whenever the sole controversy, in a suit begun in a state court, but subsequently removed to a federal court, is one between citizens of the same state, the suit will be remanded, upon motion, to the state court from which it was removed. *Iowa Homestead Co. v. Des Moines Nav. and R. R. Co.*, 8 Federal Reporter, 97; 3 McCrary (U. S. C. C.), 95. 1881.

16. — Under the act of March 2, 1867 (14 Stat., 558), a suit pending in a state court, between a citizen of the state in which the suit was brought and a citizen of another

state, could not, on the application of the former, be removed to a circuit court of the United States. *Hurst v. Western and Atlantic R. R. Co.*, 98 U. S., 71. 1876.

17. — An objection to the removal, founded upon the citizenship of one of the parties to the suit, will not be favored after the expiration of eighteen months. *Hervey v. Illinois Midland R'y Co.*, 3 Federal Reporter, 707. 1880.

18. — The provision in the first clause of § 2 of the act entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes," approved March 3, 1875, "that any suit of a civil nature, at law or in equity, now pending . . . in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, . . . in which there shall be a controversy between citizens of different states, . . . either party may remove said suit into the circuit court of the United States for the proper district," construed, and held to mean that when the controversy about which a suit in the state court is brought is between citizens of one or more states on one side, and citizens of other states on the other side, either party to the controversy may remove the suit to the circuit court without regard to the position they occupy in the pleadings, as plaintiffs or defendants. For the purposes of a removal, the matter in dispute may be ascertained, and according to the facts the parties to the suit arranged on opposite sides of that dispute. If in such an arrangement it appears that those on one side, being all citizens of different states from those on the other, desire a removal, the suit may be removed. *Removal Cases; Meyer v. Construction Co.; Construction Co. v. Meyer; Railroad Co. v. Meyer*, 100 U. S., 457, 1879; 21 Amer. R'y Rep., 465. See, also, *Bates v. New Orleans, etc., R. R. Co.*, 16 Federal Reporter, 294, 1883; *Burnham v. Chicago, Dubuque and Minnesota R. R. Co.*, 4 Dillon (U. S. C. C.), 503, 1876; *Arapahoe County v. Kansas Pacific R'y Co.*, 4 Dillon (U. S. C. C.), 277, 1877.

19. — A cause is not removable under the first clause of § 2 of the act of March 3, 1875, unless all the parties on one side are

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citizens of different states from those on the other, and all the defendants must join in the petition. *Connell v. Utica, etc., R. R. Co.*, 13 Federal Reporter, 241. 1882.

20. — A case cannot be removed, under the act of 1875, on the ground of citizenship, unless it appears from the record that at the time the suit was commenced the parties were citizens of different states. *Kaeiser v. Illinois Central R. R. Co.*, 6 Federal Reporter, 1; 2 McCrary (U. S. C. C.), 187, 1880; *Miller v. Chicago, Burlington and Quincy R. R. Co.*, 17 Federal Reporter, 97, 1881; *Indianapolis, Bloomington and Western R'y Co. v. Risley*, 50 Ind., 60, 1875; *Up-ton v. New Jersey Southern R. R. Co.*, 25 N. J. Eq., 372, 1874. *Contra, Nye v. Northern Central R'y Co.*, 24 Hun (N. Y.), 556. 1881. And see *Laird v. Connecticut and Pass. Rivers R. R. Co.*, 55 N. H., 375. 1875.

21. — alien. The act of congress of March 2, 1867, relating to the removal of suits from a state court to a United States circuit court, has no application to a controversy between a citizen of the state in which the suit is brought and an alien. *Stinson v. St. Paul, Stillwater and Taylor's Falls R. R. Co.*, 20 Minn., 492. 1874.

22. Consolidation of railways. Where two corporations existing in different states are in accordance with law consolidated into one by the sale of the franchises and property of one corporation to the other, the latter becomes the one consolidated company, and its citizenship is to be considered in determining the right of the consolidated company to sue in the federal court. *Held*, accordingly, that the Chicago, Burlington and Quincy R. R. Co., formed by consolidation of the Burlington and Missouri River R. R. Co. in Nebraska with the former company, is an Illinois corporation. *Antelope County v. Chicago, Burlington and Quincy R. R. Co.*, 4 McCrary (U. S. C. C.), 46. 1883. See, also, *Chicago and Western Indiana R. R. Co. v. Lake Shore and Mich. Southern R'y Co.*, 5 Federal Reporter, 19; 10 Bissell (U. S. C. C.), 122. 1881.

23. Corporations. Corporations have citizenship for the purposes of suing and being sued, and are embraced in the United States legislation with reference to the removal of causes to its courts from state courts, *Stan-*

ley v. Chicago, Rock Island and Pacific R. R. Co., 62 Mo., 508, 1875; *Horne v. Boston and Maine R. R. Co.*, 12 Amer. & Eng. R. R. Cases (U. S. C. C.), 287, 1883; *Maltz v. American Express Co.*, 1 Flippin (U. S. C. C.), 611, 1876; *Williams v. Missouri, Kansas and Texas R'y Co.*, 3 Dillon (U. S. C. C.), 267, 1875.

24. — chartered in several states. A railway company may be chartered by more than one state, and, when so chartered, the company, when sued in the courts of either state, cannot remove the cause to the federal courts. *Henen v. Baltimore and Ohio R. R. Co.*, 9 Amer. & Eng. R. R. Cases, 496; 17 West Va., 881, 1881; *Baltimore and Ohio R. R. Co. v. Pittsburgh, Wheeling and Ky. R. R. Co.*, 17 West Va., 812, 1881; *Horne v. Boston and Maine R. R. Co.*, 18 Federal Reporter, 50, 1883; *Johnson v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 9 Federal Reporter, 6, 1881; *Memphis and Charleston R. R. Co. v. Alabama*, 107 U. S., 581, 1882; *Uphoff v. Chicago, St. Louis and New Orleans R. R. Co.*, 5 Federal Reporter, 545, 1880.

25. Criminal cases. The act of March 3, 1875, does not make provision for the removal of a criminal case from a state court to the federal courts upon a claim of alienage. So held on application to remove a cause where defendant was indicted under the statute for negligently killing a person, the statute providing for a penalty of \$5,000 for the benefit of the representatives of the deceased. *State v. Grand Trunk R'y Co.*, 3 Federal Reporter, 887. 1880.

26. Default. A default on an issue of law raised by a demurrer is a trial within the meaning of the act of congress of 1875 as to removal of causes, and precludes a removal. If a cause is at issue, and might have been put in a condition for trial by plaintiff putting it on the calendar and noticing it, he cannot, although prevented from doing so by injunction, have it afterwards removed under the act of 1875. *Bright v. Milwaukee, etc., R. R. Co.*, 1 Abbott's New Cases (N. Y.), 14. 1876.

27. Duty of state court. Where a corporation, created and existing under the laws of another state, and having its principal office in another state, is sued in a court of

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Illinois, and, at the first term at which the cause could be tried, presents its petition and bond in due form for the removal of the cause to the circuit court of the United States, and no objection is raised as to the form or sufficiency of the bond, it is the duty of the state court to make the order for the removal. *Empire Transportation Co. v. Richards*, 88 Ill., 401. 1878.

28. Error in remanding; mandamus. The order of a circuit court remanding, for want of jurisdiction to hear it, a case removed from a state court into it, is not a "final judgment" in that sense which authorizes a writ of error. The remedy of the party against whose will the suit has been remanded is by *mandamus* to compel action, and not by a writ of error to review what has been done. *Railroad Co. v. Wiswall*, 23 Wallace, 507. 1874.

29. Evidence taken in state court. Where depositions taken to be used in an action in a state court that has been dismissed would be admissible as evidence under the statute of the state in another suit subsequently brought, and such second suit, after being brought, has been removed from the state court into the United States circuit court, under the provisions of § 721 of the Revised Statutes, such depositions are admissible in the circuit court. *Gravelle v. Minneapolis and St. Louis R'y Co.*, 16 Federal Reporter, 435. 1882.

30. Failure to file record. A cause removed under act of March 3, 1875, will be remanded if the record is not filed on the first day of the next session of the federal court. *Bright v. Milwaukee and St. Paul R. R. Co.*, 14 Blatchford (U. S. C. C.), 214, 1877; *McLean v. St. Paul and Chicago R'y Co.*, 16 ib., 309, 1879. See, also, *St. Paul and Chicago R'y Co. v. McLean*, 65 Howard's Practice (N. Y.), 454. 1883.

31. — In such case a second removal upon the same ground cannot be had. *McLean v. St. Paul and Chicago R'y Co.*, 17 Blatchford (U. S. C. C.), 333, 1879; *St. Paul and Chicago R'y Co. v. McLean*, 65 Howard's Practice (N. Y.), 454, 1883.

32. Federal corporation. A suit cannot be removed upon the sole ground that it is a suit by or against a corporation organized under the laws of the United States. *Myers v.*

Union Pacific R'y Co., 3 McCrary (U. S. C. C.), 578; 16 Federal Reporter, 292, 1882; *Adams Express Co. v. Denver and Rio Grande R'y Co.*, 16 Federal Reporter, 712, 1883; *Magee v. Union Pacific R. R. Co.*, 2 Sawyer (U. S. C. C.), 447, 1873. *Contra*, *Union Pacific R. R. Co. v. McComb*, 17 Blatchford (U. S. C. C.), 510, 1880; 21 Amer. R'y Rep., 266; 1 Federal Reporter, 266; *Union Pacific R. R. Co. v. McComb*, 58 Howard's Practice (N. Y.), 478, 1880; *Bauman v. Union Pacific R. R. Co.*, 3 Dillon (U. S. C. C.), 367, 1875. See *Turton v. Same*, ib., 366. 1875.

33. — An act of congress granting to a railway company, organized under territorial legislation, right of way through the public domain does not create the corporation, but only grants to an existing corporation certain rights, and constitutes no ground of jurisdiction on the part of the federal courts in a case in which the cause of action does not in any sense rest upon or grow out of the grant of such right of way. *Adams Express Co. v. Denver and Rio Grande R'y Co.*, 4 McCrary (U. S. C. C.), 77. 1883.

34. — A corporation chartered by the United States is neither an alien nor a citizen, and hence a suit in which it is a party may be removed from the state court to a federal court at any time before trial or final hearing. *Eby v. Northern Pacific R. R. Co.*, 13 Philadelphia, 161. 1879.

35. Federal question. Where two corporations, organized under the laws of Illinois, executed a contract to be performed in that state, which, according to the decisions of the supreme court of the state, they had no power to make, and which, according to said decisions, was void, and one of the contracting parties brought suit in a court of the state of Missouri, the supreme court of which had previously, in a suit between the same parties, held the contract valid, *held*, that the cause could not be removed to this court because of said failure of the supreme court of Missouri to follow the decisions of the supreme court of Illinois, the case not resting on a federal law. *Wiggins Ferry Co. v. Chicago and Alton R. R. Co.*, 11 Federal Reporter, 381; 3 McCrary (U. S. C. C.), 609. 1882.

36. — In order to entitle a corporation chartered by congress to remove, under § 640

Injunction — Jurisdiction.

of the Revised Statutes of the United States, a suit commenced against it in a state court, its application for removal must show that such corporation is not a banking corporation, and that it has a defense arising under the constitution, or some treaty or law of the United States. *Texas and Pacific R'y Co. v. McAlister*, 12 Amer. & Eng. R. R. Cases (Tex.), 239. 1883.

37. — In order for a railway company to remove a suit brought against it for extortion, from a state to the federal court, on the ground that a statute of the state impairs the validity of its charter in violation of the United States constitution, it is not necessary to decide that the immunity claimed by the defendant can be sustained. If it appears that there is in the suit a question arising under the national constitution, that is sufficient. *People of Illinois v. Chicago, Burlington and Quincy R. R. Co.*, 11 Bissell (U. S. C. C.), 584; 16 Federal Reporter, 706. 1883.

38. — Where the defense sets up matters involving the construction of the constitution of the United States the cause is removable to the federal courts. So held where the provisions of the constitution of California in relation to taxation were assailed by the defendant. *San Mateo County v. Southern Pacific R. R. Co.*, 7 Sawyer (U. S. C. C.), 517. 1892.

39. — That the courts of one state are called upon to construe the laws of another state is no ground for removal of the cause to the federal courts. *Chicago and Alton R. R. Co. v. Wiggins Ferry Co.*, 9 Amer. & Eng. R. R. Cases (U. S. S. C.), 509. 1883.

40. — The truth of averments made by a defendant corporation in its petition for removal, to the effect that it has a defense arising under or by virtue of the constitution or laws of the United States, cannot be inquired into or controverted on a motion to remand the cause to the state court. *State v. Texas and Pacific R. R. Co.*, 3 Woods (U. S. C. C.), 308. 1879.

41. **Injunction.** The court of last resort of a sovereign state cannot by a federal court, by injunction or other process against the litigants, be deprived of its power to control by *mandamus* the inferior courts of the state in the discharge of their duties.

White v. Chesapeake and Ohio R. R. Co., 20 W. Va., 792. 1885.

42. — A township in Illinois and a taxpayer thereof, on behalf of himself and other tax-payers, filed their bill in a court of that state against certain state, county and township officers and the "unknown owners and holders" of certain township bonds, each payable in the sum of \$1,000. The bill prayed for an injunction to restrain the levy and collection of a tax to pay the principal of the bonds or any interest thereon. A., a citizen of another state, was the owner of all of them. *Held*, that he was entitled, under the act of March 3, 1875, to remove the suit to the circuit court of the United States. *Harter v. Kernochan*, 103 U. S., 562, 1880; 3 Amer. & Eng. R. R. Cases, 82.

43. **Intervention.** Intervenors who have without leave filed their petition of intervention may apply for removal of the cause to the federal courts. *Snow v. Texas Trunk R. R. Co.*, 16 Federal Reporter, 1. 1882.

44. — Before a suit is pending in a state court, for the purpose of the removal act, it must be a suit within the meaning of the state law; and the mere filing of a petition of intervention, without the issuing or service of notice or process of any kind, does not constitute a suit within the meaning of the law of Iowa. Code of Iowa, 1873, § 2599. *Iowa and Minnesota Construction Co. Receivership*, 6 Federal Reporter, 799; 2 McCrary (U. S. C. C.), 178. 1881.

45. **Judgment.** Where a party to a cause, properly removable to the federal courts, presents a proper petition and bond for such removal, and complies with the statute in relation to the removal of causes, all subsequent proceedings in the state court are void, and a judgment afterwards rendered in the state court may be attacked for want of jurisdiction in a subsequent action upon such judgment. *Risley v. Indianapolis, Bloomington and Western R'y Co.*, 1 Indianapolis Superior Court Rep., 572. 1874.

46. **Jurisdiction.** A suit in the state court which falls within the description of removable suits may be removed, although it could not have originally been brought in the federal court. *Warner v. Pennsylvania R. R. Co.*, 13 Blatchford (U. S. C. C.), 231. 1876.

Leased Lines — Nominal Parties.

47. Leased lines. A., a corporation of Maryland, having assumed the right to take, and B., a corporation of Virginia, the right to grant, a lease of the railroad and franchises of the latter in Virginia, A., with the implied assent of both states, took possession, and is in the actual use of the road and franchises. *Held*, that A. did not thereby forfeit or surrender its right to remove into the circuit court a suit instituted against it in a court of Virginia by a citizen of that state. *Railroad Co. v. Koontz*, 104 U. S., 5, 1881; 4 Amer. & Eng. R. R. Cases, 105.

48. — In a suit against an Iowa corporation and an Illinois lessee, holding under a perpetual lease the railway of the former company, *held*, that there was no separable controversy entitling the Illinois corporation to a removal of the cause to the federal courts. *Le Mars v. Iowa Falls, etc., R. R. Co.*, 4 McCrary (U. S. C. C.), 218. 1882.

49. — A foreign railroad corporation, by merely leasing, possessing and operating the property of a domestic railroad corporation in Ohio, does not thereby become an Ohio corporation, nor such citizen of the state. *Baltimore and Ohio R. R. Co. v. Cary*, 28 Ohio St., 203, 1876; 14 Amer. R'y Rep., 97; *Railway Co. v. Stringer*, 32 Ohio St., 468, 1877.

50. — Where a railroad company, which was incorporated in another state, leases a railroad lying in this state, and operates the same as owner thereof, and an injury occurs thereon, the person having the right of action for such injury may sue the railroad company in the courts of this state, and such company has no right to remove the suit to the federal court. *Baltimore and Ohio R. R. Co. v. Wightman*, 29 Grattan (Va.), 431, 1877; *Same v. Noell*, 32 ib., 394, 1879.

51. Local prejudice. Removal, on the ground of local prejudice, may be made at any time before trial. *Cox v. East Tenn., Va. and Ga. R. R. Co.*, 62 Ga., 163. 1878.

52. — Sufficiency of the affidavit determined. *Baltimore, Pittsburgh and Chicago R'y Co. v. New Albany and Salem R. R. Co.*, 53 Ind., 597. 1876.

53. — Under the third subdivision of § 639 of the Revised Statutes of the United States, commonly known as "the local prejudice

act," it is not necessary, in order to the removal of a cause, that it should appear from the record that the parties were citizens of different states at the time the suit was commenced. *Miller v. Chicago, Burlington and Quincy R. R. Co.*, 3 McCrary (U. S. C. C.), 460. 1881.

54. Mandamus. Where a state court had properly refused an application to remove a case to the United States court, the case not being removable, and after such refusal the petitioner obtained a record of the case, and filed it in the federal court, which docketed the case, and the said petitioner then took a copy of said order of the federal court and filed it in the state court, and objected to that court proceeding further in the case for the reason that under such circumstances the case had been docketed in the federal court, and the judge of the state court refused to proceed, on application the supreme court of appeals of the state will issue a *mandamus* to compel him to proceed with the case. *White v. Chesapeake and Ohio R. R. Co.*, 20 W. Va., 792. 1883.

55. Motion for execution against stockholder of corporation. A motion, under the Missouri statute as to corporations, for execution against a stockholder cannot be removed to the federal court. It is not a "suit at law or in equity" within the meaning of these words as used in the statutes giving the right of removal of causes from state to federal courts. *Webber v. Humphreys*, 5 Dillon (U. S. C. C.), 223. 1879.

56. Mortgage. A suit for the foreclosure of a mortgage, commenced in a state court, was removed to the circuit court, where a motion to remand it was made and overruled. A final decree in favor of the complainant was passed, whereunder the mortgaged property was sold. From the order confirming the sale an appeal was taken. *Held*, that the final decree, not disclosing a want of jurisdiction of the court below as to subject matter or parties, will be examined here only to ascertain whether the sale conformed to its provisions. *Turner v. Farmers' Loan and Trust Co.*, 106 U. S., 552, 1882; 9 Amer. & Eng. R. R. Cases, 580.

57. Nominal parties. The right of removal is not defeated by the presence of a

Non-Negotiable Contracts — Stock and Stockholders.

party who is merely a formal party to the suit. *Chicago, St. Louis and New Orleans R. R. Co. v. McComb*, 17 Blatchford (U. S. C. C.), 371. 1879.

58. Non-negotiable contracts. A non-negotiable railway subscription cannot by assignment become subject to suit in the federal courts, where the original contract was between citizens of the same state. *Ferry v. Town of Merrimack*, 18 Federal Reporter, 657. 1883.

59. Non-suit. Where proper application is made by defendant for the removal of a cause, the state court proceeds no further with the cause, and a non-suit cannot be taken therein by plaintiff. *Beery v. Chicago, Rock Island and Pacific R. R. Co.*, 64 Mo., 533, 1877; *Powell v. Same*, ib., 544, 1877.

60. Petition. If the petition is sufficient, it is the duty of the state court to proceed no further in the cause, but at once to transfer the jurisdiction to the United States court. But if the petition is insufficient, the state court may properly disregard it, and refuse to remove the cause. *Indianapolis, Bloomington and Western R'y Co. v. Risley*, 50 Ind., 60. 1875.

61. Power to determine the facts. The state courts have the power to inquire into the truth of the facts alleged in a petition for the removal of a cause from the state to the federal court. *Burch v. Davenport and St. Paul R. R. Co.*, 46 Ia., 449. 1877. But the ultimate question rests with the federal courts. *Jackson v. Alabama Great Southern R. R. Co.*, 53 Miss., 648. 1881.

62. Procedure. Causes at common law, removed to the federal courts, will there proceed under the practice prevailing in the state courts. *Bills v. New Orleans, St. Louis and Chicago R. R. Co.*, 13 Blatchford (U. S. C. C.), 227. 1876.

63. Proceedings after removal. The federal courts will respect an order in relation to an attachment, made before the removal of the cause. *Phelps v. Canada Central R. R. Co.*, 20 Blatchford (U. S. C. C.), 450. 1882.

64. — The time of filing a plea in abatement is not extended by the removal of the cause to the federal courts. *Wertheim v. Continental R'y and Trust Co.*, 20 Blatchford (U. S. C. C.), 503. 1832.

65. Receiver. Where the receiver of a construction company, appointed by a state court, has gone on under the terms of the order of appointment with the work of construction, and has made contracts for that purpose, if a controversy arises between a contractor and the receiver, or between a contractor and other claimants of a common fund, the state court under whose authority the contracts were entered into is the proper tribunal to decide the questions, and the contractor is not entitled to have the cause removed to the federal court on the ground of citizenship. *Buell v. Cincinnati, Effingham and Quincy Construction Co.*, 10 Bissell (U. S. C. C.), 555. 1881.

66. Reorganized corporation. Where two persons in one state, trustees for bondholders of a mortgage of a railroad owned by a company in another, foreclosed the mortgage, bought in the road in trust for the bondholders, and then leased it to a citizen of the state to which they themselves belonged, and then a majority of the bondholders in the state where the original company was, in pursuance of a statute there, formed themselves into a new corporation, to which the statute gave ownership and control of the road, and suit was brought in a state court against the lessee of the road by the trustees who had made the lease, *held*, that the defendant could not remove the suit from the state court to the federal court on the ground that it was wholly between the new corporation and the lessee, and that the trustees were now merely nominal parties. *Knapp v. Railroad Co.*, 20 Wallace, 117, 1873; 10 Amer. R'y Rep., 95.

67. Severable causes. Where an action is brought against a resident and non-resident defendant sounding in tort, and each is liable as a wrong-doer, and the controversy is severable, the party bringing the suit cannot, by joining the non-resident defendant, debar him from asserting a right given by the act of 1875. *Clark v. Chicago, Milwaukee and St. Paul R'y Co.*, 11 Federal Reporter, 355; 3 McCrary (U. S. C. C.), 591. 1832.

68. Stock and stockholders. In a controversy between a railroad and its stockholders, as to the validity of certain shares of the railroad stock, the cause cannot be removed

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to the federal court upon the application of the holder of such stock, where there is no controversy as to its ownership. *Shumway v. Chicago and Iowa R. R. Co.*, 4 Federal Reporter, 885. 1880.

69. Taxation. In a suit to recover state and county taxes, defendant answered and also filed a bond and petition for a removal of the cause to the federal court on the ground that the suit was one arising under the constitution and laws of the United States, and, the petition being denied, applied to the state supreme court for a writ of prohibition. Writ denied. *Central Pacific R. R. Co. v. Superior Court of Tulare County*, 63 Cal., 618. 1883.

70. Territorial court. The act of March 3, 1875, is not applicable to a suit brought in a territorial court, although, on the admission of the territory as a state, such suit passed into the jurisdiction of a state court. *Ames v. Colorado Central R. R. Co.*, 4 Dillon (U. S. C. C.), 260. 1877.

71. Time of removal. An application for the removal of a cause to the federal court on the ground of the citizenship of the parties should be made before or at the term at which the cause is first triable under the law, whether the parties are ready to try it or not. *Chicago, Burlington and Quincy R. R. Co. v. Welch*, 44 Ia., 665, 1876; *Barber v. St. Louis, Kansas City and Northern R'y Co.*, 43 Ia., 223, 1876; *White v. Chesapeake and Ohio R'y Co.*, 20 W. Va., 792, 1883; *Warner v. Pennsylvania R. R. Co.*, 6 Hun (N. Y.), 197, 1875. See, also, *Shirley v. Waco Tap R. R. Co.*, 13 Federal Reporter, 705. 1882.

72. Time of trial. In the case of a removal the jurisdiction of the federal court is not complete, so as to hear and determine the cause, before the day prescribed by the statute, although a transcript has been filed. *Barnesville and Moorhead R'y Co., In re*, 4 Federal Reporter, 10; 2 McCrary (U. S. C. C.), 216, 1880; *New Orleans City R. R. Co. v. Crescent City R. R. Co.*, 5 Federal Reporter, 160. 1881.

73. — Where a case is removed into the United States circuit court after it has been put on the calendar and noticed for trial in the state court, it stands ready for trial in the circuit court immediately upon the record being filed therein. *Waldman v. Penn-*

sylvania R. R. Co., 13 Federal Reporter, 801; 64 Howard's Practice (N. Y.), 198. 1882.

74. Two defendants. Where one defendant removes the cause as to him, and the other defendant contests the suit in the state courts, the question of the ouster of the jurisdiction of the state court as to the remaining defendant cannot be raised for the first time on appeal to the supreme court. *St. Louis, Wichita and Western R. R. Co. v. Ransom*, 29 Kans., 298. 1883.

75. Whole suit removed. If there is a controversy between citizens of different states, and the statute providing for the removal of causes from a state to the federal court has been complied with so as to authorize a removal, then the removal takes the whole suit, notwithstanding there may be other controversies in it. *Farmers' Loan and Trust Co. v. Chicago, Pekin and Southwestern R. R. Co.*, 9 Bissell (U. S. C. C.), 133. 1879.

REPLEVIN.

See PLEADING; TAXATION.

1. Dwelling-house. A house held subject to replevin under the facts in the case. *Central Branch Union Pacific R. R. Co. v. Fritz*, 20 Kans., 480. 1878.

2. Rails. Upon motion after non-suit in replevin for the return of a large quantity of imported rails, and for damages for their detention, it appeared by the officer's return that he had replevied the rails and delivered them to the plaintiff, and, by an indorsement upon the writ, that the plaintiff had received them; but it also appeared that from the time of their importation by the defendant, they had been in bond under the laws of the United States; that the plaintiff had never obtained actual possession, — the warehouse receipt and the custom-house delivery order, the possession of which the parties regarded as a necessary means for obtaining possession, and without which the warehouseman refused to deliver, being in the possession of the defendant, who refused to transfer them to the plaintiff. *Held*, that the defendant, having prevented the plaintiff's obtaining actual possession of the rails, was not entitled to damages for their detention; and that, as there had never been an actual

Do Not Create a Liability to a Third Party — Baggage — State and Federal Courts.

change of possession, an order for a return was unnecessary. *Ware River R. R. Co. v. Vibbard*, 114 Mass., 458. 1874.

REPORTS OF OFFICERS.

1. Do not create a liability to a third party. Neither the reports of officers of a corporation made to its stockholders, nor reports made to its directory, in which certain claims for which the corporation is not bound are estimated as liabilities of the corporation, will bind the corporation to pay either principal or interest of the debt, or prevent it from changing its purpose with regard thereto. *Hall v. Mobile and Montgomery R. R. Co.*, 58 Ala., 10. 1877.

RES ADJUDICATA.

1. Baggage; merchandise. An action for loss of baggage is not a bar to a second suit for loss of merchandise contained in the trunk of a passenger. *Millard v. Missouri, Kansas and Texas R. R. Co.*, 20 Hun (N. Y.), 191. 1880. See *Same v. Same*, 86 N. Y., 441; 6 Amer. & Eng. R. R. Cases, 311. 1881.

2. Carrier; warehouseman. A cause of action for goods burned while in defendant's hands as a carrier, and a cause of action existing at the same time in favor of the same person against the same defendant, for goods destroyed by fire while in such defendant's hands as a warehouseman, need not be joined; and a judgment upon one is no bar to a subsequent action on the other. *Kronshage v. Chicago, Milwaukee and St. Paul R'y Co.*, 45 Wis., 500. 1878.

3. Connecting lines; suit against one carrier. If one carrier is sued for the loss of goods, and notifies a second carrier, to whom he delivered the same for transportation, of the pendency of the suit, and requires him to defend, the judgment against the first is not conclusive as to the question of the liability of the second. *Chicago and Northwestern R. R. Co. v. Northern Line Packet Co.*, 70 Ill., 217. 1873.

4. Contract of lease. Where, in a judicial proceeding, the matter passed upon is the right, under the language of a certain contract, to take certain gross receipts on a

railroad for the lease of the same, the judgment concludes the question of the meaning of the contract on a suit for subsequent tolls received under the same contract. *Tioga R. R. Co. v. Blossburg and Corning R. R. Co.*, 20 Wallace, 137, 1873; 10 Amer. R'y Rep., 81.

5. Contract of carriage of goods. In an action brought against one of two railroad companies for breach of their joint agreement to carry goods from A. to B., the defendant denied that it had agreed to carry or be responsible for the goods, except for part of the distance. The issue thus joined was found for the defendant, and judgment entered thereon. Held, that this judgment was a bar to any subsequent action against both companies upon the same contract. *Reynolds v. Pittsburgh, Cincinnati and St. Louis R'y Co.*, 29 Ohio St., 602. 1876.

6. Demurrer. A judgment on demurrer is a bar on the facts stated. *Gould v. Evansville and Crawfordsville R. R. Co.*, 91 U. S., 526. 1875.

7. Negotiable paper. The judgment in an action brought by the holder of negotiable paper against the indorsers is not a bar to his subsequent action against the maker, who was not notified of the pendency of the first action. *Railroad Co. v. National Bank*, 102 U. S., 14. 1880.

8. Non-suit. Where a judgment of non-suit is pleaded in bar the rulings of the court must be shown in evidence. *Spurlock v. Mo. Pacific R'y Co.*, 76 Mo., 67. 1882.

9. State and federal courts. Where the same matters involved in a suit in equity were involved in a prior suit, though in the United States circuit court, and the two suits were between the same parties, the decision in the prior suit will be conclusive on the trial of the second suit brought in the state court. *Ruegger v. Indianapolis and St. Louis R. R. Co.*, 103 Ill., 449. 1882.

10. — Where a suit commenced in the state court has been carried to the supreme court, and a new trial ordered, the plaintiff has the right to dismiss his suit and commence in the federal court; the opinion of the supreme court does not constitute a bar unless it finally determines the suit. *Hazard v. Chicago, Burlington and Quincy R. R. Co.*, 4 Bissell (U. S. C. C.), 453. 1865.

Miscellaneous.

11. Trespass; streets. A judgment for damages, for constructing a railway over a street without payment of compensation to an abutting owner, is no bar to another action for the continuance of the use for railway purposes. *Scott v. Indianapolis and Vincennes R. R. Co.*, 10 Amer. & Eng. R. R. Cases (Ind.), 189. 1883.

RESCISSION.

1. Failure of title. Mere failure of title in the grantor will not authorize a rescission. *Hart v. Hannibal and St. Joseph R. R. Co.*, 65 Mo., 509. 1877.

2. Right of way contract. Even if a party who has given his obligation to a railway company to convey a right of way had a right to rescind the same for delay in the construction of the road, good faith would require him to give notice of such intention before the company takes possession of the land and constructs its road, so that it may adopt another location, or take proceedings to condemn, before rendering itself otherwise liable. *Ross v. Chicago, Burlington and Quincy R. R. Co.*, 77 Ill., 127. 1875.

REWARDS FOR ARREST OF CRIMINALS.

1. When reward is earned. Where a railway company offered certain rewards for the apprehension and conviction of criminals, and the criminals were arrested, but not convicted, owing to the dismissal of the proceedings against them, which dismissals were entered at the request of the corporation, *held*, that the company was liable for the rewards. *Louisville and Nashville R. R. Co. v. Goodnight*, 10 Bush (Ky.), 552. 1874.

RIGHT OF WAY.

See CONTRACT; CONVEYANCE; CORPORATE POWERS; EMINENT DOMAIN; FIRES; FRANCHISES; INJUNCTION.

1. Construction of railway; contract; breach. In an action for breach of defendant's contract in constructing its track nearer than seven rods from plaintiff's grist-

mill, and so that it injured plaintiff's mill-dam, the jury found that the defendant had constructed its track in the manner alleged, and that plaintiff's mill property was thereby depreciated in value to a certain amount, but did not find expressly that plaintiff owned the property. The question submitted to the jury related only to plaintiff's property. *Held*, that the omission could not prejudice the defendant, and is not ground for reversing a judgment against it. *Hutchinson v. Chicago and Northwestern R'y Co.*, 41 Wis., 541. 1877.

2. Contract; breach; mutual breaches. If plaintiff covenanted to give defendant a right of way over a larger amount of land than he owned, he may be liable to defendant in damages for a breach of the contract, but that will not defeat his right of action for defendant's breach of the contract on its part. *Id.*

3. — deed in fee. An owner of land entered into articles of agreement with a railway company, whereby, "*in consideration of \$450, payable as thereafter stated, with interest in full, for right of way and all claims for damages,*" he agreed to convey to the said company, "by a good and sufficient deed in fee simple, with covenant of general warranty," a certain strip of land. "Upon the delivery of said deed . . . at any time after the expiration of five years, the said . . . company agreed to pay . . . the said sum of \$450." The portions of the above contract cited in italics were written and the rest printed. *Held*, that there was no conflict or repugnance between the different parts of the contract, and that the plain intent of the parties was to contract for a conveyance of the strip of land in fee. *Wheeling, Pittsburgh and Baltimore R. R. Co. v. Gourley*, 99 Pa. St., 171. 1881.

4. — Where the owner of said land, after entering into the above articles of agreement, conveyed the land to a third party, reserving to himself only the right to convey to said company a right of way over said strip of land, *held*, that he had put it out of his power to carry into execution his contract with the company, and that, therefore, he could not bring an action of equitable ejectment against said company to

Conveyance — Notice.

enforce payment of the purchase money for said strip of land. *Id.*

5. Conveyance. A conveyance of right of way construed. *Warner v. Sandusky, etc., R. R. Co.*, 11 Amer. & Eng. R. R. Cases (Ohio), 417, 1883; *Hutchinson v. Chicago and Northwestern R'y Co.*, 37 Wis., 582, 1875.

6. Drainage. A deed conveyed a strip of land to a railroad company, its successors and assigns forever, "provided always, and this deed is upon the express condition," that a certain system of drainage was to be kept up by the company. *Held*, that this created a condition subsequent in the deed, and voidable by the grantor upon condition broken. *Hammond v. Port Royal and Augusta R. R. Co.*, 15 So. Car., 10, 1880; 11 Amer. & Eng. R. Cases, 352. See, also, *Same v. Same*, 16 So. Car., 567, 1881; 11 Amer. & Eng. R. Cases, 352.

7. Donation of right of way; right of donee to permit another company to use it. Where the donee of a right of way had consented to the use of the same by another railroad company, *held*, that this constituted a good defense to an application by the donor for an injunction to restrain defendant from the use and occupation of the right of way. *Holbert v. St. Louis, Kansas City and Northern R'y Co.*, 38 Ia., 315. 1874.

8. Easement; spring. A grant of a right of way to a railway company, reserving a spring and the privilege of laying pipes thereto, held to entitle the company to lay its tracks over the spring upon protecting the same properly. *Matthews v. Delaware and Hudson Canal Co.*, 27 Hun (N. Y.), 427. 1880.

9. Grant. A right of way cannot be granted by deed, estoppel, or otherwise, by any one but the land owner; a mere equitable owner of an undivided interest in a possible reversion cannot give it, and it cannot well exist over an undivided interest alone. *Tapert v. Detroit, Grand Haven and Milwaukee R'y Co.*, 50 Mich., 267; 11 Amer. & Eng. R. Cases, 413. 1888.

10. License. Where a licensee has a right to the possession of land for a particular purpose, and commits no act which his license does not cover, the owner of the land cannot destroy such right. *Buchanan v. Logansport, etc., R'y Co.*, 71 Ind., 265. 1880.

11. — *H.*, being the owner of certain land and the mines thereunder, by indenture conveyed the surface to *C.*; but he excepted and reserved a "wagon or cart road" of the width of eighteen feet, to be at all times thereafter kept in repair at his own costs and charges. *Held*, that these words would not enable *H.* to lay down a railroad or tramway for the carriage of coals raised from neighboring collieries belonging to him. *Bidder v. North Staffordshire R'y Co.*, Law Reports, 4 Queen's Bench Division, 412. 1878.

12. — An answer, in an action to recover real property, averred that the defendant was granted a license by the plaintiff to build and operate a railway upon such land under a contract that the damages thereto would thereafter be settled, and that, acting upon such license, the defendant built a railway thereon, and expended large sums of money, of which the defendant had knowledge. *Held*, that said answer was sufficient on demurrer. *Held*, also, that it was not necessary to aver to what officer or agent of the company the license was given. *Buchanan v. Logansport, etc., R'y Co.*, 71 Ind., 265. 1880.

13. — Under a trust deed which vested the legal title to lands in a trustee for the benefit of a married woman and her children, but which gave to the husband the absolute control and management of the land, the husband might give to a railway company license to construct its line over such lands, binding so long as he lived, or, at least, until revoked, unless such right of way injuriously affected the duties and limitations imposed upon the husband by the deed. *Tutt v. Port Royal and Augusta R. R. Co.*, 16 So. Car., 365. 1881.

14. — Where a railway company seeking to appropriate lands does not obtain authority from the owner of the fee, it can obtain no rights of control over the land by any license or grant from the holder of a contingent dower interest or a tenant at will. *Toledo, Ann Arbor and Grand Trunk R'y Co. v. Dunlap*, 47 Mich., 456, 1882; 5 Amer. & Eng. R. Cases, 378.

15. Notice; railway grade. A vendee who purchases land with an open, graded railway track across it, with its embank-

Execution — Selection — Delivery to Carrier is Delivery to Purchaser

ments and excavations plainly visible, purchases with notice of whatever rights in said track there may be outstanding, and the warranty deed of his vendor cannot affect such outstanding rights in third parties, nor can he divest such rights upon a breach by the third parties of a condition subsequent contained in the grant to them by the vendor. *Paul v. Connersville and Newcastle Junction R. R. Co.*, 51 Ind., 527, 1875; *Fl. Wayne, Muncie and Cincinnati R. Co. v. Gough*, ib., 600, 1875.

16. Street; abutting owner of private way. A land owner agreed to convey to a railway company a strip of land, part of which was to be occupied by its track, and part to be used for a public street, but the whole to revert absolutely on breach of condition. He afterwards made a plat on which this strip was marked as a street, and, in acknowledging it, provided that it should remain a street if the company performed its obligations, but if not, it should instantly revert. After his death his estate was partitioned, except the railway strip, and one of the partitioners received certain premises abutting thereon, which he sold. This partitioner afterwards obtained grants from the rest of the heirs, and conveyed the strip to the railway company unconditionally. A subsequent grantee of the premises which he had previously sold claimed a right to use the street, where the track lay, as a private way appurtenant to his lots, and sought to enjoin the company from occupying it with another track. *Held*, that the bill for injunction would not lie; the plat had been made with reference to a way that had never been unconditionally dedicated, and the premises occupied by the way had afterwards been unconditionally conveyed to the company, and became its private property, before complainant's title had passed out of a representative of the estate. *Tapert v. Detroit, Grand Haven and Milwaukee R'y Co.*, 50 Mich., 267; 11 Amer. & Eng. R. R. Cases, 413. 1883.

17. Width. Where a statute authorizes a railway company to receive, from owners of land over which it is about to construct its line, conveyances of right of way, not exceeding a specified width, an instrument granting such right, without specifying the

width, should be construed as granting a right of way as wide as the company may choose to occupy, not exceeding the statutory width. *Indianapolis, Peru and Chicago R'y Co. v. Rayl*, 69 Ind. 424, 1880; 3 Amer. & Eng. R. R. Cases, 182.

ROLLING STOCK.

See MORTGAGE.

1. Execution. Rolling stock is part of the realty and cannot be seized on execution. *Grand Trunk R'y Co. v. Eastern Counties Bank*, 10 Lower Canada Jurist, 11. 1865.

ROUTE.

See CHARTER; CORPORATE POWERS; RIGHT OF WAY; STREET RAILWAYS; SUBSCRIPTIONS BY INDIVIDUALS.

1. Selection; filing map. A railroad company having filed a map showing its proposed route, brought this action to restrain defendant, another company, from locating or constructing its road upon such route or any part thereof. *Held*, denying a motion for a preliminary injunction, that, even granting that plaintiff had acquired the right to purchase or condemn the lands in question, it had a sufficient remedy without such action in its power to acquire the lands and eject the defendant; but that it had not, by such location, acquired the right to prevent the owner from using it as he chose, even for the building thereon of another road, until it had actually acquired title. *N. Y. and Albany R. R. Co. v. N. Y., West Shore, etc., R. R. Co.*, 11 Abbott's New Cases (N. Y.), 336. 1882.

2. — The purchase of the lands in question by another railroad company will not, in such case, sustain the right to an injunction. If plaintiff's rights are thereby taken away, it has no standing in court; if not, it is not injured, in the absence of any act which unfits the lands for its use. *Id.*

SALES.

See EMINENT DOMAIN; EVIDENCE; FRAUD.

1. Delivery to carrier is delivery to purchaser. Goods bought and paid for were de-

Miscellaneous.

livered to a railway company, whose bill of lading was executed to the vendor, acknowledging the receipt of the goods to be delivered to the vendee. *Held*, that the contract for transportation was in legal effect with the vendee, and the company was liable to him for non-delivery of the goods. In such case the title vests in the purchaser, and a delivery of the goods to the carrier is a delivery to the purchaser himself. *Gwyn v. Richmond and Danville R. R. Co.*, 85 N. C., 429, 1881; 6 Amer. & Eng. R. R. Cases, 452.

2. **Sale of railway.** The sale of the Macon and Brunswick Railroad held to be binding upon the state. *Wood v. Macon and Brunswick R. R. Co.*, 68 Ga., 539. 1882.

3. — A railway company has no implied power to sell any portion of the land actually used for the railway or works. *Mulliner v. Midland R'y Co.*, Jessell's Decisions, 252; 48 Law Journal Rep. (Ch.), 258; Law Reports, 11 Chancery Div., 611. 1879. See, also, *Campbell v. Marietta and Cincinnati R. R. Co.*, 23 Ohio St., 168, 1872; *Clarke v. Omaha and Southwestern R. R. Co.*, 5 Neb., 814, 1877.

4. — Contract for sale of a railway franchise construed. *Clarke v. Omaha and Southwestern R. R. Co.*, 4 Neb., 458, 1876; 19 Amer. R'y Rep., 423.

5. — Under the laws of Nebraska a corporation organized for the purpose of building a railroad has no power to sell or dispose of its property or franchises until its road has been constructed. *Ib.*

6. — **purchaser's liability.** A purchaser of the road-bed, property and franchises of a railroad company is not liable for its obligations which are not liens upon the property. *Sappington v. Little Rock, Mississippi River and Texas R. R. Co.*, 37 Ark., 23, 1881; 10 Amer. & Eng. R. R. Cases, 330.

7. — **stockholders.** Where a stockholder in a railroad corporation has signed a contract disposing of its assets, knowing its contents, and voting at meetings of the company to carry it into effect, he cannot afterward repudiate it, or question the *bona fides* of the transaction, no fraud being shown. *Clarke v. Omaha and Southwestern R. R. Co.*, 4 Neb., 458, 1876; 19 Amer. R'y Rep., 423.

8. — The sale of the Shelby Railroad by the trustees of the company to the Louisville, Cincinnati and Lexington R. R. Co., made

upon the condition that it was not to be effectual until ratified by the stockholders of both companies, is declared a nullity and set aside on equitable principles, because no notice was given, as required by the charter, of the meeting of the Shelby R. R. Co. at which the sale was ratified. *Stockholders of Shelby R. R. Co. v. Louisville, Cincinnati and Lexington R. R. Co.*, 12 Bush (Ky.), 62, 1876; 18 Amer. R'y Rep., 218.

SCRIP CERTIFICATES.

1. **Judgment in gold coin.** Where the scrip certificates sued on are for the payment of gold coin, the judgment should be for the amount found due, payable in gold coin; not for the market value of it, payable in paper currency. *Foster v. Atlantic and Pacific R. Co.*, 1 Mo. App., 390. 1876.

SECRET SERVICE.

1. **Directors' powers.** A suggestion that money has been used for "secret service" will not exonerate the directors from accounting for such money. *York and North Midland R'y Co. v. Hudson*, 19 Eng. Law & Equity, 361; 22 Law Jour. Rep. (N. S.), Chanc., 529. 1853.

SECURITY FOR COSTS.

See COSTS.

1. **Executor.** It is discretionary with the trial court whether or not to require security for costs in an action by an executor or administrator. *Tolman v. Syracuse, Binghamton and N. Y. R. R. Co.*, 92 N. Y., 353. 1888.

SET-OFF.

See BONDS OF RAILWAY COMPANIES; CARRIAGE OF MERCHANDISE; GARNISHMENT; PLEADING.

1. **Dismissal.** The railway company sued G., its agent, for a balance due on account. G. had purchased claims against the company, which he pleaded as a set-off. The account was referred and the report showed a balance due G. *Held*, that the company

Administrator—Mistake in.

could not thereafter dismiss the action without the consent of *G. Galbraith v. East Tenn. Va. and Ga. R. R. Co.*, 11 Heiskell (Tenn.), 169. 1872.

2. Wages. In an action by an employe against his employer for wages due, the latter cannot recoup unliquidated damages arising from an act of the employe outside of the line of his duty. *Nashville and Chattanooga R. R. Co. v. Chumley*, 6 Heiskell (Tenn.), 325. 1871.

SETTLEMENT.

1. Administrator. A receipt by an administrator to a railway company in full settlement of an indebtedness to his intestate, held a valid settlement under the facts of the case. *Ruby v. Railroad Co.*, 8 W. Va., 269. 1875.

2. Fraud. Where one who has been injured, and settled her claim for damages, and given a receipt in full, has repudiated and rescinded the settlement for fraud, and brought suit for the original injury, evidence of the representations and promises under which the receipt was obtained ought not to be excluded on the objection that it tended to vary a written contract by parol evidence. *Michigan Central R. R. Co. v. Dunham*, 30 Mich., 128. 1874.

3. — In such an action a modification of a request to charge that an acquiescence in the settlement by using the money, or any portion of it, after the discovery of the alleged fraud would defeat the plaintiff's right of action, by adding the proviso: "Unless you find that she made a tender, or returned the money, or offered to make a tender, and was prevented from completing it by the acts of defendant or its agents," is not error; this addition was necessary to prevent the inference to which the request was open, that a use of the money, although defendant had refused to receive it back, would operate as a waiver of the fraud and an affirmation of the settlement. *Ib.*

4. — In tendering back money it is immaterial whether the bills transferred back are the identical ones received or not; nor was the previous use of \$15 out of the \$100 received, a matter of any consequence. *Ib.*

5. — If a railway company obtains the signature of the plaintiff to a paper, purporting to be a settlement and discharge of the cause of action, by the fraudulent representations that it is merely a receipt for a gratuity, the plaintiff may maintain his action without returning the money paid him. *Mullen v. Old Colony R. R. Co.*, 127 Mass., 86. 1879.

6. — Evidence held sufficient to show that a release was not fraudulently obtained, *Pennsylvania R. R. Co. v. Shay*, 82 Pa. St., 198, 1876; 15 Amer. R'y Rep., 462.

7. Mistake. When parties make out what they believe to be a correct itemized account of their mutual dealings, and the balance is thereupon paid, the items can no longer be considered unsettled within the meaning of R. S., ch. 81, § 84, although one item was omitted by mistake. *Lancey v. Maine Central R. R. Co.*, 72 Me., 34. 1881.

SEWERS.

See WATERCOURSES.

1. Assessments. The expense of constructing a sewer in one of the streets of a city may be assessed upon the track, sleepers and rails of a railroad company, which are laid in such street. *Troy and Lansingburgh R. R. Co. v. Kane*, 9 Hun (N. Y.), 506, 1877; affirmed, *Same v. Same*, 72 N. Y., 614, 1878. See, also, *Baltimore and Potomac R. R. Co. v. Dennison*, 3 MacArthur (Dist. of Columbia), 245. 1879.

2. Street railways. The easement acquired by the appellee under its charter and the ordinances of the city held subject to the paramount right of the city; and in constructing its railway the appellee knew, or was bound to know, that its use of the bed of the street for railway purposes was liable at any time to be interfered with, whenever the city authorities might deem it necessary for the public welfare. *Kirby v. Citizens' R'y Co.*, 48 Md., 168. 1877.

SHIPPING RECEIPTS.

1. Mistake in; estoppel. A railway company is not estopped by its shipping receipt

License — Contract — Right to have Cars Forwarded.

from showing that it has in fact delivered all the goods that it has received. *Horseman v. Grand Trunk R'y Co.*, 30 Upper Canada (Queen's Bench), 130, 1870; *Same v. Same*, 31 ib., 535, 1871.

SIDE-TRACK.

See CONTRACTS; EMINENT DOMAIN; STREETS.

1. **License; private use.** Where parties living adjacent to a railroad track made the grade and furnished the cross-ties for a switch for neighborhood convenience, under a contract with the railroad company that the switch should remain permanently, etc., held, that after the road and franchises of the contracting company had been sold under a decree of foreclosure, the corporation purchasing the same might remove the switch, unless it assumed the original contract, under sec. 3 of the Railroad Act of March 3, 1865. *Smith v. Indianapolis, Peru and Chicago R'y Co.*, 1 Indianapolis Superior Court Rep., 88. 1871.

SLEEPING CARS.

1. **Contract.** Courts ought not to favor a monopoly in the accommodations which are necessities to the traveling public, or foster it by the invention or application of extraordinary or unusual orders or remedies. This principle applied to a sleeping car contract. *Pullman Palace Car Co. v. Texas and Pacific R. R. Co.*, 11 Federal Reporter, 625. 1882.

2. — A contract between a railway company and a sleeping car company construed. *Pullman Palace Car Co. v. Missouri Pacific R'y Co.*, 11 Federal Reporter, 634; 3 McCrary (U. S. C. C.), 645. 1882.

3. **Common carriers.** Sleeping car companies are common carriers and must treat all persons alike. *Nevin v. Pullman Palace Car Co.*, 106 Ill., 222; 11 Amer. & Eng. R. R. Cases, 92. 1893. A passenger, conducting himself with decorum, and tendering the usual fare at a proper time and in an orderly manner, is entitled to a berth if there is one vacant. *Id.*

4. **Injury to passengers; liability of railway company.** A passenger, traveling in

the coach of a sleeping car company, may properly assume, in the absence of notice to the contrary, that the whole train is under one management, and in such case, where he sustains injury by the negligence of one in the employ of the sleeping car company, he may maintain an action against the railway company. What the effect of such notice would be is not determined. *Cleveland, Columbus, Cincinnati and Indianapolis R. R. Co. v. Walrath*, 8 Amer. & Eng. R. R. Cases (Ohio), 371. 1882.

5. **Loss of clothing, etc.** A sleeping car company is not held to the strict accountability of an innkeeper. Its liability is the same as that of the railway company. *Welch v. Pullman Palace Car Co.*, 16 Abbott's Practice (N. S.), 352. 1874. See, also, *Woodruff Sleeping and Parlor Coach Co. v. Diehl*, 84 Ind., 474, 1882; 9 Amer. & Eng. R. R. Cases, 294; *Pullman Palace Car Co. v. Smith*, 73 Ill., 360, 1874; 9 Amer. R'y Rep., 328.

6. — Neither as a common carrier nor as an inn-keeper is a sleeping car company responsible. It must not only furnish a berth to its guests, but keep a watch during the night, exclude unauthorized persons from the car, and take reasonable care towards preventing thefts. If loss should occur by reason of negligence in this regard, the company is liable for such articles as are usually carried by a passenger about his person, and such a sum as may be deemed reasonably necessary for traveling expenses. *Blum v. Southern Pullman Palace Car Co.*, 1 Flippin (U. S. C. C.), 500, 1876; 9 Amer. R'y Rep., 321.

7. **Right to have cars forwarded.** The C. Company was bound to afford to Scottish east coast traffic of the N. B. Company using its railway all usual facilities, including, so far as might reasonably be required, through carriages, and also any greater facilities which it might grant to any other company in respect of such traffic, or of any traffic competitive with it. A Pullman car weighing twenty-one tons is so different from a saloon sleeping carriage weighing three tons that the forwarding of the lighter carriage for one line does not entitle another line to insist on the forwarding of the Pullman car as a similar facility. *Caledonian*

Penalty for not Consuming — Agreement to Maintain Siding.

R'y Co. v. North British R'y Co., 3 Neville & McNamara, 56. 1877.

8. Tickets; contract; change of cars. A passenger purchased of a company engaged in furnishing sleeping cars for the use of passengers over a certain continuous line of railways, a ticket purporting to entitle him to accommodations between certain stations, in a certain sleeping car, and in a berth to be designated on the ticket, by the conductor of such car, in the manner directed by the ticket. Upon entering that car at the starting point, a certain berth was assigned to him, and designated on the ticket in the manner provided by it, by the conductor, but, before arriving at his destination, the car was removed from the train by the defendant, and a different berth in a different sleeping car was offered to him, which he refused, and sued the company for a breach of its contract. *Held*, that by the contract evidenced by the ticket, the passenger was entitled to a continuous passage in that berth, on that particular car, or in an equally desirable berth on an equally safe, convenient and comfortable sleeping car. *Pullman Palace Car Co. v. Taylor*, 65 Ind., 153. 1879.

9. — An answer in such action, alleging that the defendant had simply furnished the car to the railway companies, for the use of passengers, for a certain rent, pursuant to a contract between it and such companies, but admitting that the change of cars was made as alleged in the complaint, is insufficient. *Id.*

10. — loss; expulsion of passenger. Where a passenger who had purchased a ticket for a particular berth in a sleeping car and had lost the same, but gave satisfactory assurance that he had purchased the same, was expelled from the car, there being no abusive language or personal violence used by the conductor in charge, in an honest purpose to execute a reasonable rule of the company, but through a mistaken judgment, it was held that a verdict, in a suit by the passenger against the company, for \$3,000 damages was grossly excessive, and that in such a case, where men might honestly differ in opinion, and where the passenger might have kept his berth by paying the fare of \$1.50, but would not, he was only entitled to recover the price he paid for his ticket

and a reasonable compensation for the trouble and inconvenience he suffered by being deprived of his berth in the sleeping car. *Pullman Palace Car Co. v. Reed*, 75 Ill., 125. 1874.

SMOKE.

1. Penalty for not consuming. The Railways Clauses Consolidation Act, 1845 (§ and 9 Vict., c. 20, s. 114), enacts that "every locomotive steam-engine to be used on the railway shall, if it use coal or other similar fuel emitting smoke, be constructed on the principle of consuming and so as to consume its own smoke; and if any engine be not so constructed the company or party using such engine shall forfeit 5*l.* for every day during which such engine shall be used on the railway." *Held*, that a penalty is not incurred under this section, unless the engine using smoke-emitting fuel is so defectively constructed as to be incapable of consuming its own smoke, though used with proper care; that, consequently, no penalty attaches where the engine, though properly constructed on the principle of consuming its own smoke, is so carelessly used on a railway as to emit instead of consume its smoke. *Manchester, Sheffield and Lincolnshire R'y Co. v. Wood*, 2 Ellis & Ellis, 344; 105 E. C. L., 343. 1839.

SPECIFIC PERFORMANCE.

See CONVEYANCE; RIGHT OF WAY.

1. Agreement to maintain siding. An agreement was entered into between a railway company and a land-owner, part of whose land had been, under another agreement, taken by the company, whereby, in consideration of the previous withdrawal by the land owner of a petition to parliament against the company's bill, the company agreed to construct and forever maintain at its expense a siding of specified length alongside the line upon land belonging to the land owner, and to be provided by him for that purpose, for the use and to the reasonable satisfaction of the land owner. *Held*, that this agreement was not incapable of being enforced by a court of equity. *Greene*

Sinking Fund.

v. West Cheshire R'y Co., Law Reports, 13 Equity Cases, 44, 1871; 1 Eng. (Moak), 546.

2. **Contract by agent.** An agent of a railway company, without any direct authority, agreed to sell to the plaintiff a piece of land of the company at a certain price per acre. Some of the terms were that the company should lay down a branch railway to the land; that the plaintiff, who was going to erect iron-works on the land, should use the company's railway in preference to others—use it whenever reasonably practicable, and for the longest distance it was reasonably capable of use; and that the traffic to and from the works should be conveyed on the terms of a certain prior agreement between the parties relating to another piece of land bought by the plaintiff from the company, and the other stipulations of that agreement carried out. The company's surveyor measured the land, the company's engineer laid down the branch railway to it, the plaintiff was let into possession, and his machinery was brought in the company's wagons to the land, and there deposited. After this the company refused to complete the sale. On an appeal from a decree of the master of the rolls, directing a specific performance, *held*, by the Lord Justice Turner, *dissentiente* Lord Justice Knight Bruce, that the stipulations as to the use of the defendant's railway by the plaintiff did not render a decree for specific performance improper; for that the insertion of a covenant to that effect would effectuate what the parties must be held to have contemplated. *Wilson v. West Hartlepool R'y Co.*, 2 De Gex, Jones & Smith, 475; 67 Eng. Ch., 475. 1864.

3. **Contract to make a branch line.** A railway company applied to parliament for an act to form its line, and its application was opposed by a land owner through whose land the line would pass. He afterwards withdrew his opposition on the faith of an agreement which provided for the formation of a branch line to his iron works. The company obtained an act for this purpose, but afterwards determined to abandon its intention of making the branch railway, and was about to apply to parliament for an act to enable it to do so, when the plaintiff filed his bill for an injunction. The vice-chancellor of England granted the injunction, but

the lord chancellor, on appeal, reversed his decision and dissolved the injunction. *Held*, that a contract to make a railway is not one of which a court of equity will compel the specific performance, but will leave the parties to their legal remedies. *Heathcote v. North Staffordshire R'y Co.*, 6 Eng. R. R. & Canal Cases, 358. 1850.

4. **Foreign corporation; ditches.** A court of chancery, in Georgia, has no jurisdiction to compel a domestic corporation to go into a foreign state and specifically execute a contract, by opening ditches on complainant's land, keeping the same open to a certain depth, constructing and keeping in repair cattle-guards thereon, and on its failure thus to perform, to enforce that decree by attachment and sequestration of its property in Georgia. *Port Royal R. R. Co. v. Hammond*, 58 Ga., 523, 1877; 16 Amer. R'y Rep., 108.

5. **Parties.** Where a railway company desired to purchase land, and the land owner would not sell the land unless the company would buy the whole of his farm, which the company could not lawfully do, and the company procured one L. to make the purchase, in a suit for specific performance, *held*, that L. was a necessary party. *Pennsylvania and New England R. R. Co. v. Ryerson*, 36 N. J. Eq., 112. 1882.

6. **Railway stock.** A court of equity will decree a specific performance of an agreement for the sale of a certain number of shares in a railway company. *Duncuft v. Albrecht*, 12 Simons (Eng. Ch.), 162. 1841.

STATE AID.

See GRANTS; SUBSCRIPTIONS BY STATES.

STATE BANKS.

1. **Sinking fund.** A committee of three persons, appointed by the plaintiff commissioners of a sinking fund authorized by law, and empowered to exchange N. C. bonds, known as "old sixes," for those known as "new sixes," must, in effecting such exchange, *all act together*, and any attempted exchange made by one or two of such committee without consultation with, and con-

Bills and Notes — Abandonment — Amendment of Charter.

currence of, the other members thereof, is utterly void, and in no way binding on the plaintiff. *North Carolina R. R. Co. v. Swepson*, 71 N. C., 350. 1874. See *Same v. Same*, 73 ib., 316. 1875.

STATE RAILWAYS.

See INJURIES TO PASSENGERS; INJURIES TO PERSONS GENERALLY; INJURIES TO PERSONS ON THE TRACK.

1. Bills and notes; powers of superintendent. The superintendent of a certain railroad, the property of the state of Georgia, was authorized by statute to make contracts necessary for the general working and business of the road, not exceeding a prescribed sum, "and over that amount subject to the approval of the governor in writing." *Held*, that notes executed by the superintendent, each calling for an amount over that prescribed, without the approval of the governor in writing, were void, even in the hands of an innocent purchaser for value in due course of trade, and although similar notes had been executed and paid by the superintendent. *Elliott National Bank v. Western and Atlantic R. R. Co.*, 2 Lea (Tenn.), 676. 1879.

2. Liability for negligence; Hoosac Tunnel. Under the Stats. of 1875, ch. 77; 1876, ch. 150; 1878, ch. 191; 1879, ch. 141, and 1880, ch. 261, an action may be maintained against the manager of the Troy and Greenfield Railroad and the Hoosac Tunnel, for an injury to property caused by the defective construction of the railway, under such circumstances that an action could have been maintained had the road been owned by a corporation and not by the commonwealth, although the defective construction was the act of a former manager. *Amstein v. Gardner*, 134 Mass., 4. 1883.

STATION.

See CONTRACT; DEPOTS AND DEPOT GROUNDS.

1. Abandonment. Where the place claimed to be a station was a mere platform at which certain daily trains had stopped to take or leave passengers, but the railway company had never sold tickets to or from

the place and kept no office or agent there, and had never placed it in its list of stations or on its time cards, it was held not to be "a station" within the meaning of the statute which forbids a railway company to abandon a station without the consent of the railway commissioners. *State v. New Haven and Northampton Co.*, 41 Conn., 131, 1874; 6 Amer. R'y Rep., 84. See, also, *Same v. Same*, 42 Conn., 56. 1875.

2. — power of commissioners. The commissioners, upon the application of a railway company for the discontinuance of one of two stations within the town of C., ordered that the station should be discontinued upon a certain private road which had been made to the other station being conveyed by the owner of the land unconditionally to the town of C., and upon the company paying \$250 to the town to be expended in certain highway improvements. *Held*, that the order was one that the commissioners had no power to make. *Town of Chester v. Connecticut Valley R. R. Co.*, 41 Conn., 348. 1874.

3. — The company having performed one of the conditions and procured the performance of the other, applied to the commissioners for an absolute order for the discontinuance of the station, and the commissioners, after notice and a hearing, made a supplemental order, finding that its conditions had been complied with and directing, unconditionally, the discontinuance of the station. *Held*, that this order, being supplemental to and founded upon the original void order, was also void. *Ib.*

4. Amendment to charter. A railway company abandoned a station on its road, upon application to and approval by the railway commissioners, who were authorized, upon a hearing, to grant such permission. The legislature afterwards passed an act requiring the company to stop its trains at the station. A general statute provided that when any amendment of the charter of a corporation should be made, if not otherwise specially provided in the resolution making the amendment, it should not become operative unless accepted by the corporation within six months at a meeting called for the purpose. The charter in question contained a provision that the general as-

Contract against Public Policy — Void Statute.

sembly might alter or repeal it at its pleasure. Upon a *mandamus* to compel the company to stop its trains at the station in question, it was held that the act was operative without acceptance by the company. *State v. New Haven and Northampton Co.*, 43 Conn., 351. 1876.

5. Contract; breach; damages. If a contract to erect a depot is established the measure of damage for its breach would be the additional value that would have accrued to plaintiff's land had the depot been erected. *Watterson v. Allegheny Valley R. R. Co.*, 74 Pa. St., 203, 1873; 8 Amer. R'y Rep., 30.

6. — evidence. A land owner for \$1 released to a railway company the right of way, etc., through his land, and sold it a lot on which to erect a depot. In an action against the company for not erecting the depot, parol evidence that its erection was the consideration for the release was admissible. *Ib.*

7. Establishment by law. The provision of the act of the general assembly of Connecticut, 1866, relative to the abandonment of railroad stations, whilst it authorizes the railroad commissioners to consent, or to refuse to consent, to the abandonment of an existing station, confers upon them no authority to bind the state by contract not to exercise its legislative power touching the establishment of such stations. The act entitled "An act establishing a depot at Plantsville," approved July 15, 1875, does not impair the obligation of any contract between that state and the New Haven and Northampton Company. *Railroad Co. v. Hamersley*, 104 U. S., 1, 1881; 2 Amer. & Eng. R. R. Cases, 418.

8. Signal stations; right to flag trains. Where a Branch Railway Act gave a land owner the right to stop by signal all ordinary trains, *held*, that accelerated trains forming part of fast through trains from London were not "ordinary trains," though the fares charged were at ordinary rate. *Turner v. London and South Western Ry Co.*, Law Reports, 17 Equity Cases, 561. 1874.

9. Statute of frauds. Where a bill was filed for the specific performance of a contract, not in writing, alleging that the officers of a certain railroad company, in considera-

tion that the plaintiff would consent that the road should run through his land, without charge against the company for the right of way or for damages, if the company would erect a depot on plaintiff's land and make it one of its stations, and setting forth that the road had been built, and that plaintiff had not claimed or recovered anything for the right of way or for his damages, *held*, that there was no such part performance of the contract by either party as authorized a specific performance of this agreement, not in writing, in relation to lands or an interest therein. *Haisten v. Savannah, Griffin, etc., R. R. Co.*, 51 Ga., 193, 1874; 6 Amer. R'y Rep., 424.

10. Stopping trains. The railway commissioners granted permission to discontinue a station when the company should have complied with certain conditions, one of which was the establishment of a new station and the erection of a proper building at a place designated in the order. *Held*, that the action of the commissioners, and the establishment of the new station by the company under the order, did not constitute a contract between the state and the company; and that an act of the legislature requiring trains to stop at the station was not void as impairing the obligation of a contract. *State v. New Haven and Northampton Co.*, 43 Conn., 351. 1876.

STATUTES.

[The various statutes in relation to railways will be found construed under different titles throughout this book.]

1. Contract against public policy; special act. An agreement by a peer to withdraw his opposition to a special act of incorporation on condition that the line of the company should be changed was held in the queen's bench to be void as a fraud upon the legislature. But the judgment was reversed in the exchequer chamber because it did not appear that the agreement was meant to be concealed. *Lord Howden v. Simpson*, 10 Adolphus & Ellis, 793; 37 E. C. L., 416. 1839.

2. Void statute; amendments. A void enactment cannot be validated by subse-

Bill of Sale — Collision.

quent amendments. *State v. Little Rock, Miss. River and Texas R'y Co.*, 31 Ark., 701. 1877.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

1. Bill of sale; creditors. Mere production of a bill of sale, which would be valid and binding as against the vendor, is not sufficient as against a creditor or subsequent purchaser, without proof of good faith or payment of value. *Kansas Pacific R'y Co. v. Couse*, 17 Kans., 571. 1877.

2. Contract to support widow and children. The jury found a verbal contract between the company and the widow of a person killed by one of its trains, whereby she agreed not to sue for damages, and the company thereupon agreed to support her and her three children (all then minors) during her life, and, in the event of her death before the majority of the youngest child, to support the children until then. *Held*, that this contract was within the statute of frauds (Code, § 1758), as an agreement "not to be performed within the space of one year from the making thereof." *Deaton v. Tenn. Coal and R. R. Co.*, 12 Heiskell (Tenn.), 650. 1874.

3. Injury to employes. An agreement by parol, with an injured employe, to give him employment at a specified price per day so long as he should remain disabled, is not within the statute of frauds. The contract may be performed within one year, as the employe may die within that time. *East Tenn., Va. and Ga. R. R. Co. v. Staub*, 7 Lea (Tenn.), 397. 1881.

4. Order; acceptance. A verbal acceptance of an order is valid and enforceable only when the drawee has funds of the drawer in his hands, so that, by payment of the order, he satisfies his own debt. Such acceptance by a contractor on a railway, for the debt of his subcontractor, where the contractor does not owe the subcontractor, is not valid. *Walton v. Mandeville, Dowling & Co.*, 56 Ia., 597. 1881.

5. Promise to pay railway fares. Where a wife pledges her trunk to pay the railroad fare of a child traveling under her charge, and the husband agrees to pay the fare if

the trunk is forwarded, and, when forwarded, replevies it, the carrier is entitled to a finding that its special interest in the trunk is the amount of the fare thus promised to be paid. In such a case, the husband's contract is not to pay the debt of another, and is not within the statute of frauds. *Coquard v. Union Depot Co.*, 10 Mo. App., 261. 1881.

6. Real estate contract. Under an oral agreement that defendant would convey to plaintiff its interest in certain real estate if the plaintiff would procure and pay in consideration therefor a certain specified amount in the warrants of the county of Jasper, the warrants were tendered to defendant's agent, according to the terms of the agreement, whereupon the defendant refused to convey. *Held*, that the contract was within the statute of frauds, and specific performance should not be decreed. *Wilson v. Chicago, Rock Island and Pacific R. R. Co.*, 41 Ia., 443. 1875.

7. Specific performance; part performance. An oral contract by a railway company to release to a person one of two tracts of land included in its location and owned by him at the time the location was filed, upon the consideration that he should not demand damages for taking the land so released, is a contract for the transfer of an interest in lands within the statute of frauds; and neither the building of fences by the company after the making of the contract, dividing the land released from the land used by the company for its railway, and the digging of a new channel for a brook along the dividing line between the land, nor the refraining by the owner from collecting compensation for the taking of the land covered by the agreement, and the continued occupation by him of the land, constitute such part performance as to warrant a decree in equity for the specific performance of the agreement. *Barnes v. Boston and Maine R. R. Co.*, 130 Mass., 388. 1881.

STEAMBOATS.

See CARRIAGE OF MERCHANDISE; MANDAMUS.

1. Collision. The reason of the rule, that a steamer must change her course for a sail-

General Matters.

ing vessel, because she has superior powers of locomotion to the sailing vessel, does not apply to a row-boat, which has adequate means of locomotion to enable it to avoid a collision. *Philadelphia and Reading R. R. Co. v. Adams*, 89 Pa. St., 31. 1879.

STOCK AND STOCKHOLDERS.

See CONSOLIDATION; CONSTRUCTION OF RAILWAYS; CONTRACTS; DIVIDENDS; ELECTION OF CORPORATE OFFICERS; ESTOPPEL; EVIDENCE; EXECUTIONS; FRAUD; GUARDIAN AND WARD; INSOLVENCY; MANDAMUS; SET-OFF; STOCKHOLDERS; SUBSCRIPTIONS BY CITIES AND TOWNS; SUBSCRIPTIONS BY COUNTIES; SUBSCRIPTIONS BY INDIVIDUALS.

I. GENERAL MATTERS.

II. RIGHTS OF STOCKHOLDERS.

III. CONTRACTS.

IV. TRANSFERS AND ASSIGNMENTS.

V. DIVIDENDS.

VI. PERSONAL LIABILITY OF STOCKHOLDERS, AND ASSESSMENTS.

1. Assessments.

2. Personal liability.

VII. PREFERRED STOCK.

VIII. ILLEGAL AND SPURIOUS STOCK. OVER-ISSUES.

IX. INCREASE OF STOCK.

X. ACTIONS BY STOCKHOLDERS.

I. GENERAL MATTERS.

1. **Advances of stock; interest.** An agreement to account for dividends on stock advanced is not an agreement to pay interest on the stock. *Southwestern R. R. Co. v. Papot*, 67 Ga., 675. 1881.

2. **Borrowed stock.** Stock of a corporation borrowed from the owner, returnable upon demand, may be repaid in kind, notwithstanding the subsequent insolvency of the corporation. *Fosdick v. Greene*, 27 Ohio St., 484. 1875.

3. **Brokers.** Where a broker sells without due notice stock purchased by him for a customer, on a margin, and held in pledge to secure the advance made by him to make the purchase, he does not thereby, as matter of law, extinguish all claim against the customer for the advance. *Gruman v. Smith*, 81 N. Y., 25. 1880.

4. — A broker may recover for losses paid by him for his principal. *Pollock v. Stables*, 5 Eng. R. R. & Canal Cases, 352. 1848.

5. **Consolidation of railways.** The mere consolidation of one railroad company with another company since the taking effect of the act of March 1, 1870, authorizing the consolidation of such companies, will not discharge or release a non-assenting subscriber of stock, *Atchison, Colo. and Pacific R. R. Co. v. Comm'rs of Phillips County*, 25 Kans., 261, 1881; 4 Amer. & Eng. R. R. Cases, 326.

6. — A railway and canal company was formed by the union of several ancient canal and three railway companies, and power was given to the united companies to issue new shares for the purpose of raising capital. A large debt was due before the act of union from one of the canal companies, and in pursuance of a resolution passed at a general meeting, a call was made on the shareholders of the united companies for the purpose of paying it off. Some of the shareholders in the new company objecting to this application of the moneys to be raised under the new act, and alleging that it would prevent the construction of the railway at all, filed a bill for an injunction to restrain the directors from enforcing a call or applying any of the funds in their hands for the purpose of paying the debt. A demurrer for want of equity was allowed. *Cooper v. Shropshire Union R'y Co.*, 6 Eng. R. R. & Canal Cases, 136. 1849.

7. **Contractors.** Where, under its charter, the directors of a railway company issued shares of stock to a contractor for building its road as full-paid shares (which contract was never questioned by the shareholders or by creditors as being either fraudulent or *ultra vires*), and such shares were sold by the contractor, in the public market, as full-paid shares, to purchasers for value, without actual notice of the equities between the contractor and the company, the holders of such shares are not subject to such equities or liable to have the shares thus issued and thus purchased treated as unpaid shares. *Stacy v. Little Rock and Fort Smith R. R. Co.*, 5 Dillon (U. S. C. C.), 348. 1879.

General Matters.

8. *Donatio causa mortis*. Railway stock cannot be the subject of *donatio causa mortis*. *Moore v. Moore*, Law Reports, 18 Equity Cases, 474. 1874.

9. *Election of directors*. Where the charter of a corporation provides that annual meetings for the election of directors shall be held by the stockholders, the directors cannot, by a by-law, so change the time of holding the annual election that they will continue themselves in office more than a year against the wishes of the holders of a majority of the stock. *Elkins v. Camden and Atlantic R. R. Co.*, 36 N. J. Eq., 467. 1883.

10. — At a meeting of the stockholders, called for the election of directors, under § 3246, Revised Statutes, the right to choose the inspectors or judges of election is vested in the stockholders, and the directors, against the will of the stockholders present, cannot appoint such inspectors. *State ex rel. v. Merchant*, 37 Ohio St., 251, 1881; 9 Amer. & Eng. R. R. Cases, 516.

11. *Executor*. Since the act of April 8, 1871, a foreign executor can transfer stock, and the company is not obliged to see that the will gives the executor the power to assign or dispose of the stocks; it is to be presumed that it does. *Williams v. Pa. R. R. Co.*, 9 Philadelphia, 298. 1874.

12. *Fictitious name*. Where an intestate had executed transfers of railway shares and stock to a fictitious person, the court, on a bill filed by his administrator, declared that the intestate used the fictitious name as another designation of himself, and that the plaintiff, as his administrator, was entitled to transfer the shares and stock, and to receive the dividends thereof. *Arthur v. Midland E'y Co.*, 3 Kay & Johnson (Eng. Ch.), 204. 1857.

13. *Gift*. The facts held insufficient to show a valid gift of stock in a corporation. All dominion over the property must cease to make the gift valid. *Jackson v. Twenty-Third St. R'y Co.*, 88 N. Y., 520, 1882; reversing 47 N. Y. Superior Ct., 85; 9 Amer. & Eng. R. R. Cases, 648, 1882.

14. *Insolvent corporation*. Where stockholders are indebted to the corporation on stock subscriptions, the sum due may be reached by a creditor's bill. *Walser v. Seligman*, 13 Federal Reporter, 415. 1882.

15. — A. executed a transfer of his shares and sent it to B. to be left with the secretary for registration, together with £320, being the amount then due for calls, payment of which was required by the articles before any transfer could be recognized. B. appropriated the £320, but tendered to the secretary, in payment of the amount due from A. for calls, certain overdue coupons, payable in respect of debentures of the company which had been issued to B., and on some of which equities were attaching as between himself and the company. Held, that the tender of these coupons was not a payment, and consequently that the company was not bound to register the transfer, and that A. remained liable for the shares. *European Central R'y Co., In re*, Law Reports, 8 Equity Cases, 444. 1869.

16. *Misapplication of funds*. Pleadings held sufficient in an action to restrain misapplication of money raised by sale of stock. *Bagshaw v. Eastern Union R. R. Co.*, 7 Hare (Eng. Ch.), 114. 1849.

17. *Officers*. Where coupon bonds, issued under the provisions of an act of assembly by a municipal corporation, for stock in a railway company, to enable it to build its road, are in the possession of the president, and the fact that he is the president of the company is shown by the bonds themselves, his possession is *prima facie* evidence that they belong to the company, and constructive notice of their title to one about to take them as collateral security for a private debt owed by the president. *Pittsburgh and Connelville R. R. Co. v. Garrard*, 1 Pittsburgh, 378. 1857.

18. — The issue of full-paid stock to corporate officials held valid under the facts. *Van Cott v. Van Brunt*, 82 N. Y., 535, 1880; 2 Amer. & Eng. R. R. Cases, 407.

19. *Powers of majority*. The business of a corporation is always controlled by a majority in interest, unless the charter provides otherwise. *Covington v. Covington and Cincinnati Bridge Co.*, 10 Bush (Ky.), 69, 1873.

20. *Register*. A register book, though irregularly kept in not containing the amount of the subscription paid on the shares, was held *prima facie* evidence that the defendant was a proprietor. *Birmingham R'y Co. v.*

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Locke, 2 Eng. R. R. & Canal Cases, 867, 1841; *London Grand Junction R'y Co. v. Gunstone*, 2 ib., 870, 1841. See, also, *West Cornwall R'y Co. v. Mowatt*, 15 Adolphus & Ellis (N. S.), 521; 69 E. C. L., 521, 1850; *North Western R'y Co. v. M'Michael*, 1 Eng. Law & Equity, 414; 20 Law Jour. Rep. (N. S.), Exch., 6; 14 Jurist, 987, 1850. But see as to unsealed register, *Birkenhead R'y Co. v. Brownrigg*, 6 Eng. R. R. & Canal Cases, 47, 1849.

21. — Although a party may not actually have had his name inserted on the register of the company as a shareholder, yet, if he has so acted, and his acts have been so far adopted that it may be inferred that both parties have waived the observance of the necessary forms, he will be held to be a contributory within the meaning of the act. His liability will, however, be limited to the time when his legal right to be registered accrued. *Hollingsworth, Ex parte*, 5 Eng. R. R. & Canal Cases, 623. 1849.

22. — The books of the company, including the stock ledger, are admissible in a suit between the company and a stockholder. *Macon and Augusta R. R. Co. v. Vason*, 57 Ga., 314. 1876.

23. — When a person has a good equitable right to be registered as a stockholder, and has actually been registered as such, the company cannot strike his name from the registry on the ground that there is a flaw in his legal title. *Ward v. South Eastern R'y Co.*, 2 Ellis & Ellis, 812; 105 E. C. L., 811. 1860.

24. — Merely placing a subscriber's name on the registry of stockholders is not sufficient to make him a shareholder. The agreement must be signed by him. *New Brunswick and Canada R'y Co., In re*, 4 Hurlstone & Norman (Exchequer), 160, 1859; *Waterford R'y Co. v. Pidock*, 8 Welsby, Hurlstone & Gordon (Exchequer), 279, 1833.

25. — Under "The Joint Stock Companies Act, 1856," a printed copy of the memorandum of association or articles of association may be signed by a subscriber before the original is signed or registered, in pursuance of s. 3 of that act; and such signature of the subscriber is an authority for placing his name on the register of shareholders. *New Brunswick Railway Co. v. Boone*,

3 Hurlstone & Norman (Exchequer), 249, 1858.

26. **Right of corporation to take stock.** A corporation cannot, in its own name, subscribe for stock or be a corporator, under the general railroad law, nor can it do so by a simulated compliance with the provisions of the law through its agents as pretended corporators and subscribers of stock. *Central R. R. Co. of New Jersey v. Pennsylvania R. R. Co.*, 31 N. J. Eq., 475. 1879.

27. **Selling individual stock to corporation.** The plaintiff having issued all the stock it was authorized to, still had subscribers for seventy-two shares who had agreed to pay therefor at par; the defendant and the president of the company purchased a large portion of the stock, so issued, at fifty-five cents on the dollar, transferred seventy-two shares thereof to the subscribers, charging the company on the corporate books with the par value of such seventy-two shares. In an action against the treasurer by the corporation, he claimed such credit in his account with the company. *Held*, that defendant could not, by charging over the stock at its par value, make the corporation his debtor, and thus extinguish his liability for moneys received by him as its treasurer. *East New York and Jamaica R. R. Co. v. Elmore*, 5 Hun (N. Y.), 214. 1875.

28. **Stock defined.** The terms "stock" and "capital stock" considered, and held that stock, when used in reference to corporations and in connection with the privilege of subscribing thereto, means capital stock. *State ex rel. v. Cheraw and Chester R. R. Co.*, 16 So. Car., 524, 1881; 9 Amer. & Eng. R. R. Cases, 631.

29. — The stocks and bonds of a railroad company are personal property, and accompany the person of the owner. *Hutzinger v. Philadelphia Coal Co.*, 11 Philadelphia, 609. 1876.

30. **Trust.** A bank is liable to a *cestui que trust* of its stock, standing on its books in the name of a trustee "in trust for" such *cestui que trust*, if it transfers the stock to a purchaser from the trustee without the knowledge or consent of the *cestui que trust*—the trust being without power of sale, and the *cestui que trust* being an unmarried fe-

Rights of Stockholders.

male of full age. *Magwood v. Railroad Bank*, 5 So. Car., 379. 1874.

31. — The registered holder of shares in a railway company, though a mere trustee, is, in the absence of any special contract to the contrary, alone liable to the company for calls on such shares; and the company have no remedy in equity for calls against the real or beneficial owner of such shares. *Newry R'y Co. v. Moss*, 4 Eng. Law & Equity, 34; 15 Jurist, 437. 1850.

32. — The chairman of a company, with the assent of the company, held in his name shares in another company, which had been purchased with the money of the first-named company. The chairman became bankrupt. *Held*, that though the purchase by one company of shares in another company was illegal, the shares were not within the order and disposition of the bankrupt so as to pass to his assignees, and that he must transfer them as the company should direct. *Great Eastern R'y Co. v. Turner*, Law Reports, 8 Chancery Appeal Cases, 149; 4 Eng. (Moak), 826. 1872.

33. — If a corporation issues a stock certificate to a person as trustee, and, on his death, at the request of a person claiming to be entitled to the stock, refuses to examine the evidence offered and to permit a transfer, without a decree of court, it may, in a suit in equity against it to compel a transfer, if it appears that it could easily have satisfied itself of the truth of the facts, be ordered to pay costs as well as to make the transfer. *Iasigi v. Chicago, Burlington and Quincy R. Co.*, 129 Mass., 46. 1880.

34. **Will; bequest.** A bequest of railway shares will carry railway stock. *Morrice v. Aylmer*, Law Reports, 10 Chancery Appeal Cases, 148. 1874.

II. RIGHTS OF STOCKHOLDERS.

35. **Action by creditor of corporation.** In an action by a judgment creditor of a railway corporation, against a stockholder for unpaid stock, the record of plaintiff's judgment against the corporation is competent evidence. *Stephens v. Fox*, 83 N. Y., 313. 1881.

36. — Equity will compel the payment of

a sufficient per cent. of unpaid stock subscribed to pay the debts of a corporation; and a bill brought against the stockholders to that end is the proper remedy. *Mandamus* against the directors to compel a collection of the stock is not the proper remedy. *Dalton and Morgantown R. R. Co. v. McDaniel*, 56 Ga., 191. 1876.

37. **Certificates.** A subscriber may become the owner of shares, but not in such sense that he may take away those shares out of the corporate fund; and the corporation has no power and cannot be compelled, while continuing in legal existence and carrying on the business for which it was created, to issue and deliver such shares. All that it can do is to deliver written evidence of the ownership of such shares. *Burrall v. Bushwick R. R. Co.*, 75 N. Y., 211. 1878.

38. — Certificates of stock are not necessarily invalid because issued at a place outside of the state in which the corporation was organized and has its principal place of business. *Courtright v. Deeds*, 37 Ia., 503. 1873.

39. — Stock certificates are paper assets in the hands of their owner. *Walker v. Detroit Transit R'y Co.*, 47 Mich., 338. 1882.

40. — Possession of stock certificates properly indorsed is *prima facie* evidence of their ownership; and a holder for value, without notice of prior equities, obtains a perfect title thereto as against such equities. *Ib.*

41. — One who is entitled to stock wrongfully transferred to another can maintain a suit in equity to have the wrongful certificates canceled and certificates issued to himself, if the loss of the stock cannot be adequately compensated in a law action. *Ib.*

42. — A loan of stock may be returned in other stock of the same kind. *Barclay v. Culver*, 30 Hun (N. Y.), 1. 1883.

43. **Change of undertaking.** An undertaking authorized the directors to apply to parliament for the necessary powers to build a railway, giving them general powers to act in the premises as they might deem proper. They applied to parliament and obtained an act which, among other things, required them to purchase and maintain a canal. *Held*, that they were authorized to

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apply for and to accept such an act. *Midland Great Western R'y Co. v. Gordon*, 5 Eng. R. R. & Canal Cases, 76, 1847; 16 Meeson & Welsby (Exchequer), 804, 1847.

44. Collateral security. By a Missouri statute stockholders of a corporation at its dissolution are liable for its debts; but it is provided that no person holding stock as executor, administrator, guardian or trustee, and no person holding stock as collateral security, shall be personally subject to such liability, but the persons pledging such stock shall be considered as holding the same, and liable; and the estates and funds in the hands of executors, etc., shall be liable. *Held*, that persons to whom a corporation pledges its stock as collateral security are within the exemption of the statute; that certificates of the stock, absolute on their face, issued as collateral security to a creditor, may be shown to be so held by evidence *in pais*; that the person holding such stock in trust, or as collateral security, is not, by his voting thereon, estopped from showing that it belongs to the company, and that he holds it as collateral security. *Burgess v. Seligman*, 107 U. S., 20, 1882; 9 Amer. & Eng. R. R. Cases, 655.

45. — The supreme court of Missouri, after the circuit court had decided this case, made a contrary decision against the same stockholders, at the suit of another plaintiff. *Held*, that this court is not bound to follow the decision. *Ib.*

46. — The plaintiff delivered to the defendant a bill of sale of certain railroad stock, which recited that the stock had been that day transferred to the defendant, but that the plaintiff was to hold the same for the payment of a note given by the defendant for its purchase price, and which bill of sale also contained an agreement on the part of the plaintiff to deliver the stock on the payment of the said note. In an action brought upon the note after its maturity, *held*, that the agreement implied a present and executed sale of the stock, with the agreement that the plaintiff should hold the same as collateral to the note, and that it was unnecessary for him to make any tender of the stock, or any formal transfer thereof on the books of the company, until the defendant should have paid the note, or, at

least, tendered the amount due thereon. *James v. Hamilton*, 2 Hun (N. Y.), 630. 1874.

47. — The evidence considered justifying the surrender of collateral stock upon the consolidation of the corporation. *Fitchburg Savings Bank v. Torrey*, 134 Mass., 239. 1883.

48. Conversion of bonds into stock. Bonds of a corporation were indorsed as follows: "The within bond convertible into the capital stock of the company at the pleasure of the holder, at par, upon the surrender thereof, with the unpaid interest coupons, to the secretary of the company. By order of the directors." *Held*, that the right to convert the bonds into stock could not be assigned except by the assignment of the bonds themselves. The actual holder of the bonds could alone insist upon damages for a refusal to convert them into stock. *Denny v. Cleveland and Pittsburgh R. R. Co.*, 28 Ohio St., 108, 1875; 14 Amer. R'y Rep., 73. See, also, *Sutliff v. Cleveland and Mahoning R. R. Co.*, 24 Ohio St., 147, 1873; 6 Amer. R'y Rep., 356.

49. Detinue for railway shares. In detinue for scrip shares, where it appeared that after action brought, and before verdict, the scrip had been delivered up to the plaintiff, *held*, that the jury might, as a measure of damages, take into consideration the difference in value of the scrip shares between the time of the demand and refusal, and the time of the delivery of them to the plaintiff, and that in such case the jury might find the facts specially and confine themselves to an assessment of damages for the detention. *Williams v. Archer*, 5 Eng. R. R. & Canal Cases, 289. 1847.

50. Forfeiture. Where the charter provided that shares should not be forfeited for non-payment except by a special or general meeting of the company, it was held that a plea of forfeiture was not good unless it appeared that the forfeiture was declared at a general or special meeting. *Edinburgh R'y Co. v. Hebblewhite*, 6 Meeson & Welsby (Exchequer), 707. 1840.

51. — Facts stated under which a stockholder was held not entitled to recover for stock in a corporation, the charter of which had been forfeited. The forfeiture was

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waived by the state on condition that certain stockholders' rights should be restored; but the plaintiff had failed to comply with the requirements of the statute. *Van Alstyne v. Houston and Texas Central R'y Co.*, 56 Tex., 373, 1882; 9 Amer. & Eng. R. R. Cases, 447.

52. — A forfeiture of stock is a satisfaction of the debt, and when the right to forfeit has been exercised, no action to recover the subscription for the stock so forfeited can be maintained; but a mere threat, made in the call, to forfeit if not paid — that is, that the stock will be forfeited at a future day if payment be not then made, — will not bar the action to recover the subscription, if it appear that there was no actual forfeiture. *Macon and Augusta R. R. Co. v. Vason*, 57 Ga., 314. 1876.

53. — Shares in a railway company were declared forfeited for non-payment of calls; and on petition filed to redeem them, the redemption was decreed, on payment of all arrears of calls and of interest upon such arrears. The owner of the shares was entitled to set off all dividends accruing which would have been paid but for the default in payment of calls. *Turner v. Dublin and Belfast Junction R'y Co.*, 4 Irish Ch., 194. 1854.

54. — Where a railway company has exercised its option to declare shares forfeited for non-payment of calls, such fact may be pleaded in defense to an action for such calls. *South Eastern R'y Co. v. Hebblewhite*, 12 Adolphus & Ellis, 497; 40 E. C. L., 249. 1840. *Contra*, *Great Northern R'y Co. v. Kennedy*, 4 Welsby, Hurlstone & Gordon (Exchequer), 417, 1849; *Great Northern R'y Co. v. Kennedy*, 6 Eng. R. R. & Canal Cases, 5, 1849.

55. — Pleadings examined and held sufficient in an action for damages for an illegal declaration of forfeiture. *Catchpole v. Ambergate R'y Co.*, 1 Ellis & Blackburn, 111; 72 E. C. L., 109; 22 Law Jour. Rep. (N. S., Q. B.), 35; 17 Jurist, 345; 16 Eng. Law & Equity, 163. 1852.

56. **Infancy.** Infancy is a good defense to an action upon a subscription for railway shares. *Newry and Enniskillen R'y Co. v. Coombe*, 3 Welsby, Hurlstone & Gordon (Exchequer), 565, 1849; *Birkenhead R'y Co. v.*

Pilcher, 5 Welsby, Hurlstone & Gordon (Exchequer), 24, 122, 1848; 6 Eng. R. R. & Canal Cases, 564, 622. See, also, 1 Eng. Law & Equity, 522.

57. — An infant must repudiate the subscription in order to be released. *North Western R'y Co. v. M'Michael*, 5 Welsby, Hurlstone & Gordon (Exchequer), 114, 1850; *Dublin and Wicklow R'y Co. v. Black*, 8 Welsby, Hurlstone & Gordon (Exchequer), 181, 1852; 16 Eng. Law & Equity, 556; 23 Law Jour. Rep. (N. S., Exch.), 94.

58. — To an action for calls on railway shares, the defendant pleaded (by attorney) that, at the time of the making of the calls, he was an infant; and also that, at the time he became the holder of the shares, he was an infant. *Held*, that the pleas were bad, it not appearing that he became a shareholder by contract, and avoided it; also, that the court could not infer, from his appearance by attorney, that he was of full age. *Leeds and Thirsk R'y Co. v. Fearnley*, 4 Welsby, Hurlstone & Gordon (Exchequer), 26; 5 Eng. R. R. & Canal Cases, 644. 1849.

59. **Meetings; notice.** Notice of the time and place of holding stockholders' meetings for the transaction of business, to be effectual, must be given in the mode prescribed by the charter. *Stockholders of Shelby R. R. Co. v. Louisville, Cincinnati and Lexington R. R. Co.*, 12 Bush (Ky.), 62, 1876; 18 Amer. R'y Rep., 213.

60. — At common law all notices of corporate meetings were required to be personal, unless otherwise fixed by the by-laws. Notice by publication or by mail was invalid; and notices of meetings for any special and exceptional purpose were required to state the object of the call. *Tuttle v. Michigan Air Line R. R. Co.*, 35 Mich., 247, 1877; 15 Amer. R'y Rep., 406.

61. — The notice of a meeting of stockholders prescribed by the charter or by-laws of a corporation may be waived by the stockholders; and if each stockholder attends and participates in the action of the meeting, they are estopped from denying its legality for want of notice. *Kenton Furnace R. R. Co. v. McAlpin*, 5 Federal Reporter, 737. 1880.

62. **New stock.** When new stock is issued that is to share in profits with existing stock,

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all holders of the latter have an equal right to subscribe for their proportionate share of the new stock; but this rule does not apply to original stock bought in by the corporation and held as assets, and sold for the payment of liabilities, or for the general benefit. *State ex rel. v. Smith*, 48 Vt., 266; 16 Amer. R'y Rep., 394. 1876.

63. Partnership. One partner of a firm which owns stock in a corporation as a part of its assets, acquired in its regular business, has the power to represent that stock in all matters which relate to it in the usual management of such firm's business, and his action binds the firm; thus, he may receive and waive notice of stockholders' meetings, vote at such meetings, etc. *Kenton Furnace R. R. Co. v. McAlpin*, 5 Federal Reporter, 737. 1880.

64. Prospectus. A prospectus of a railway company stated that "the engineer's report, maps, plans, etc., may be inspected, and further information obtained at the offices of the company." An applicant for shares signed the printed form of application, in which, as usual, it was stated that he agreed to be bound by the conditions and regulations contained in the memorandum and articles of association. An examination of all these papers would have afforded him the information, the want of which he alleged as a ground for rescinding his contract. Trusting to the representations, he did not examine all. *Held*, that his neglect to do so was no answer to his demand to be relieved from the contract. *Central R'y Co. of Venezuela v. Kisch*, Law Reports, 2 English & Irish Appeal Cases, 99. 1867.

65. — In an action to recover the amount of deposit money paid on certain railway shares, the prospectus of the railway company setting forth that one hundred and twenty thousand shares would be issued, *held*, first, that the allotment of fifty-eight thousand shares was a breach of contract, and that the plaintiff was entitled to recover on that ground; secondly, that, if it was agreed that the company should go on with smaller number of shares, that was virtually a new contract, from which any individual shareholder might withdraw. *Wontner v. Shairp*, 2 Carrington & Kirwan, 273; 61 E. C. L., 272. 1846.

66. Reduction of stock. The directors may change the shares from 25l. to 20l. each, where such change is not forbidden by the charter. *Ambergate R'y Co. v. Mitchell*, 4 Welsby, Hurlstone & Gordon (Exchequer), 540. 1849.

67. — The facts considered in relation to the reduction of capital stock, and held not to impair the rights of stockholders. *Strong v. Brooklyn Cross-Town R. R. Co.*, 93 N. Y., 426. 1883.

68. Rights of holder of majority; estoppel. The real owner of the majority of stock in a railroad company who permits its affairs to be managed by others holding the legal title to the stock, and the officers elected by them, cannot claim, as against innocent parties, that the company is exempted from any obligation which it has assumed through such officers and managers, or to which it may, through them, have become equitably liable. *North Carolina R. R. Co. v. Drew*, 3 Woods (U. S. C. C.), 674. 1877.

69. Statute of limitations. The statute of limitations is a good plea in bar of an action upon stock which has been forfeited over six years for non-payment of assessments. *Whet- ham v. Pa. and N. Y. Canal and R. R. Co.*, 9 Philadelphia, 284. 1873.

70. — An action of *debt* by a railway company against one of its members, for calls, under the Companies Clauses Consolidation Act (8 and 9 Vict., c. 16), and the special act (8 and 9 Vict., c. cxxii), is an action founded upon a statutory liability; and therefore a plea "that the action is founded upon contracts *without specialty*, and that the alleged causes of action did not, nor did any or either of them, accrue within *six years* before the suit," is a bad plea,—the proper limitation to such an action being *twenty years*, by the 3 and 4 W. 4, c. 42, s. 3. *Cork and Bandon R'y Co. v. Goode*, 13 Common Bench, 826; 76 E. C. L., 824. 1853.

III. CONTRACTS.

71. Action. A contract for the sale of railway shares may be the subject of an action at law. *Tempest v. Kilner*, 2 Manning, Granger & Scott, 800; 52 E. C. L., 298; 3 Eng. R. R. & Canal Cases, 790. 1845.

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72. Broker. A. gave an order to B., a stockbroker, to purchase shares in a foreign railway. There were no shares in the market, and B. bought a letter of allotment, it being the practice of the stock exchange at that time to buy and sell letters of allotment, as shares, in that railway. In an action to recover the value of the shares and the broker's commission, *held*, that the question for the jury to determine was, whether the order to buy had reference to that which alone could be bought in the market at that time, or was an order to buy at a future time, when, by the passing of the foreign act, actual shares would be transferable and purchasable. *Mitchell v. Newhall*, 4 Eng. R. R. & Canal Cases, 300. 1846.

73. Contract. An agreement for the issue of preferred stock construed. *St. John v. Erie R'y Co.*, 22 Wallace, 136, 1874; 11 Amer. R'y Rep., 446.

74. — Shareholders may maintain an action to set aside an illegal contract of the corporation. *Beman v. Rufford*, 1 Simons, N. S. (Eng. Ch.), 550. 1851.

75. Damages. Where there is no trust relation between the parties and no obligation to deliver specific stock, the measure of damages for a failure to deliver stock is its market value on the day it should have been delivered with interest thereon to the time of trial. *Huntingdon, etc., R. R. Co. v. English*, 86 Pa. St., 247. 1878. See, also, *Shaw v. Holland*, 4 Eng. R. R. & Canal Cases, 150. 1846.

76. — Where shares are not accepted, and are resold within a reasonable time by the vendor, the measure of damages is the difference between their price at the time of the contract and at the time of the resale. *Stewart v. Canty*, 2 Eng. R. R. & Canal Cases, 616. 1841. See, also, *Pott v. Flather*, 5 Eng. R. R. & Canal Cases, 85, 1847; *Bayliffe v. Butterworth*, *ib.*, 283, 1847.

77. Fraud. Where a subscriber made separate contracts with a corporation, by one agreement to take certain stock, and by another to receive certain compensation for services, the agreements being thus separately made to enable him to obtain the stock at less than par, *held*, that specific performance of that part of the agreement would be enforced in which he bound him-

self to take the stock. *Odessa Tramways Co. v. Mendel*, Law Reports, 8 Chancery Division, 235; 25 Eng. (Moak), 240. 1878.

78. — The president of a railway company in purchasing stock of a county is not bound to disclose his knowledge of facts showing the value of the stock. The relation of trustee and *cestui que trust* does not exist in such case. *Board of Commissioners of Tippecanoe County v. Reynolds*, 44 Ind., 509. 1873.

79. — The statements made by the president of a railway company to induce a person to purchase stock in the corporation, that the corporation was able to lay its track and provide rolling stock, and pay all bills contracted, and that its stock was not for sale, and could not be bought anywhere but of him, are statements which a jury would be warranted in finding were representations of fact, and not expressions of opinion. *Teague v. Irwin*, 127 Mass., 217. 1879.

80. — A shareholder in a company filed a bill to have his contract to take shares declared void on the ground of deception and misrepresentation of the company by reason of its having commenced its railway when only one-fifth of the share capital was subscribed, and having entered into a contract for the construction of a part only of the proposed line with insufficient capital. *Held*, on appeal (without giving any opinion as to the plaintiff's original title to relief), that his bill must be dismissed on the ground of his having continued to act as a shareholder for some months after he became aware of the circumstances on which he founded his case. *Sharpley v. South and East Coast R'y Co.*, Law Reports, 2 Chancery Division, 663. 1876.

81. — What facts will amount to fraud in a prospectus determined. *Pulsford v. Richards*, 19 Eng. Law & Equity, 387; 23 Law Jour. Rep. (N. S., Chanc.), 559; 17 Jurist, 865. 1853.

82. Specific performance. The plaintiff employed a broker to sell railway shares and the broker employed an auctioneer, who sold the shares by auction to the defendant. A few days after the defendant employed the same auctioneer to resell the shares, which were accordingly sold by him to a third party, whose name was handed in to the plaintiff's broker for the purpose of pre-

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paring the deed of transfer, which was thereupon executed by the plaintiff, conveying the shares to such third party, who refused to complete the contract by registering the shares in his name. One year after this sale, during all which time the plaintiff was ignorant that the defendant had been the original purchaser (the shares remaining in the plaintiff's name and calls having been made), he filed his bill for specific performance against the defendant. *Held*, that, having executed the deed of transfer to the third party, the privity of contract between the plaintiff and defendant no longer existed, and the bill was accordingly dismissed. *Shaw v. Fisher*, 5 De Gex, Macnaghten & Gordon, 596; 54 Eng. Ch., 1855.

83. Statute of frauds. A parol agreement for the sale of railway shares is binding, for they are neither an interest in or concerning lands within § 4 of the Statute of Frauds, nor goods, wares or merchandises within the seventeenth section. *Duncuff v. Albrecht*, 12 Simons (Eng. Ch.), 162, 1841; *Humble v. Mitchell*, 2 Eng. R. R. & Canal Cases, 70, 1839; *Bradley v. Holdsworth*, 3 Meeson & Welsby (Exchequer), 422, 1838.

84. Vendor and purchaser of shares. The purchaser of railway shares on the London stock exchange is bound to do all acts necessary to relieve the vendor from subsequent liabilities in respect of such shares, although no stipulation be made to that effect at the time of the contract. *Wynne v. Price*, 5 Eng. R. R. & Canal Cases, 465, 1849; *Shaw v. Fisher*, *ib.*, 461, 1848.

IV. TRANSFERS AND ASSIGNMENTS.

85. Agent. Ch. 165 of 1842, entitled "An act to compel transfer agents of foreign corporations to exhibit a list of the stockholders thereof," is only applicable to the transfer agents, and not to the officers of the corporation, and a *mandamus* to compel the exhibition of the transfer books should be directed to such agents only. *People ex rel. v. Lake Shore and Michigan Southern R. R. Co.*, 11 Hun (N. Y.), 1. 1877.

86. — The supreme court has power to compel, by *mandamus*, the exhibition of the transfer books of a domestic corporation containing the names of the stockholders, at

any time when the exercise of such power is shown to be necessary to preserve and protect the interests of the stockholders therein. *Id.*

87. Blank indorsements. Blank indorsements of certificates of stock are legal. *Walker v. Detroit Transit R'y Co.*, 47 Mich., 338. 1882. But see *Hibblewhite v. M'Morine*, 6 Meeson & Welsby (Exchequer), 200, 1840; *Taylor v. Great Indian Peninsular R'y Co.*, 4 De Gex & Jones, 559; 61 Eng. Ch., 558, 1859.

88. Calls. By a navigation act, the shares were declared to be vested in the subscribers, with power to the subscribers to assign their shares; and a committee to be appointed under the act were authorized to make calls on the proprietors of shares at such time as they should think fit. *Held*, that an original subscriber is not liable for any call made by the committee after assigning his share. *Huddersfield Canal Co. v. Buckley*, 1 Eng. R. R. & Canal Cases, 556 (Appendix). 1796.

89. Contract. It is no defense to an action for breach of contract for purchase of railway shares that there were unpaid calls, although the statute provides that stock shall not be transferred without payment of calls. It is sufficient if the seller of the shares is in condition to make good his contract by paying the calls and transferring the stock. *Shaw v. Rowley*, 16 Meeson & Welsby (Exchequer), 810. 1847.

90. Estoppel. Where the rightful owner of stock invests another person with the usual evidence of title thereto, or an apparent authority to dispose of the stock, he is estopped from making any claim thereto against an innocent purchaser dealing on the faith of such apparent ownership or right of disposal. *Walker v. Detroit Transit R'y Co.*, 47 Mich., 338. 1882.

91. Expense of transfer. A railway act provided for the transfer of shares by a deed under seal. It was conceded that in case of purchase of lands it was necessary for the purchaser to have the conveyances prepared at his own expense. *Held*, that the same rule would apply to purchases of stock. *Stephens v. De Medina*, 4 Adolphus & Ellis (N. S.), 422; 45 E. C. L., 420. 1848.

92. Foreign executor. This was a bill filed by foreign executors to compel a cor-

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poration here to permit them to transfer stock of their decedent; and upon general demurrer to the bill, *held*, that the act of June 16, 1836, s. 3, does not confer power upon foreign executors to transfer corporate stock here, unless their authority be derived from one of the provinces in this country at the time the act of 1705 (1 Smith, 33) was passed. *Alfonso v. Philadelphia and Reading R. R. Co.*, 8 Philadelphia, 86. 1871.

93. Forgery. If a corporation issues a stock certificate upon the surrender of a former certificate for the same, accompanied by a transfer under a forged power of attorney, neither the person acting under such power, nor the person to whom the certificate is issued, is a necessary party to a bill in equity by the true owner against the company to compel it to procure a like number of shares of its capital stock, to record and issue to him a certificate thereof, and to pay him the dividends thereon. *Pratt v. Boston and Albany R. R. Co.*, 126 Mass., 443. 1879.

94. — T. and B. were partners. Stock was standing in the books of a railway company in their joint names. B. sold out the stock by a deed which he executed and to which he forged the name of T., but he continued to account to T. for the dividends, and T. died in ignorance of the forgery. T.'s personal representative afterwards filed a bill against the company for a retransfer of the stock. *Held*, that though by the death of T. the right to an action at law was gone, the right to a suit in equity still remained, and a decree directing the company to retransfer the stock was sustained. *Midland R'y Co. v. Taylor*, 8 House of Lords Cases, 751. 1860.

95. — H. & Co., in good faith, advanced money upon C. O. R. R. Co. stock, pledged to them under forged powers of transfer. The railroad company upon the receipt of the original certificates of stock in like good faith canceled them and issued new ones in the name of H. & Co. *Held*, that as between H. & Co. and the railroad company (the rights of third parties not being involved), the loss must fall upon the former. *Hambleton v. Central Ohio R. R. Co.*, 44 Md., 551. 1876.

96. — Where a company has registered

what is alleged to be a forged transfer of shares, and an action is brought against it by the original shareholder, for dividends, and another is threatened by the alleged transferee, the court will not grant an interpleader. *Dalton v. Midland R'y Co.*, 22 Eng. Law & Equity, 452; 12 Common Bench, 458; 19 Law Times, 204; 74 E. C. L., 458. 1852.

97. Fraud. Where a stockholder intrusts his certificates with blank powers of attorney to an agent for safe keeping, who fraudulently transfers them to a third party, who in turn, without knowledge of the fraud, has them transferred to himself, the owner cannot recover from the corporation for the loss. *Pennsylvania R. R. Co.'s Appeal*, 86 Pa. St., 80. 1878.

98. — An assignee of shares who leaves them, with the assignments unrecorded, in the possession of the assignor, is not thereby guilty of negligence so as to be estopped to set up his title against a person who claims title to the certificates through an alteration of the assignments by the fraud and forgery of the assignor. *Eaton v. New England Telegraph Co.*, 68 Me., 63. 1878.

99. Lost certificates. Where certificates of stock have been assigned by indorsement only, and mislaid by the transferee, and the corporation at the request of the transferor causes the shares to be transferred upon the books and new shares issued to another person, under a by-law in relation to lost certificates, such transfer will not defeat the rights of the true owner. *Cleveland and Mahoning R. R. Co. v. Robbins*, 35 Ohio St., 483. 1880. But for dividends paid before notice of the transfer the company would not be liable. *Ib.*

100. Mandamus; transfer books. A corporation may by *mandamus* be compelled to exhibit its stock transfer books to its stockholders. *Sage, In re*, 70 N. Y., 220, 1877; 18 Amer. R'y Rep., 555. See *People ex rel. v. Lake Shore and Mich. Southern R. R. Co.*, 11 Hun (N. Y.), 1. 1877.

101. Manner of transfer. It is a matter of discretion with the directors whether to allow the transfer of shares without the production of the certificates. *Shropshire Union Railways and Canal Co. v. The Queen*, Law Reports, 7 English & Irish Appeal

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Cases, 496. 1875. See, also, *State ex rel. v. New Orleans and Carrollton R. R. Co.*, 30 La. An., 308. 1878.

102. — A corporation is the trustee of its stockholders, and is bound to use due care that they may not be injured by unauthorized transfers of stock. *Pennsylvania R. R. Co.'s Appeal*, 86 Pa. St., 80. 1878.

103. — Where the signatures to powers of transfer were genuine, yet it appearing that at the time the transfer was made they were thirteen years old, this fact was enough to put the corporation upon inquiry, and it was not justified in making the transfer unless it had first ascertained if the powers had been revoked. *Ib.*

104. — Where a transfer of a certificate of stock was made by an unrecorded assignment, it was held valid as between the parties. And the corporation, by issuing the stock to a third person, who did not present the original certificate, became liable to the rightful assignee for damages. *Strange v. Houston and Texas Central R. R. Co.*, 53 Tex., 162, 1880; 4 Amer. & Eng. R. R. Cases, 338.

105. — The title to stock in a railway company is completely vested in the purchaser as against every one but the corporation, when the seller has given on the scrip the proper authority to make the transfer upon the books and the purchaser has paid the price. *Ross v. Southwestern R. R. Co.*, 53 Ga., 514. 1874.

106. — After a sale of stock by the owner to whom the certificate had issued, the sale being evidenced by assignment and delivery of the certificate, and after the purchaser had surrendered the certificate to the company and received in lieu thereof a certificate in his own name, the transaction being properly evidenced on the books of the corporation, the original certificate and the rights of the original owner were extinguished, so that a subsequent assignment of said stock by the original owner to another party would pass no right or title thereto. *Houston and Texas Central R'y Co. v. Van Alstyne*, 56 Tex., 439, 1882; 9 Amer. & Eng. R. R. Cases, 686.

107. Married women. A married woman who has transferred shares without compli-

ance with the statute is not estopped from setting up her title against a subsequent purchaser without notice. *Merriam v. Boston, Clinton and Fitchburg R. R. Co.*, 117 Mass., 241. 1875.

108. Second transfer; mistake. Where stock is surrendered and transferred, and afterwards, by mistake, a second transfer is made and a new certificate issued to a second assignee, he not being an innocent purchaser, the second issue will not confer the rights of a stockholder upon such second assignee. *Houston and Texas Central R'y Co. v. Van Alstyne*, 9 Amer. & Eng. R. R. Cases (Tex.), 686. 1882.

109. Warranty. The transferrer of stock, without representation or specification as to the particular property held by the corporation, warrants only his title to the stock, and not the title of corporation to the property held by it. *State v. North Louisiana and Texas R. R. Co.*, 34 La. An., 947. 1882.

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110. Convertible bonds. Where plaintiff, holding bonds of defendant, by their terms convertible into stock, surrendered them and received stock issued prior to the declaration of a dividend by the board of directors, that said board had no right to limit the payment of the dividend to the stockholders holding stock at a day prior to the issue of such stock, which was the close of the fiscal year of the company, but that plaintiff was entitled to the dividend; and that the fact that the directors had adopted a particular day as the close of the corporate fiscal year, or special days for declaring dividends, or that they directed the close of the transfer books for any purpose, did not in any way impair the legal rights of stockholders to share in dividends subsequently declared. *Jones v. Terre Haute and Richmond R. R. Co.*, 57 N. Y., 196. 1874.

111. Declaration and payment. A shareholder in a corporation is not entitled to any of the property or profits until a division has been made or a dividend declared. *Boardman v. Lake Shore and Michigan Southern R'y Co.*, 84 N. Y., 157, 1881; 4 Amer. & Eng. R. R. Cases, 265.

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112. — The term "capital stock," in the provision of the Revised Statutes (1 R. S., 601, § 2) prohibiting the directors of a corporation from making dividends except from the surplus profits, or from dividing, withdrawing or in any way paying to the stockholders "any part of the capital stock of such company," means the property of the corporation, contributed by the stockholders or otherwise obtained, to the extent required by its charter. The object of the provision was to prevent a withdrawal of the property which would reduce the value of its assets below the sum limited for its capital in its charter or articles of association. *Williams v. Western Union Telegraph Co.*, 93 N. Y., 462. 1883.

113. — Where a dividend is declared by a corporation it belongs to the holders of the stock at the time of the declaration, without regard to the source from which, or the time during which, the funds divided were acquired by the corporation. *Jermain v. Lake Shore and Michigan Southern R'y Co.*, 91 N. Y., 483. 1883.

114. — A corporation may lawfully pay dividends to the stockholder whose name appears upon the stock book as owner of the shares. *Brisbane v. Delaware, Lackawanna and Western R. R. Co.*, 25 Hun (N. Y.), 438. 1881.

115. — Where a dividend is declared it belongs to the owners of the stock, but until such declaration, the profits form part of the assets; and an assignment by a stockholder of his shares carries with it his proportionate share of the assets, including all undeclared dividends. *Boardman v. Lake Shore and Michigan Southern R'y Co.*, 84 N. Y., 157, 1881; 4 Amer. & Eng. R. R. Cases, 265.

116. — As a general rule, in the absence of any agreement to the contrary, dividends due on stock follow the ownership thereof. *Central R. R. and Banking Co. v. Papot*, 59 Ga., 342, 1877; *Ryan v. Leavenworth, Atchison and Northwestern R'y Co.*, 21 Kans., 365, 1879.

117. — Accumulated earnings on which no dividend has been declared furnish no consideration for the issuing of stock to be divided among the stockholders. Such dividends are *ultra vires*. *Hatch v. Western*

Union Tel. Co., 9 Abbott's New Cases (N. Y.), 430. 1881.

118. — The claims of stockholders to dividends are subordinate to the claims of creditors. *Ryan v. Leavenworth, Atchison and Northwestern R'y Co.*, 21 Kans., 365. 1879.

119. — The same principles which apply to partnerships in relation to the division of profits apply to corporations, and the majority can overrule the minority upon the questions of the division of profits while the corporate debts are still unprovided for. *Stevens v. South Devon R. R. Co.*, 9 Hare (Eng. Ch.), 313. 1851.

120. — Where a stockholder receives dividends from a corporation declared and admitted by it to be due to him on stock, an action is not maintainable against him in the first instance by one claiming to be entitled to share in the dividends, but whose rights had been ignored by the corporation, to recover as for moneys had and received, the proportion of the dividends so received which plaintiff would have been entitled to had his shares participated. *Peckham v. Van Wagenen*, 83 N. Y., 40. 1880.

121. Guaranty of dividends. An agreement between two corporations, whereby one guaranties the other a certain specified annual dividend on its capital stock, is not a guaranty to its stockholders severally, but to the corporation, and the power to modify the terms of such guaranty is in the directors of such corporations, not in the stockholders. Where such power is fairly exercised by the directors, in view of all the circumstances, and in good faith, a court will not interfere, even though, on the same facts, it might have arrived at a different conclusion. *Flagg v. Manhattan R'y Co.*, 10 Federal Reporter, 413, 1881; 4 Amer. & Eng. R. R. Cases, 140.

122. Injunction to restrain. By its acts of parliament, the Monmouthshire Railway and Canal Company was empowered to make a new railway, with branches, and to improve its existing railways, and to adapt them to the use of locomotive engines, which the company was required to provide, and a time was limited for the completion of the works. The works were not completed in pursuance of the requisitions of the act of parliament, in consequence, as was alleged,

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of want of funds. *Held*, under the circumstances, that the court had no jurisdiction, at the suit of a shareholder, to restrain the company from declaring a dividend until the works were all completed, there being no provision in the acts to that effect. *Brown v. Monmouthshire R'y Co.*, 4 Eng. Law & Equity, 113; 15 Jurist, 475. 1851.

123. — A court of equity will not restrain the payment of dividends to stockholders at the suit of another company claiming the right to distress for non-payment of toll charges. The remedy is at law. *South Yorkshire R'y Co. v. Great Northern R'y Co.*, 19 Eng. Law & Equity, 513; 23 Law Jour. Rep. (N. S., Chanc.), 761; 9 Welsby, Hurlstone & Gordon (Exchequer), 55. 1853.

124. — The payment of dividends out of the capital stock will be required. *Bloxham v. Metropolitan R'y Co.*, Law Reports, 3 Chancery Appeal Cases, 337. 1868. Nor will the corporation be permitted to pay dividends out of money necessary to maintain repairs. *Dent v. London Tramways Co.*, Law Reports, 16 Chancery Division, 344, 1880; 1 Amer. & Eng. R. R. Cases, 592.

125. Preference. If the memorandum and articles of association of a company are silent on the subject, it is an implied condition that the shareholders are entitled to rank equally as regards dividend, without preference or priority between themselves; but such implication will be rebutted if the articles of association, contemporaneous with the memorandum, contain clear provisions as to the preference or priority of classes of shares. *Harrison v. Mexican R'y Co.*, Law Reports, 19 Equity Cases, 358, 1875; 12 Eng. (Moak), 793.

126. Unclaimed. The provisions of ch. 236, Laws 1874-5, which enacts "that all dividends heretofore declared or which shall hereafter be declared by any corporation, company or association, whether chartered or not, which shall not be recovered or claimed by suit by the parties entitled thereto for five years after the same were or shall be declared, shall be paid by the corporations, etc., to the trustees of the university," are in conflict with art. IX. § 6, of the constitution. *Trustees of University v. North Carolina R. R. Co.*, 76 N. C., 103, 1877; 14 Amer. R'y Rep., 298.

VI. PERSONAL LIABILITY OF STOCKHOLDERS, AND ASSESSMENTS.

See SUBSCRIPTIONS BY INDIVIDUALS.

127. Assessment. An assessment can only be made by the directors of a corporation. *Pike v. Bangor and Calais Shore Line R. R. Co.*, 68 Me., 445, 1878; 20 Amer. R'y Rep., 407.

128. — A corporation has no authority to levy an assessment on capital stock fully paid up. *Santa Cruz R. R. Co. v. Spreckles*, 9 Amer. & Eng. R. R. Cases (Cal.), 679, 1882. Nor can the creditors enforce such liability. *Spense v. Iowa Valley Construction Co.*, 36 Ia., 407. 1873.

129. — Where it was enacted that "so soon as the sum of 1,500,000*l.* shall have been subscribed, etc., it shall be lawful for the company to put in force all the powers of the act authorizing the construction of the railway, and of the acts therein recited," namely, the Lands Clauses Consolidation Act and the Railways Clauses Consolidation Act, as regards a portion of the railway, *held*, that the raising of the capital was not a condition precedent to the power of the company to make calls, but only to its right of exercising the compulsory powers for taking land. *Waterford R'y Co. v. Dalbiac*, 6 Eng. R. R. & Canal Cases, 753, 1851; 6 Welsby, Hurlstone & Gordon (Exchequer), 443, 1851.

130. — A call payable by instalments is valid. *London and North Western R'y Co. v. M'Michael*, 4 Eng. Law & Equity, 459; 20 Law Jour. Rep. (N. S., Exch.), 233. 1851. But an action of debt will not lie for a call payable in instalments, until all of the instalments are due. *Ambergate R'y Co. v. Coulthard*, 6 Eng. R. R. & Canal Cases, 218, 1850; *London and North Western R'y Co. v. M'Michael*, 6 Eng. R. R. & Canal Cases, 495, 1851.

131. — Where the charter expressly requires notice to be given in certain newspapers, and for a certain number of days, before the calls for instalments shall be valid, the company must show a compliance with such condition precedent before a recovery can be had on such calls. *Macon and Augusta R. R. Co. v. Vason*, 57 Ga., 814. 1876.

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132. — Where the statute does not provide that calls shall be made at a general meeting of the company, they may be made at a special meeting. *Ambergate R'y Co. v. Mitchell*, 4 Welsby, Hurlstone & Gordon (Exchequer), 540. 1849.

133. — By a railway act (7 Wm. 4, c. 21, s. 115), the directors were authorized to make calls, and the time in which calls might be made was prescribed. A call was made, but the place of payment was not designated, nor the person to whom payment might be made. *Held*, that the place and person might be designated by a subsequent resolution, and that the call was valid. *Sheffield, Ashton-under-Lyne and Manchester R'y Co. v. Woodcock*, 2 Eng. R. R. & Canal Cases, 522. 1841.

134. — The letter list of notices of calls sent by mail is competent evidence against a shareholder. *Eastern Union R'y Co. v. Symonds*, 5 Welsby, Hurlstone & Gordon (Exchequer), 237. 1850.

135. — The notice of a call inserted in the local newspapers, according to the directions of the special act, specified the time and place of payment, and the persons to whom the payment was to be made. *Held*, that the publication of the notice must be assumed to be the act of the directors, and that the call was properly made. *Great North of England R'y Co. v. Biddulph*, 7 Meeson & Welsby (Exchequer), 243. 1840. See, also, *Sheffield R'y Co. v. Woodcock*, 7 ib., 574. 1841.

136. — A transfer of railway shares from an original subscriber to the undertaking, made before the formation of a register of proprietors pursuant to the act, but after the passing of the act of parliament, is good, although the transferrer be never registered as a proprietor. Where the act required the transfer to be by deed, and the transfer of shares was executed by the seller with a blank for the purchaser's name and stating the consideration untruly, but the purchaser afterwards signed and transmitted to the company, in pursuance of the act, a proxy paper describing him as the proprietor of the shares, *held*, in an action by the company against him for calls on such shares, that he was precluded from disputing the validity of the transfer. *Sheffield R'y*

Co. v. Woodcock, 7 Meeson & Welsby (Exchequer), 574. 1841.

137. — Plaintiff employed defendants, brokers, to buy for him thirty shares, scrip, in a railway company, for which an act of parliament had lately been obtained. Defendants purchased in their own names, the practice of brokers being such; and plaintiff paid them the price. The scrip was purchased "for account, 29th of August," but could not be then delivered, the scrip having, in the meantime, been called in by the directors to be registered, in order that shares might be issued. Before the shares came out a call was made. These facts were known to the plaintiff; but he, from time to time, desired to have the scrip forwarded without delay. The share certificates came out in December; and then the selling brokers tendered the shares to the defendants, with a demand of 150*l.* for the call. Plaintiff, on being applied to, refused to furnish the 150*l.*, denying his liability, and claiming the shares without such payment; and, on their being withheld, he repudiated the contract, and brought an action for money had and received. *Held*, that the non-delivery of the scrip on the 29th August did not entitle him to recover his purchase money. *McEuen v. Woods*, 11 Adolphus & Ellis (N. S.), 13; 63 E. C. L., 12. 1847.

138. — In an action for calls on railway shares, the court refused to allow the defendant to plead, first, that due notice of the calls was not given pursuant to the act of parliament; second, that no time, place or person was appointed for the payment of the calls; third, that the calls were made for other purposes than those mentioned in the act; fourth, that the company had made deviations not warranted by the act, and that the calls were made for the purpose of these deviations; fifth, that at the time of making the calls there were not thirty-six thousand shares in the company, as provided in the act. *London and Brighton R'y Co. v. Wilson*, 1 Eng. R. R. & Canal Cases, 530. 1839.

139. Execution against shareholders whose stock is not paid up. Under s. 36 of the Companies Clauses Consolidation Act, 1845 (8 and 9 Vict., c. 16), a party who has recovered judgment against a company is

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not precluded from issuing execution against the shareholders who have not paid up for their shares, though lands of the company have been delivered on *elegit*, if the proceeds of the lands be insufficient to satisfy the debt. Therefore, in such a case, a *mandamus* issued commanding the company to give the creditor inspection of the register of shareholders. *Queen v. Derbyshire R'y Co.*, 3 Ellis & Blackburn, 784; 77 E. C. L., 788. 1854.

140. Labor debts. Extension of time in corporation orders, issued for debts due laborers, defeats an action against the stockholders. Comp. L., § 2852. *Powell v. Eldred*, 39 Mich., 552. 1878.

141. — A finding that a defendant is not a stockholder, within the meaning of the statute, defeats an action against him for labor debts of the corporation. *Ib.*

142. — The constitutional liability of stockholders for labor debts can only be enforced in equity, if it can be enforced at all without legislation. *Peck v. Miller*, 39 Mich., 594. 1878.

143. — Stockholders are only collaterally, not primarily, liable for labor debts of the company. *Ib.*

144. — The conditions of the act that makes stockholders liable for labor debts of the company must be fully complied with, and they restrict recovery to the amount of stock owned; courts cannot enlarge a surety's liability beyond the plain terms of his sureship. *Ib.*

145. — A railroad contractor is not a "laborer" within the meaning of the provisions which make stockholders liable for labor debts. *Ib.*

146. Personal liability. The provisions in the constitution and statutes of Oregon creating the liability of stockholders in private corporations, for the indebtedness of such corporations, apply to such only as are or have been holders of the legal title in unpaid stock. *Branson v. Oregonian R'y Co.*, 10 Oreg., 278. 1881.

147. — A failure to comply with the requirements of §§ 1076 and 1077 of the Code does not render the private property of stockholders liable for the debts of the corporation. *Langan v. I. and M. Construction Co.*, 49 Ia., 317. 1878.

148. — Under § 6 of the constitution of 1865, as amended, a stockholder in a corporation cannot be made liable to a creditor when his stock is fully paid up. *Gausen v. Buck*, 68 Mo., 545, 1878; *Schricker v. Ridings*, 65 Mo., 208, 1877.

149. — The individual or personal liability of stockholders, under § 79 of the corporation act of May 1, 1852 (1 S. & C., 310); also, under § 8 of April 10, 1861, regulating street railway companies (S. & S., 136), attaches in favor of creditors at the time the debt was contracted or the liability incurred by the corporation. *Brown v. Hitchcock*, 4 Amer. & Eng. R. R. Cases (Ohio), 352. 1881.

150. — The members of a joint-stock company under the laws of New York are liable as partners. *Boston and Albany R. Co. v. Pearson*, 128 Mass., 445. 1880.

151. — Where a partnership owns stock and is personally liable for the debts of the corporation, any individual partner is likewise liable. *Bray v. Seligman*, 75 Mo., 31; 9 Amer. & Eng. R. R. Cases, 653. 1881.

152. — Section 9, p. 301, Wagn. Stat., in relation to railroad companies, provides that "no person holding stock in such company . . . as collateral security shall be personally subject to any liability as a stockholder of such company; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly." *Held*, that this section has no application to stock which has not been issued in the usual course of business, and, therefore, does not exempt from liability a person holding as collateral security unsubscribed stock issued to him by the company. *Griswold v. Seligman*, 72 Mo., 110, 1880; 4 Amer. & Eng. R. R. Cases, 371. See, also, *Fisher v. Seligman*, 9 Amer. & Eng. R. R. Cases, 670, 1881; 75 Mo., 13.

153. — A corporation is a necessary party defendant to a bill to enforce a judgment against it by compelling contribution from its stockholders. All the stockholders are also necessary parties in such a suit, if they apply to be heard. *Walsh v. Memphis. Carthage, etc., R. R. Co.*, 6 Federal Reporter, 797; 2 McCrary (U. S. C. C.), 156. 1881.

154. — From July 4, 1865, to November 1, 1870, no corporation could be created in Missouri, the stockholders of which were not

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liable for the debts of the corporation so far as those debts did not exceed the full par value of the stock by them respectively held. The constitutional amendment adopted in November, 1870, did not have the effect of impairing an obligation incurred by a stockholder prior to that date. *St. Louis R'y Supplies Co. v. Harbine*, 2 Mo. App., 184. 1876. See, also, *Ochiltree v. Railroad Co.*, 21 Wallace, 249, 1874; 7 Amer. R'y Rep., 525.

155. — Where bonds are issued by a corporation while double liability attached to its stock, the holder of such bonds, though he became such after the repeal of the double-liability clause, may enforce the liability against a stockholder. The double liability of a stockholder is not a penalty, but a right arising out of contract, and the assignee of the obligation of the corporation takes all the right of the assignor. *Blake-man v. Benton*, 9 Mo. App., 107. 1880.

156. *Scire facias*. The manner of proceeding by *scire facias* against a shareholder determined. *Hitchins v. Kilkenny R'y Co.*, 10 Common Bench, 159; 70 E. C. L., 158, 1850; 29 Eng. Law & Equity, 341, 1854; *Same v. Same*, 15 Common Bench, 459; 80 E. C. L., 458, 1854; *Wyatt v. Darouth Valley R'y Co.*, 2 Common Bench (N. S.), 110; 89 E. C. L., 110, 1857; 40 Eng. Law & Equity, 387; *Edwards v. Kilkenny R'y Co.*, 14 Common Bench (N. S.), 526; 108 E. C. L., 524, 1863; *Devereux v. Kilkenny R'y Co.*, 5 Welsby, Hurlstone & Gordon (Exchequer), 834, 1850; *Nixon v. Brownlow*, 40 Eng. Law & Equity, 521, 1857.

VII. PREFERRED STOCK.

157. *Dividends*. Defendant, a railroad corporation in 1857, issued certain preferred stock. By the terms of the certificate issued, it was stated that the stock was "entitled to dividends at the rate of ten per cent. per annum, payable semi-annually, in New York, on the first days of June and December, in each year, out of the net earnings of said company, and the payment of dividends as aforesaid is hereby guaranteed." *Held*, that the net earnings of any year might be applied to the payment of these dividends. *Prouty v. Michigan Southern and Northern Indiana R. R. Co.*, 4 Thompson &

Cook (N. Y. Supreme Ct.), 230; 1 Hun (N. Y.), 655. 1874.

158. — The net earnings of the defendant before the action was brought had been, in part, appropriated to dividends upon common stock. *Held*, that the owners of preferred stock were entitled to interest on the dividends they were entitled to receive from the time of such appropriation. *Ib.* See, also, *Sturge v. Eastern Union R'y Co.*, 7 De Gex, Macnaghten & Gordon, 158; 56 Eng. Ch., 157, 1855; *Boardman v. Lake Shore and Michigan Southern R'y Co.*, 84 N. Y., 157, 1881; 4 Amer. & Eng. R. R. Cases, 265; *Henry v. Great Northern R'y Co.*, 4 Kay & Johnson (Eng. Ch.), 1, 1857; 1 De Gex & Jones, 606; 58 Eng. Ch., 605, 1857.

159. — Preference shareholders of a railway company, upon whose shares an arrear of dividends had accrued, permitted, for several years, the profits of the company to be appropriated to the payment of dividends upon other preference shares inferior to theirs. *Held*, under the special circumstances of the case, that they had not lost their right to the arrear, either by acquiescence or laches. *Smith v. Cork and Brandon R'y Co.*, 5 Irish Reports (Equity), 65. 1870.

160. — The rights of preferred stockholders are not those of creditors; but still they may, under the plan of organization of a corporation, be made so far superior to those of common stockholders as to enable them to compel a division of profits which the board of directors had determined to accumulate. *Nickals v. New York, Lake Erie and Western R. R. Co.*, 15 Federal Reporter, 575. 1883.

161. — That a board of directors has determined to apply all profits made by a road to its improvement does not take away their present character. In this respect net earnings and profits are alike; and largely, at least, the improvement would be chargeable to capital. *Ib.*

162. — Dividends payable upon preferred stock are not debts of a corporation, and such dividends cannot be paid except from net earnings, and subject to the rights of the creditors of the corporation. *Chaffee v. Rutland R. R. Co.*, 55 Vt., 110. 1882.

163. — But certificates having been issued for such dividends without objection by the

 Illegal and Spurious Stock; Overissues.

creditors or stockholders, the corporation is estopped from denying their validity. *Ib.*

164. — After the issue of common stock by a railroad company, a supplement to its charter was passed, which authorized the issue of preferred stock, on the following conditions: "That when so issued, . . . the holders thereof, respectively, shall be entitled to receive dividends on the same, not to exceed seven per centum per annum, before any dividend shall be set apart or paid on the other and ordinary stock of said company." In some years dividends of seven per cent. or less were declared on the preferred stock alone, and in other years such dividends were declared on both the preferred and common stock. *Held*, that a holder of the preferred stock was not entitled to annual dividends thereon at a fixed rate, but only to dividends out of the annual profits; but when such profits had been earned, he was entitled to a dividend of seven per cent. therefrom, before any dividend could be paid on the common stock. *Elkins v. Camden and Atlantic R. R. Co.*, 38 N. J. Eq., 233, 1882; 9 Amer. & Eng. R. R. Cases, 639.

165. — A railway company issued stock; becoming embarrassed, a statute was enacted in 1855, authorizing it to complete its road, etc., to issue preferred stock, the holders to receive a dividend of eight per cent. from the time of payment therefor before the other stock; the dividend to be paid only out of the net earnings of the line. Other laws authorized the issue of a "consolidated preferred stock," to retire the stock theretofore issued; the holders to receive eight per cent. from July, 1872, before any other stock should receive a dividend. "Consolidated" stock was issued, which was used in retiring all other stock except forty-two shares of the "preferred" stock. In July, 1873, a dividend was declared on the "consolidated" and "preferred" stock as it should then stand on the books, payable out of the earnings of the road for the two preceding years. *Held*, that the owners of the forty-two shares of "preferred" stock were entitled to a dividend of eight per cent. per annum from the time of payment for it in 1855, the whole amount of dividend declared being sufficient for that purpose. *West Chester and Philadelphia R. R. Co. v. Jackson*, 77 Pa. St., 321. 1875.

166. Moneys advanced by officers. The directors of a railway company, whose borrowing power had been fully exercised, procured advances from a bank on their own personal security. The moneys so advanced were within the limit of the capital of the company, and were applied in the payment of contractors or otherwise in completion of the undertaking. The directors subsequently paid off the amount due to the bank. The railway company, at a general meeting, sanctioned these proceedings. *Held*, that the directors were entitled to be repaid the amount so paid by them, with interest, out of the profits of the company, in priority to preference shareholders. *Ulster R'y Co. v. Banbridge, etc.*, R'y Co., 2 Irish Eq., 190. 1868.

167. Ultra vires. A scheme for the issue of preferred stock as a dividend held to be *ultra vires*. *Hoole v. Great Western R'y Co.*, Law Reports, 3 Chancery Appeal Cases, 262. 1887.

VIII. ILLEGAL AND SPURIOUS STOCK; OVERISSUES.

168. Bona fide holder. The president of a railway company fraudulently issued certificates of stock, properly signed and sealed, in excess of the amount authorized by law. *Held*, that persons who bought this stock or took it as collateral security were entitled to relief as *bona fide* purchasers on the faith of certificates issued by the company, and which it cannot gainsay. *Willis v. Philadelphia and Darby R. R. Co.*, 13 Philadelphia, 33. 1879.

169. Damages; evidence. In a suit for damages for the alleged fraudulent issuing by defendant of a certificate for fifty shares of plaintiff's stock, he filling up a blank certificate which had been intrusted to him as treasurer, defendant testified that the stock was given to him by bondholders of the company who were entitled thereto. Defendant was also a director of the company. *Held*, that the jury were not bound by defendant's testimony, although undisputed, he being an interested witness, and it not appearing that he disclosed the gift to plaintiff's directors, or claimed that he was equita-

Increase of Stock — Actions by Stockholders.

bly entitled to the stock, when disputes arose concerning the transaction. *Brooklyn Cross-town R. R. Co. v. Strong*, 75 N. Y., 591. 1878.

170. Overissue. A railway company is liable, in case of a fraudulent overissue of stock by its officers, for the amount of money advanced by the purchaser or holder of such stock, with interest thereon. *Tome v. Parkersburg Branch R. R. Co.*, 39 Md., 36, 1873; 11 Amer. R'y Rep., 285.

171. Wrongful issue by directors. The directors of a railway company are not justified in acting on an old resolution authorizing the issue of shares, after the particular purpose for which the authority was given has ceased to be available. Nor in issuing shares, supposing them to have the power, for the express purpose of creating votes to influence a coming general meeting. *Fraser v. Whalley*, 2 Hemming & Miller (Eng. Ch.), 10. 1864.

IX. INCREASE OF STOCK.

172. Powers of officers. Where the charter of a corporation says that the capital stock of the corporation shall be a sum named, as *ex. gr.* \$100,000, "and may be increased from time to time at the pleasure of the said corporation," the directors alone, and without the matter being submitted to and approved by the stockholders, have no power to increase it unless expressly authorized thereto; and the fact that the charter declares that "*all the corporate powers* of the said corporation shall be vested in and exercised by a board of directors and such officers and agents as said board shall appoint," does not alter the case. The powers thus granted to the directors, etc., refer to the ordinary business transactions of the corporation. *Railway Co. v. Allerton*, 18 Wallace, 233, 1873; 6 Amer. R'y Rep., 430.

173. Right of former shareholders to increase. In order for a stockholder to avail himself of his right, under the charter, to take the additional stock about to be issued, he must apply for the shares and tender payment within the time specified in the charter. *Hart v. St. Charles St. R. R. Co.*, 30 La. An., 758. 1878.

X. ACTIONS BY STOCKHOLDERS.

174. Action against officers. The directors of a corporation represent *all* its stockholders. They cannot, therefore, be charged by a plaintiff in an action with the duty of caring for and protecting the interests of one class of stockholders as against another, and this although they may belong to the former class; if for any reason that class of stockholders should be represented in the action, others not having an official relation to the corporation should be selected as the representatives. Under the Code, officers cannot be made parties to such action. *Chase v. Vanderbilt*, 62 N. Y., 307, 1875; 12 Amer. R'y Rep., 141.

175. Action by stockholder against corporation. An action by a stockholder against a corporation, to restrain it from a contemplated transaction which is *ultra vires*, may be maintained, and must be sanctioned by the court, although all the other stockholders of the corporation are willing to assent to and affirm the proposed course of action; but in a case of evident expediency, and where there is no attempt to go beyond the power conferred, a court of equity will not be swift to grant the stringent relief of a preliminary injunction to a stockholder assailing transactions in the corporate affairs of which the other stockholders do not complain, and to which they have given their consent. *Dupont v. Northern Pacific R. R. Co.*, 18 Federal Reporter, 467. 1883.

176. — Although it is the undoubted right of every shareholder in a company to prevent the directors from exceeding their powers, still, where it appears that the plaintiff is merely a puppet in the hands of others not shareholders in the company, who indemnify him against the costs of the suit, the court will not interfere by interlocutory injunction. *Filder v. London, Brighton and South Coast R'y Co.*, 1 Hemming & Miller (Eng. Ch.), 489. 1833.

177. — A county, as stockholder in a railroad company, brought suit against the company. *Held*, on demurrer, that where the bill shows a condition of things touching the control of the corporate affairs of those intrusted with their active management, as would have rendered a formal ap-

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plication to the board of directors to bring the suit an idle ceremony, a case is presented requiring the defendant to answer. *Tazewell County v. Farmers' Loan and Trust Co.*, 12 Federal Reporter, 752. 1882.

178. Injunction. Though a shareholder in a railway company has an equity to have an injunction to restrain the directors from applying the funds of the company in the completion of a part only of the line, with a view to the abandonment of the remainder, yet where the shareholder, with the knowledge of the intention to abandon the greater part of the line, remained passive for eighteen months, while the directors were expending large sums in the completion of the remainder, the court refused to interfere by injunction. *Graham v. Birkenhead R'y Co.*, 6 Eng. Law & Equity, 132; 20 Law Jour. Rep. (N. S.), Chanc., 445. 1851.

179. — Upon an *ex parte* application an injunction was granted restraining the directors of the R. and S. L. R. Co. from passing a resolution declaring the office of treasurer vacant; removing the treasurer; electing any other person to perform the duties of his office, or to take the books or papers of the company from him. The action was commenced by a stockholder, on the ground that two former treasurers had, by means of false entries in the books, defrauded the company, and that certain of the defendants intended to pass the resolution for the purpose of preventing any further investigation and the company from recovering the amount due, and plaintiff asked that the said defaulting treasurers, defendants herein, should be adjudged to pay to the company the amount due to it from them. *Held*, that a stockholder could not maintain the action until request had been made to the corporation, and its officers had refused to bring suit. *Wilkie v. Rochester and State Line R'y Co.*, 12 Hun (N. Y.), 242. 1877.

180. Misapplication of funds. Where one company enters into an illegal transaction with another company, and makes an illegal payment out of its funds in respect of such transaction, a shareholder impeaching the dealings of the companies, and seeking to have the money restored to the funds of his own company, is entitled, in his own

name, to maintain a suit against both companies for that purpose. *Salomons v. Laing*, 6 Eng. R. R. & Canal Cases, 308. 1830.

181. Right of stockholders to defend for corporation. Stockholders, except when expressly authorized by statute, are not allowed to plead and defend for the corporation, when the suit is against it, and they are not parties on the record. *Blackman v. Central R. R. and Banking Co.*, 58 Ga., 189. 1877.

182. Right of stockholder to sue for corporation. A stockholder in a business corporation cannot sue in equity for relief against an injury done or threatened to the corporation in which he is a stockholder, without an averment that the corporation or its officers are derelict in their duty. *Morgan v. Railroad Co.*, 1 Woods (U. S. C. C.), 15. 1870.

183. — The corporation must be made a defendant in such suit. *Davenport v. Dows*, 18 Wallace, 626. 1873.

STOCK YARDS.

1. Fraudulent organization. Where a stock yard company was organized by the officers of a railway company and others, and the only means put into the same was by the railway company, through its officers, who also controlled the stock yard company, and the latter company issued stock to the extent of its charter, a portion of which was used as a corruption fund, and the balance divided between certain members of the company, they paying nothing therefor, it was held that the issue of the stock was in violation of law and in fraud of the rights of the stockholders of the railway company, and vested in the recipients of the same no rights which a court of equity would enforce or protect. The stock, if of any validity, belonged to the railway company. *Tobey v. Robinson*, 99 Ill., 222. 1881.

2. Monopoly. A preliminary injunction granted to restrain the withdrawal of railway connection with an old established stock yard, the withdrawal being attempted to aid in the erection of a monopoly at another point. *Coe v. Louisville and Nashville R. R. Co.*, 3 Federal Reporter, 775. 1880.

Agent and Principal — Notice.

STOP-OVER TICKETS.

See TICKETS; INJURY TO PASSENGERS.

STOPPAGE IN TRANSITU.

See LIEN OF CARRIER.

1. **Agent and principal.** Where one through his agent sells goods to another, and they are shipped to the purchaser, the agent has no right to stop the goods *in transitu* because his principal owes him on account of money advanced in the purchase of the goods. *Gwyn v. Richmond and Danville R. R. Co.*, 85 N. C., 429, 1881; 6 Amer. & Eng. R. R. Cases, 452.

2. **Assignment of bill of lading.** The assignment of a bill of lading to an innocent holder will defeat the right of stoppage *in transitu*. *Newhall et al. v. Central Pacific R. R. Co.*, 51 Cal., 345, 1876; 12 Amer. R'y Rep., 229.

3. — An assignment to an attorney held fraudulent and void under the evidence. *Poole v. Houston and Texas Central R'y Co.*, 58 Tex., 184, 1883; 9 Amer. & Eng. R. R. Cases, 197.

4. — As a general rule a bill of lading is evidence of the title to personal property; but if it be obtained without the authority of the owner and vendor of the goods, or by fraud, it will not authorize a transfer so as to defeat the title of the original owner or affect his right to stop the goods *in transitu*. *Evansville and Terre Haute R. R. Co. v. Erwin*, 84 Ind., 457, 1882; 9 Amer. & Eng. R. R. Cases, 252.

5. **Between what parties the right exists.** F., a merchant at Dardanelle, ordered goods of W. B. & Co., merchants at St. Louis. They sent the order to L. A. & Co., merchants at New Orleans, with directions to ship the goods to F. at Dardanelle, and send them the bill and bill of lading. L. A. & Co. filled the order, shipped the goods to F., and sent the bill and bill of lading to W. B. & Co., and charged the goods to them, and they charged them to F. During the transit W. B. & Co. failed, and L. A. & Co., claiming the right of stoppage *in transitu*, demanded the goods of the M. and L. R. R. Co., which was transporting them to F., and

the company delivered them up to them. F. then sued the company for the value of the goods. *Held*, that L. A. & Co. were not the vendors of F.; there was no privity between him and them, and they had no right to stop the goods, and the defendant was liable to F. for their value. *Memphis and Little Rock R. R. Co. v. Freed*, 38 Ark., 614, 1882; 9 Amer. & Eng. R. R. Cases, 212.

6. **Delivery.** On November 12th a railroad received certain boxes of tobacco to be carried from Atlanta to Macon; they reached the latter place on November 15th, and, under an agreement between the consignee and the carrier, they were set aside by the latter in its depot to be sold and the proceeds used to pay past due freights, it being agreed that the balance, if any, should go to the consignee. He did not receive the boxes and then turn them over, nor did he assign the bill of lading, nor was the freight paid. On December 12th the consignors sought to stop the goods *in transitu*, and, failing to obtain them on demand, sought to recover against the carrier. *Held*, that no actual delivery had taken place so as to prevent a stoppage *in transitu*. *Macon and Western R. R. Co. v. Meador*, 65 Ga., 705, 1880; 6 Amer. & Eng. R. R. Cases, 450.

7. **Equity.** A bill in equity will lie to enforce a right of stoppage *in transitu*. *Schotsman v. Lancashire and Yorkshire R'y Co.*, Law Reports, 2 Chancery Appeal Cases, 332. 1867.

8. **Liability of carrier.** For the erroneous delivery of goods to the consignee by the carrier, after receiving notice to stop the goods, the carrier is responsible. *Campbell v. Jones*, 9 Decisions des Tribunaux (Lower Canada), 10. 1858.

9. **Notice.** The notice to the carrier is sufficient if he is clearly informed of the desire of the seller to exercise the right of stoppage *in transitu*. The objection that the purchaser is not insolvent can only be raised by the purchaser; such objection is not available to the carrier, except that he may show, as a matter of defense, that the debt might have been collected by due diligence. *Bloomingtondale v. Memphis and Charleston R. R. Co.*, 6 Lea (Tenn.), 616, 1881; 6 Amer. & Eng. R. R. Cases, 371.

10. — The statute of Texas recognizes no

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such officer as "general freight agent," and service of citation on the station agent having control of freights of the railway company at the point of destination of the goods is service on the company. Notice to such an agent of stoppage *in transitu* is notice to the company. *Poole v. Houston and Texas Central R'y Co.*, 58 Tex., 134, 1882; 9 Amer. & Eng. R. R. Cases, 197.

11. — The notice of stoppage *in transitu* should be sufficiently specific to enable the carrier to identify the goods; otherwise it will not be liable for delivery of the goods after notice. *Clementson v. Grand Trunk R'y Co.*, 42 Upper Canada (Queen's Bench), 263. 1877.

12. Right of vendor. Where goods are left with a common carrier to be delivered to the consignee without any qualification or restriction, the consignor parts with the goods and all control over them, and cannot, by a subsequent order to the carrier, prevent their delivery to the consignee, unless such facts are shown as will justify the stoppage of the goods *in transitu*. *Philadelphia and Reading R. R. Co. v. Wireman*, 88 Pa. St., 264. 1879.

 STREET RAILWAYS.

See BRIDGES; CHARTER; CONTRACTS; CORPORATE POWERS; DOGS; EMINENT DOMAIN; EVIDENCE; INJUNCTION; INJURIES TO PERSONS ON THE TRACK; INJURIES TO PASSENGERS; INSOLVENCY; MECHANICS' LIENS; PASSENGERS; SUNDAY LAWS; TAXATION.

I. CHARTER AND GRANTS.

II. EMINENT DOMAIN.

III. STREETS — REPAIRS AND IMPROVEMENTS.

IV. COLLISIONS.

V. INJURIES TO PERSONS ON THE TRACK.

VI. INJURIES TO PASSENGERS.

VII. EXPULSION OF PASSENGERS.

VIII. MISCELLANEOUS.

I. CHARTER AND GRANTS.

1. Authority to use street. A railway cannot occupy a street with its track, even temporarily, unless such right is clearly conferred by its charter. The councils of a city cannot confer such right; but only the peo-

ple of the whole state by their legislature. *Attorney-General v. Lombard and South Sts. R. R. Co.*, 10 Philadelphia, 353. 1875. See, also, *Metropolitan City R'y Co. v. City of Chicago*, 96 Ill., 620, 1880; 2 Amer. & Eng. R. R. Cases, 291.

2. — If one street railroad company is occupying or using a street without proper license to do so, it is no concern of another railroad company having a railway on the same street, but must be inquired into by proceedings on behalf of the public. *Market Street R'y Co. v. Central R'y Co.*, 51 Cal., 583, 1877; 12 Amer. R'y Rep., 219.

3. Conflicting rights; proceedings by attorney-general. A proceeding having been commenced, in the name of the state, to determine what were in fact the conflicting rights of two street railway companies, the attorney-general may at his discretion dismiss the proceeding. *People v. Central Cross Town R. R. Co.*, 21 Hun (N. Y.), 476. 1880.

4. Charter. A party, signing an instrument plainly intended to be final articles of association of a street railway company (though defective), one of the articles giving power to any two subscribers to call a meeting "for the purpose of effecting an organization and incorporating under the laws of Indiana" and electing directors, and authorizing any three subscribers at such meeting "to have the company duly organized and incorporated as herein provided," does not thereby empower such meeting to make new and perfect articles of association, and bind him thereby. *Richmond Street R. R. Co. v. Reed*, 83 Ind., 9, 1882; 9 Amer. & Eng. R. R. Cases, 697.

5. — Ch. 160, Laws of 1873, confers upon the corporation thereby created the right to extend its tracks to the North river at the foot of Christopher street. *Christopher and Tenth Street R. R. Co. v. Central Cross-Town R. R. Co. of New York*, 4 Hun (N. Y.), 630. 1875.

6. — The statute approved December 13, 1855, to organize a street railway in St. Louis, construed. *St. Louis R. R. Co. v. Northwestern St. Louis R'y Co.*, 69 Mo., 65, 1878; reversing *St. Louis R. R. Co. v. Northwestern St. Louis R'y Co.*, 2 Mo. App., 69, 1876.

7. — Where the charter of a horse railway company authorized it to build a single

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or double track railway over any streets in the city of Chicago, as had been or should be authorized by the common council, and full permission was given by ordinance to lay a track, in which a time was fixed for its completion, and a forfeiture was provided for in case of non-completion, and before the expiration of the time the ordinance was amended and the time extended for the period of ten years, *held*, that the operation of this latter ordinance was to extend the time for ten years after the expiration of the time fixed by the previous ordinance. *McNeil v. Chicago City R'y Co.*, 61 Ill., 150, 1871; 12 Amer. R'y Rep., 457.

8. Constitutional law. The act of incorporation of a street railway company authorized it to lay its tracks in a number of streets designated. Another act was passed, entitled "A supplement (to the first act) authorizing the company to declare dividends quarterly, and to lay additional tracks of railway." *Held*, that under the clause in the constitution prohibiting laws "containing more than one subject, which shall be clearly expressed in the title," a provision authorizing the laying of tracks in streets, not authorized by the original act, was unconstitutional. *Union Passenger R'y Co.'s Appeal*, 81½ Pa. St., 91. 1872.

9. — The section of the act of 1860 providing for the construction of a railroad in Seventh avenue, New York (ch. 513, Laws of 1860), which authorizes the persons named to "run upon, intersect and use" any portion of other railroad tracks, should they deem it necessary, makes full provision for compensation, and is constitutional. *Sixth Avenue R. R. Co. v. Kerr*, 72 N. Y., 330. 1878.

10. — A statute exempting a corporation from the operation of the general statutes is unconstitutional. *Omnibus R. R. Co. v. Baldwin*, 57 Cal., 160, 1881; 1 Amer. & Eng. R. R. Cases, 316.

11. Control of streets by city. A city has general power over its streets and alleys to keep them in good order and to regulate their use for the benefit of the public. The legislature has the power to authorize the construction of a railroad over the streets of a city even against its will. In the absence of any statutory provision, a railway com-

pany is bound to keep in repair that part of the streets of a city occupied by it, but the city cannot pass an ordinance compelling it to keep it in order. If the track of a railroad company is out of order, so that it cannot be crossed with safety, the company may be indicted. *Harrisburg v. Harrisburg Passenger R'y Co.*, 1 Pearson (Pa.), 298. 1867.

12. — A city may to a certain extent control and regulate the action of other corporations within its limits by ordinance; but it cannot prohibit a city passenger railway company, chartered by the legislature, from running its cars upon its streets for the non-compliance with the provisions of an ordinance. *Ib.*

13. — A city ordinance prescribing the place and mode of construction and operation is valid, and will, after its acceptance by the railway company, be regarded as determining the control to be exercised by the city. *Clinton v. Clinton and Lyons R'y Co.*, 37 Ia., 61. 1873.

14. — An act of assembly incorporating a passenger railway company authorized it to lay tracks along certain streets of the city of Allegheny, "provided that before said company shall use and occupy any of said streets, the consent of the councils of the city or borough within which the said street lies shall first be obtained by ordinance duly passed." By a supplementary act, which contained no direction requiring the consent of councils, the company was authorized to lay tracks between certain points, the route between which was partly within the city limits. *Held*, that before tracks could be laid under the later act, the consent of councils must be obtained. *Pittsburgh, Allegheny, etc., R'y Co., Appeal of*, 1 Pennypacker (Pa.), 449. 1881.

15. — A passenger railway company having accepted its charter with the knowledge that the city possessed the most ample power to legislate by ordinance as to its streets and highways, to make all needed regulations for the most convenient enjoyment of the same by the citizens of the commonwealth, is bound, by an implied agreement, to hold its special privileges subject to a proper exercise of this power by the councils of the city. *West Philadelphia R'y Co. v. Philadelphia*, 10 Philadelphia, 70. 1873.

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16. — A passenger railway company having laid its road in the streets of the city of Philadelphia under authority of a charter from the state is liable to the regulations adopted by councils for the preservation of the public rights in the highway. *Ib.*

17. Crossings. The maintenance of a horse railroad on the streets of a city is a mere special mode of using the street, and does not exclude the public from the use of the street nor prevent the crossing of its track by another railroad, provided the crossing is effected with as little damage as may be. *Market Street R'y Co. v. Central R'y Co.*, 51 Cal., 533, 1877; 12 Amer. R'y Rep., 219.

18. — A grant of right to cross any "railways and railroads now or hereafter to be laid on Market street" does not give a right to cross a railroad now constructed. *Maris v. Union Passenger R'y Co.*, 10 Philadelphia, 41, 1873.

19. Exclusive rights. Where a street railway company has refused to build an additional line lawfully required by the city council, it is discretionary with the council to make such changes in the proposed route as to adapt it to form a junction with the line of some company that will build it, even though, in so doing, a street in which the former company had had exclusive rights is used as a connecting link. If such a use infringes the rights of the former company, it is *dammum absque injuria*. *Grand Rapids Street R'y Co. v. West Side Street R'y Co.*, 48 Mich., 433; 7 Amer. & Eng. R. R. Cases, 95, 1882. See, also, *Kinsman Street R. R. Co. v. Broadway and Newburgh Street R. R. Co.*, 36 Ohio St., 239, 1880; 5 Amer. & Eng. R. R. Cases, 327.

20. — The evidence as to performance of the conditions of an exclusive charter being conflicting, an injunction was refused till the final hearing. *Savannah, Skidaway, etc., R. R. Co. v. Coast Line R. R. Co.*, 49 Ga., 202, 1873.

21. — A municipal ordinance gave a street railway company the exclusive right to lay its track in such streets as should be designated by the city council, if accepted by the company within a certain time. *Held*, that the company, after forfeiting such right as to specified streets, could not maintain a bill

to enjoin another company, upon which the right had been subsequently conferred, from laying its track in streets not so designated to complainant, unless it could show actual injury thereby to its own interests. *Grand Rapids Street R'y Co. v. West Side Street R'y Co.*, 48 Mich., 433; 7 Amer. & Eng. R. R. Cases, 95, 1882.

22. — Section 3 of the act of January 16, 1860, whereby it was enacted that no street-railway should be constructed in the city of St. Louis nearer to a parallel railway than the third parallel street, was not repealed by the act of February 15, 1864, nor by the act of March 13, 1867, nor by the act of March 4, 1870, nor by art. 10, § 1, of the present charter of the city of St. Louis. Neither has the municipal assembly of said city the power to repeal said § 3. *St. Louis R. R. Co. v. South St. Louis R. R. Co.*, 72 Mo., 67, 1880. See, also, *St. Louis R. R. Co. v. Northwestern St. Louis R'y Co.*, 69 Mo., 65, 1878.

23. — The right acquired by a horse railroad company, under a legislative grant authorizing it to lay rails in a public highway, and to run cars thereon, charging fare, is such as entitles it to exclude from the habitual and continuous use of its tracks all companies and persons engaged in carrying passengers for hire, in competition with it. *Citizens' Coach Co. v. Camden Horse R. R. Co.*, 83 N. J. Eq., 267, 1880; 1 Amer. & Eng. R. R. Cases, 190.

24. — The exclusive right of a horse railroad company is not inconsistent with the view that such a railroad, laid on a public highway, is only a modification of the public use to which the highway was originally devoted, and not an additional burden on the land for which compensation may be required. *Ib.*

25. Extension. A street railway corporation, which owns or has a right to construct a street railroad within a city or village, may, with the permission of the council of such city or village, duly granted, extend its track beyond the termini named in the certificate of incorporation, subject to the provisions of § 2505 of the Revised Statutes (77 Ohio L., 42). *Sims v. Street R. R. Co.*, 37 Ohio St., 556, 1882; 4 Amer. & Eng. R. R. Cases, 132.

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26. Grant of franchise by city. Under §§ 411 and 412 of the Municipal Code (66 Ohio L., 217; 67 Ohio L., 77), a grant by the council of a municipal corporation to build a street railroad must be made by ordinance directly to a party to be therein named; and the authority to make the grant cannot be delegated by the council to any officer or board. *State ex rel. v. Bell*, 84 Ohio St., 194, 1877; 21 Amer. R'y Rep., 84.

27. — A city council cannot properly so multiply street railway tracks in a particular street as to interfere with the rights of the general public in the street. *Grand Rapids Street R'y Co. v. West Side Street R'y Co.*, 48 Mich., 433; 7 Amer. & Eng. R. R. Cases, 95, 1882.

28. — Where the rights granted by a city to a corporation have lapsed, the city can impose whatever conditions it pleases upon a renewal of them. *City of Detroit v. Detroit City Railway Co.*, 37 Mich., 558, 1877.

29. — A city has no power to authorize the construction of street railways without some legislative enactment vesting the municipal authorities with such authority. *Covington Street R'y Co. v. City of Covington*, 9 Bush (Ky.), 127, 1872; *Eichels v. Evansville Street R'y Co.*, 78 Ind., 261, 1881; 5 Amer. & Eng. R. R. Cases, 274.

30. — The doctrine is now settled that the legislature has the power to authorize the building of a railroad on a street of a city, and may directly exercise this power or devolve it upon the local or municipal authorities. *Harrison v. New Orleans Pacific R'y Co.*, 34 La. An., 462, 1882.

31. Legislative authority. The legislature, in the exercise of its sovereign powers, may authorize the use of the streets of a city or town for the purposes of a horse railway, and such a use is not an additional servitude for which adjoining lot owners are entitled to compensation. *Hodges v. Baltimore Union R'y Co.*, 58 Md., 603, 1882; 10 Amer. & Eng. R. R. Cases, 270; *Hiss v. Baltimore and Hampden R'y Co.*, 52 Md., 242, 1879; 4 Amer. & Eng. R. R. Cases, 201; *Maris v. Union Passenger R'y Co.*, 10 Philadelphia, 41, 1873. See, also, *Eichels v. Evansville Street R'y Co.*, 78 Ind., 261, 1881; 5 Amer. & Eng. R. R. Cases, 274.

32. Location of line in the street. A passenger railway company was incorporated with a right to lay a track on Seventh street from Filbert street to Sansom street in the city of Philadelphia, provided the assent of the city should be obtained thereto. The company was also authorized to connect at grade with any railroad upon such terms and conditions as may be agreed upon, or as the district court of Philadelphia, in case of disagreement, might direct. By a city ordinance, July 7, 1857, all railway companies were required to submit a plan to the board of surveyors of said city; and the company did submit such plan, which was duly approved, and by that plan its road was to be laid in the middle of Seventh street, then occupied by the Union R'y Co. On June 19, 1875, the city council authorized the Continental Company to construct its road over the points designated in its charter. It proceeded to lay a track on the west side of Seventh street, between the Union Railway track and the curb, to which action the city objected and applied for an injunction. *Held*, that the Continental R'y Co. having, by its plan submitted to, and approved by, the board of surveyors, located its road in the middle of the street, had no right to lay a track on the west side thereof, and the injunction was continued. *Philadelphia v. Continental Passenger R'y Co.*, 11 Philadelphia, 315, 1875.

33. Location; publication of notice. Under the "Act in regard to horse and dummy railroads," approved March 9, 1874, the city, town or village authorities are prohibited from giving consent to construct and operate a horse railroad in the streets, unless at least ten days' public notice of the time and place of presenting the petition shall first have been given by publication in some newspaper published in the city or county where such road is to be constructed. The publication of the report of a committee recommending the granting of such leave, ten days before the adoption of an ordinance authorizing the construction of such a road, and the publication of the ordinance, is not a compliance with the statute. *Metropolitan City R'y Co. v. City of Chicago*, 96 Ill., 620, 1880; 2 Amer. & Eng. R. R. Cases, 291.

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34. New lines; connection. A new street railway company, authorized by its charter to connect with the tracks of another line, must have the terms and compensation settled by due course of law. *Union Passenger R'y Co. v. Continental R'y Co.*, 11 Philadelphia, 321. 1876.

35. Ordinance. The repeal of an ordinance will not operate to disturb private rights vested under it. *Cape May and Schellenger's Landing R. R. Co. v. City of Cape May*, 35 N. J. Eq., 419. 1882.

36. — Under the provisions of the Municipal Code, the city council of Cincinnati is not authorized to pass any ordinance giving to street railway companies the exclusive right to maintain and operate such railroads upon a street, or to grant the right to construct such railroads on streets to be designated, to such company as will bid "the lowest price of commutation tickets in packages," the law requiring such grants to be let to the one that "will agree to carry passengers at the lowest rate of fare." Where an ordinance contains such illegal provisions, and they are so connected with authorized provisions that their separation is impracticable, the whole ordinance is invalid. *Cincinnati Street R. R. Co. v. Smith*, 29 Ohio St., 291. 1876.

37. — Revision of city ordinances examined and certain ordinances held unrepealed. *Providence v. Union R. R. Co.*, 13 R. I., 473. 1879.

38. Single or double track; control by city. Where a city granted to a street railway company the right to lay a double track in its streets, and thereupon the company expended a large amount of money in the enjoyment of the franchise thus conferred, it was held that the city could not afterward, by amendment to the ordinance conferring the franchise, limit the company to a single track in a street through which it proposed to extend its line. *Burlington v. Burlington Street R'y Co.*, 49 Ia., 144. 1878.

39. — Before the city could, in the exercise of its police power, limit the company to a single track, it must have been made to appear that the exercise of the right granted by the original ordinance wrought injury. *Id.*

40. — Under the St. of 1874, ch. 29, § 11,

which provides that the board of aldermen of a city and the selectmen of a town may authorize any street railway company "whose charter has been duly accepted, and whose tracks have been located and constructed, to extend the location of its tracks within the territorial limits of such city or town, whenever it can be done without entering upon or using the tracks of any other street railway corporation," a street railway company may be authorized to locate additional tracks, not connected with its existing tracks except by the tracks of another corporation. *South Boston R. R. Co. v. Middlesex R. R. Co.*, 121 Mass., 485. 1877.

41. — A railway company laid down tracks on a street and used the same for seven years; then the double track was removed and a single one laid, which was sufficient for the business of the line for the next ten years. The business again requiring the double track, the company proceeded to tear up the single track to again relay the double one, when a bill was filed to restrain it on the ground that it had forfeited its right to relay this track by non-user. *Held*, that there was no ground for forfeiture. *Hestonville, etc., R. R. Co. v. City of Philadelphia*, 89 Pa. St., 210. 1879.

42. Steam power. A town may prohibit the use of steam upon a street railway. *North Chicago City R'y Co. v. Lake View*, 11 Amer. & Eng. R. R. Cases (Ill.), 42. 1838.

43. — The legislature may grant the right to a railway company whose line is already constructed to use steam upon its road. Such grant is not unconstitutional. *People v. Long Island R. R. Co.*, 9 Abbott's New Cases (N. Y.), 181. 1880. See, also, *North Chicago City R'y Co. v. Lake View*, 105 Ill., 207. 1883.

44. Successor of corporation. When a regularly incorporated street railway company becomes entitled to the exclusive right to lay its track in certain streets upon the relinquishment or forfeiture of such right by another company, it is thereafter entitled to the same protection against injurious interference, to the extent of this right, as the other company would have been. *Grand Rapids Street R'y Co. v. West Side Street R'y Co.*, 48 Mich., 433; 7 Amer. & Eng. R. R. Cases, 95. 1832.

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45. Vested rights of company. The state having granted a right to lay rails on a street to one corporation cannot grant any right to another which will interfere with that right first granted. *Maris v. Union Passenger R'y Co.*, 10 Philadelphia, 41, 1873; *Market St. R'y Co. v. Union Passenger R'y Co.*, ib., 43.

46. Use of tracks by other companies; powers of commissioners. It is within the discretion of the railway commissioners, authorized by the St. of 1871, ch. 331, §§ 38, 39, to determine the rate of compensation to be paid by one street railway company for the use of the tracks of another such corporation, to establish rules regulating the modes of apportioning expenses and estimating compensation between the companies; and to the exercise of that discretion, if no question of law is involved, no exception lies. *Metropolitan R. R. Co. v. Highland Street R'y Co.*, 118 Mass., 290, 1875; 9 Amer. R'y Rep., 285.

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47. Abutting property. A horse street railway may be placed and operated upon the streets of a city without increasing the burden of the servitude, and the owner of the fee is not entitled to compensation because of such use of the streets upon which his property abuts. *Eichels v. Evansville Street R'y Co.*, 78 Ind., 261, 1881; 5 Amer. & Eng. R. R. Cases, 274; *West Jersey R. R. Co. v. Cape May and Schellenger's Landing R. R. Co.*, 34 N. J. Eq., 164, 1881; *Attorney-General v. Metropolitan R. R. Co.*, 125 Mass., 515, 1878. See, also, *Mahady v. Bushwick R. R. Co.*, 91 N. Y., 148, 1883. *Contra, Carli v. Stillwater Street R'y Co.*, 28 Minn., 373, 1881; 3 Amer. & Eng. R. R. Cases, 226.

48. Dummy railroad. The right of a corporation to condemn property and appropriate the same for the construction, operation and maintenance of a horse or dummy railway in the streets of a city, is derived solely from the state law, and the consent of the city authorities to the construction and operation of such railway is not a condition precedent to proceedings to condemn. Such consent can be obtained after condemnation as well as before, and, if given, is a mere

license, revocable at any time before acted on. *Metropolitan City R'y Co. v. Chicago West Division R'y Co.*, 87 Ill., 317, 1877; 19 Amer. R'y Rep., 64.

49. — The interest a city railway company may have in certain streets, derived by contract with the city prohibiting their use by any other company, is no part of the company's franchise, but is in the nature of property, and is an incorporeal right. *Id.*

50. Statute. The provisions of the statutes respecting the appropriation of the right of way for railroad companies apply as well to railways operated by animal power as to those operated by steam. *Clinton v. Clinton and Lyons R'y Co.*, 37 Ia., 61, 1873; *Ingram v. C. D. and M. R. R. Co.*, 38 ib., 669, 1874.

51. Taking of one company's property for use of another. Where the legislature has reserved the power to alter, amend and repeal the charter of a street railway company, it may lawfully authorize another company to use its tracks, or to lay similar tracks through the same streets, making compensation for the use of the tracks of the first company, without making any compensation for the diminution of its profits or the value of its franchise. *Metropolitan R. R. Co. v. Highland Street R'y Co.*, 118 Mass., 290, 1875; 9 Amer. R'y Rep., 285.

III. STREETS — REPAIRS AND IMPROVEMENTS.

52. Change of grade of street. An injunction will not be granted to restrain the city from changing the grade of a street, upon the complaint of a passenger railway company which had purchased the right of way over the street, formerly a turnpike, where ample remedy is given the company for the recovery of whatever damages may result to it by statutory proceedings. *Ridge Avenue R'y Co. v. Philadelphia*, 10 Philadelphia, 37, 1873.

53. Crossings. After a bill in equity had been filed by a street railway company against a steam railway corporation to restrain it from building its road across a highway upon which the street railway was laid, at a level with the highway, the county commissioners authorized the railway cor-

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poration to cross the highway at a level. *Held*, that the bill must be dismissed. *Lynn and Boston R. R. Co. v. Boston and Lowell R. R. Co.*, 114 Mass., 88. 1873.

54. Defect; liability of city. A city is liable for not keeping its streets safe for travel. It cannot divest itself of this duty by an ordinance. *Watson v. Tripp*, 11 R. I., 98. 1874.

55. — The plaintiff was driving in that portion of Second avenue occupied by the defendant's tracks; one wheel slipped into an excavation between the tracks, whereby he was thrown and injured. The excavation was made in order to connect with the sewer, by an adjoining property owner, who had notified defendant of his intention to make the same, whereupon the defendant bridged it over, so that horses could pass. The defendant had agreed with the city "to pave the streets, in and about the rails, in a permanent manner, and keep the same in repair." *Held*, that the contract made by the city inured to the benefit of the plaintiff, and that he was entitled to enforce it. *McMahon v. Second Avenue R. R. Co.*, 11 Hun (N. Y.), 347. 1877.

56. — injury to traveler. Defendant was licensed by the B. C. R. R. Co., a street railroad company, in the city of Brooklyn, to connect its road with that of the latter company, at a point on the street where there was a cross-walk. By the contract between the two companies, defendant was to make and pay for all switches necessary to avail itself of the license. After connection was made, the B. C. R. R. Co. stipulated to keep the tracks in repair, and no right was reserved or duty imposed on defendant, as to said tracks, after the switch was once laid, or as to the pavement or cross-walk. The B. C. R. R. Co. had contracted with the city to keep the pavement "within the tracks and three feet each side thereof" in repair. The portion of the switch at the cross-walk was a part of the track of the latter company. It was properly laid originally, with its flange below the surface of the cross-walk, but, by the sinking and wearing away of the cross-walk adjoining, its surface was brought below the switch, and an obstruction was created, by means of which the plaintiff was thrown down and injured. In

a suit for damages, *held*, that as to the portion of the switch in question, defendant had no duty to perform in maintaining it, and was not liable for failure to keep the cross-walk in repair. Therefore, a charge of the court that it was defendant's duty, in the proper maintenance of its switch, "to keep the cross-walk on a safe level with the grade of the switch," was erroneous. *Lowery v. Brooklyn City and Newtown R. R. Co.*, 76 N. Y., 28. 1879.

57. Gas pipes. Where a gas company, with the permission of the municipal authorities, had laid down, and was maintaining, its pipe in the street of a city, and a street railway company was wrongly informed by the employes of the gas company respecting the location of the latter's pipes, so that the railway track was laid over them, *held*, that the gas company could be estopped from disturbing the railway track, even for the purpose of repairing its own property. *Davenport Central R'y Co. v. Davenport Gas Co.*, 43 Ia., 301, 1876; 14 Amer. R'y Rep., 437.

58. Improvements. The right of way, right of occupancy, franchise and interest of a street railway company having a track in a street, under a charter of the legislature and under a contract with the city council, is a property, and as such is liable to be assessed for benefits in the widening of the street upon which it runs its cars, the same as any other property benefited by the proposed improvement. *Chicago City R'y Co. v. City of Chicago*, 90 Ill., 573. 1878.

59. Obstruction. There is no presumption of law that a street railroad obstructs the usual travel on a highway, or makes it dangerous. *Hawks v. Northampton*, 121 Mass., 10. 1876.

60. Repair of streets. Under an ordinance requiring a street railway company to "keep the surface of the street inside the rails, and for two feet four inches outside thereof, in good order and repair, provided, however, that, upon the paved portion of said streets, the material for repaving shall be supplied at the expense of the city," where the city directs the company to "raise and repair" that portion of the pavement within the rails, at a time when it had become so much out of repair that a reconstruction

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with new materials was necessary, the city was bound to bear the expense of the materials; such repairs amount to repaving within the meaning of the proviso. *Fort Wayne and Elmwood R'y Co. v. City of Detroit*, 34 Mich., 78. 1876.

61. — A city ordinance required a street railway company to keep the space between its rails in good repair, and provided that on the paved portion of the street the materials should be supplied at the city's expense. *Held*, that in a suit by the company to recover the expense of material which it had furnished, it was not bound to show that the necessity for repairs did not arise from its own previous neglect of duty; such a fact would be matter of defense to be shown by the city. *Fort Wayne and Elmwood Street R'y Co. v. City of Detroit*, 39 Mich., 543. 1878.

62. — The company being directed to make repairs, asked the city authorities for leave to repave with cobble-stone, and the city refused to furnish any kind of material, but made no objection to cobble-stone and offered no suggestions. *Held*, that the company might use any suitable material and maintain an action against the city for its value. *Ib*.

63. — A railroad company is bound to keep its track in good order and repair, and if it carelessly fails or omits to do so and an injury occurs in consequence thereof, it will be liable in damages. *Conroy v. Twenty-third Street R. R. Co.*, 52 Howard's Practice (N. Y.), 49. 1875.

64. — A city ordinance permitted a street railway company to double its track *throughout* a certain street, but stipulated that it should thereafter bear all the expense of repaving so much of the street as was occupied by its tracks, and should relay its tracks in the middle of the street. *Held*, that the ordinance applied to the entire street, and that if the company availed itself of the grant in part, it accepted the conditions in full, and lost the benefit of former exemptions or privileges that were inconsistent with it. *City of Detroit v. Detroit City R'y Co.*, 37 Mich., 558. 1877.

65. — An obligation to keep a street in repair requires that it shall be kept in such condition as that the ordinary and expected travel of the locality may pass with reason-

able ease and safety. *McMahon v. Second Avenue R. R. Co.*, 75 N. Y., 231, 1878; affirming *Same v. Same*, 11 Hun (N. Y.), 347, 1877.

66. — A corporation was empowered to construct a street railway, but not to use the street until the consent of the councils should be had, and to keep so much of the streets, "from curb to curb, as may be used by them, in perpetual good repair at the expense" of the corporation. The councils gave consent, on condition the corporation should keep the street in a good and sufficient state of repair, and "in a reasonable sanitary condition." On one side of the street was a ravine, rising to the top of a hill; by an extraordinary rain, rocks, stone, etc., were washed down the ravine on the street, eight or ten feet in depth, for one hundred feet in length. *Held*, that the railway corporation was bound to remove the deposit from the street. *Pittsburgh and Birmingham Passenger R'y Co. v. City of Pittsburgh*, 80 Pa. St., 72. 1875.

67. — A street railway company, having neglected to repair the street, cannot complain if the city authorities obstruct the street and proceed to make the necessary repairs themselves. *Philadelphia and Grey's Ferry R. R. Co. v. Philadelphia*, 11 Philadelphia, 358. 1876.

68. — The requirement in the charter of a street railway company that it should "keep the surface of the street, inside the rails, and for two feet four inches outside thereof, in good order and repair," was held to mean the full width of two feet four inches on *each* side of the track. *People ex rel. v. Fort Street and Elmwood R'y Co.*, 41 Mich., 413. 1879.

69. — The fact that a street railway company has agreed to keep a portion of a street in repair, as one of the conditions upon which it was permitted to lay its tracks, does not deprive the city authorities of the power or absolve them from the duty to keep such streets in a safe and proper condition; and even if the city fails to require the company to perform its contract, this is not an objection to an assessment upon owners of lots upon the streets for necessary repairs. *People ex rel. v. City of Brooklyn*, 65 N. Y., 349. 1875.

Collisions.

70. — By the charter of certain street railway companies of Washington and Georgetown, the companies were required to keep their tracks and the adjacent part of the streets, at all times, well paved and in good order, without expense to the United States and to the District, the District being also bound by statute to take all proper care of its streets and avenues. On the failure of the companies to perform this duty the work was done and paid for by the District, and to obtain reimbursement for the outlay, suit was afterwards brought by it against the companies. *Held*, that after the acceptance of their charters, the companies could not be heard to object that the provision was illegal or incapable of enforcement against them. *District of Columbia v. Washington and Georgetown R. R. Co.*, 1 Mackey (Dist. of Columbia), 361, 1881; 4 Amer. & Eng. R. R. Cases, 161.

71. — Where a tramway company enters into a contract with the road authority, under 33 and 34 Vict., ch. 78, § 29, whereby the road authority undertakes the repair of the portion of the road upon which the tramway is laid, the liability for damage occasioned by the non-repair of that part of the road which would but for such contract be cast by § 28 upon the tramway company, is transferred to the road authority. *Howitt v. Nottingham and District Tramways Co.*, Law Reports, 12 Queen's Bench Division, 16. 1883.

72. — **grading.** The obligation "to keep the road-bed of the railroad in good repair, and to keep the road-bed up to the level of the streets, and in no case to allow the road-bed to be above or below the city grade after the streets shall be graded by the city," does not require the railway company to fill up the streets beneath its track so as to keep its road-bed on a level with the street on each side of the track. *Galveston v. Galveston City R. R. Co.*, 18 Amer. R'y Rep., 274; 46 Tex., 435, 1877; *Galveston City R'y Co. v. Nolan*, 53 Tex., 139. 1880.

73. — **mandamus.** A city railway company may, by *mandamus*, be compelled to repair its track. So held where the act of incorporation required it to keep the track in repair. The remedy by indictment, though proper, is not adequate in such cases. *Hal-*

ifax v. City R'y Co., 1 Russell & Chesley (Nova Scotia Eq.), 319. 1878.

74. — **repaving.** A city ordinance, providing for repaving a street, is not invalid by reason of a failure therein to provide that a street railway company should repave its proper portion of such street. *Mayor, etc., of Baltimore v. Scharf*, 10 Amer. & Eng. R. R. Cases, 241. 1882.

75. **Snow and ice.** A street railway company is liable for removing snow from its track and placing the same in the gutter of the street, so as to cause an overflow upon the adjoining premises. *Short v. Baltimore City R'y Co.*, 50 Md., 73. 1878.

76. — A. was injured by a horse driven by B. The horse was frightened by the overturn of a sleigh to which it was harnessed, and the overturn was caused by a heap of snow and ice wrongfully made and left in a highway by C. A. sued C. to recover damages. C. demurred. *Held*, that the demurrer could not be sustained. *Lee v. Union R. Co.*, 12 R. L., 383. 1879.

77. — An injunction lies at the suit of an abutting house owner, to enjoin a street railroad company from leaving the snow which it removes from its tracks, heaped up between them and plaintiff's premises for a longer period than reasonably requisite for taking it away. *Prime v. Twenty-third Street R. R. Co.*, 1 Abbott's New Cases (N. Y.), 63. 1876.

78. **Switches.** A city railroad company taking up a crosswalk to construct a switch used by it to connect its track with that of another company is bound not only to make but to maintain the surface of the pavement at a level suitable to prevent the switch from becoming a dangerous obstruction to foot passengers. *Lowery v. Brooklyn City, etc., R. R. Co.*, 4 Abbott's New Cases (N. Y.), 32. 1878.

IV. COLLISIONS.

79. **Comparative negligence.** Where the plaintiff is driving with his buggy upon a horse railway track when a car is approaching from the opposite direction toward him at a short distance and in plain sight, it is his duty to turn off the track to avoid a collision, and if he does not do so, through

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negligence or wilfulness, and a collision ensues, he cannot recover against the railway company, even if the latter was also in fault, unless the company or its servants wilfully causes the injury, or are guilty of such negligence or reckless conduct as that the plaintiff's is slight when compared with it. *Chicago West Division R'y Co. v. Bert*, 69 Ill., 388. 1873.

80. Evidence. The facts and evidence in relation to a collision examined and held to be a question for the jury. *Watkins v. Atlantic Avenue R. R. Co.*, 20 Hun (N. Y.), 237. 1880. See, also, *Cohen v. Dry Dock, etc., R. R. Co.*, 40 N. Y. Superior Ct., 368, 1876; 69 N. Y., 170, 1877; *Cook v. Union R'y Co.*, 125 Mass., 57. 1878.

81. — In an action for damage caused by a collision, evidence that the plaintiff, while driving slowly in the highway upon the defendant's street railroad track, attempted to avoid a rapidly approaching car by turning off from the track, but that, being hindered by the sliding of his wheel in the groove of the rail, he was struck by the car driven with unchecked speed, is evidence sufficient to be considered by the jury both upon the question of his care and upon that of the defendant's negligence. *Lynam v. Union R'y Co.*, 114 Mass., 83. 1873.

82. Liability of owner of team. A street railway company was in the lawful use of its cars upon the street, and while so doing one of its cars was run into by the coal wagon of defendant, resulting in an injury to one of the passengers on such car, by reason whereof the railway company was obliged to pay damages for the injury sustained by such passenger. Held, that the railway company had a remedy over against defendant for the trespass committed in running into its car, irrespective of the special damages for injury to the passenger set out in the declaration. *Chicago West Division R'y Co. v. Rend*, 6 Bradwell (Ill.), 243. 1880.

83. Repair of streets. It is the duty of a street railway company, as to third persons, to keep in repair that portion of a switch which, being a part of its own track, yet forms a connection with the track of another company, although, as between the two corporations, the duty of repairing may rest

upon the latter; and such former company is liable for damages suffered through a collision with a team caused by such neglect. *McKenna v. Metropolitan R. R. Co.*, 112 Mass., 55. 1873.

84. Rights of parties. A person driving upon a street has the right to drive upon or cross a street railway. The only limitation upon this right is that he must give the cars the preference upon the track and not unnecessarily obstruct their passage. *Adolph v. Central Park, North and East River R. R. Co.*, 65 N. Y., 554, 1875; *Same v. Same*, 76 N. Y., 530, 1879; 43 N. Y. Superior Ct., 199, 1878.

V. INJURIES TO PERSONS ON THE TRACK.

85. Accidental fall. In an action against a city railroad company to recover damages for running over the plaintiff, who stumbled and fell upon the track in crossing the street, it is not material that the plaintiff did not look to see whether a car was approaching before he attempted to cross, if there was when he started abundance of time, under ordinary circumstances, to cross the track before the car would reach him. The rule requiring care and diligence on the part of the plaintiff does not require him to anticipate the possibility of an accidental fall at an ordinary crossing. *Mentz v. Second Avenue R. R. Co.*, 3 Abbott's Court of Appeals Decisions (N. Y.), 274. 1869.

86. Children. The facts considered under which street railway companies were held not to be responsible for an injury to a child. *Hestonville, etc., R. R. Co. v. Kelly*, 11 Amer. & Eng. R. R. Cases, 123 (Pa.), 1883; *Smith v. Passenger R'y Co.*, 13 Philadelphia, 6, 1879; *Hearn v. St. Charles Street R. R. Co.*, 34 La. An., 160, 1882; *Fallon v. Central Park, etc., R. R. Co.*, 6 Daly (N. Y.), 8, 1875; *Same v. Same*, 64 N. Y., 13, 1876; *Citizens' Street R'y Co. v. Carey*, 56 Ind., 396, 1877; 18 Amer. R'y Rep., 126; *Hestonville Passenger R'y Co. v. Connell*, 88 Pa. St., 520, 1879; *Smith v. Hestonville, etc., Passenger R'y Co.*, 92 Pa. St., 450, 1880; 2 Amer. & Eng. R. R. Cases, 12; *Maschek v. St. Louis R. R. Co.*, 71 Mo., 276, 1879; 2 Amer. & Eng. R. R. Cases, 38.

87. — A street car company is bound to ex-

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ercise only ordinary care towards children on the track. *Falotio v. Broadway and Seventh Avenue R. R. Co.*, 9 Daly (N. Y.), 243, 1880.

88. — A child of tender years was injured by a street car. The court permitted plaintiffs to ask a witness how many hours the drivers and conductors on the line were employed each day, for the purpose of showing that the driver of the car which injured the child was physically unable to discharge his duty at the time of the accident. *Held*, that this was error. *Philadelphia City Passenger R'y Co. v. Henrice*, 92 Pa. St., 431, 1880; 4 Amer. & Eng. R. R. Cases, 544.

89. — What would be contributory negligence in an adult may not be such in the case of a child of tender years; the caution required is according to the maturity and capacity of the child, and this is to be determined by the circumstances of the case. *Moore v. Metropolitan R. R. Co.*, 2 Mackey (Dist. Col.), 437, 1883.

90. — In a child's action for negligent injuries to him in the street, evidence that he and his sister were accustomed to play in the street unattended is incompetent on the part of defendant. *Smith v. Grand St. etc., R. R. Co.*, 11 Abbott's New Cases (N. Y.), 62, 1882.

91. — The plaintiff will not be prevented from recovering in consequence of the negligence of his parents, if the jury shall find that the consequences of such negligence could have been avoided by the exercise of ordinary care and prudence on the part of the defendant or its agents. *Baltimore R. R. Co. v. McDonnell*, 43 Md., 534, 1875.

92. — Where the driver of a street car sees a child ten years old playing on the street within six feet of the car track, and continues to approach at a speed of over six miles an hour until he reaches the child, who runs toward the car and is knocked down and killed by the horses, this is such negligence as warrants a recovery. *Farris v. Cass Avenue R'y Co.*, 8 Mo. App., 588, 1880.

93. — As plaintiff, a boy fourteen years of age, was walking in the street with a can of water, a driver of defendant's cars called to him to give him a drink. The horses being then on a walk the plaintiff stepped on the front platform, gave the can to the

driver, who drank therefrom, and returned it to the plaintiff, telling him to hurry off quick. Plaintiff asked him to stop the car, but he paid no attention to him, and as plaintiff was stepping off, whipped the horses into a trot. Plaintiff fell, was run over and injured. In an action against defendant to recover for the damages sustained thereby, *held*, that the acts of the driver were within the scope of his authority, and that the defendant was liable for the injuries occasioned thereby. *Day v. Brooklyn City R. R. Co.*, 12 Hun (N. Y.), 435, 1877; affirmed, *Same v. Same*, 76 N. Y., 593, 1877.

94. **Contributory negligence.** The question of contributory negligence is necessarily, almost in every case, a question of fact for the jury; and where the jury have, under proper instruction, found upon that question, an appellate court is not justified in setting aside their verdict upon its own views of the evidence. *O'Donnell v. New York and Harlem R. R. Co.*, 8 Daly (N. Y.), 409, 1878.

95. **Evidence.** The defendant, a horse railroad company, offered evidence to show that no repairs had been put upon its track since the accident. *Held*, that the testimony of a witness, offered by the plaintiff, as to his knowledge of the condition of the track at a certain time shortly before the accident, was not admissible as rebutting this evidence. *Jacques v. Bridgeport Horse R. R. Co.*, 41 Conn., 61, 1874.

96. — Verdict sustained on the evidence. *Reese v. Third Avenue R. R. Co.*, 16 Federal Reporter, 368, 1883.

97. **Pleading.** In an action against a street railway company, a declaration alleging that the plaintiff was injured by a car of the defendant being carelessly driven upon and over him, is not supported by proof that the plaintiff was injured by another car, not carelessly driven, in attempting to escape from a car which was carelessly driven. *Hanlon v. South Boston Horse R. R. Co.*, 129 Mass., 310, 1880; 2 Amer. & Eng. R. R. Cases, 18.

98. **Rate of speed; ordinances.** Where the plaintiff was injured by the defendant's street car, which at the time was running at a greater speed than was allowable under a city ordinance, it was held that the defend-

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ant was guilty of negligence, if the accident could have been avoided had the car not been running at a prohibited rate of speed. *Baltimore R. R. Co. v. McDonnell*, 43 Md., 534. 1875. Such speed is not conclusive evidence of negligence. *Hanlon v. South Boston Horse R. R. Co.*, 129 Mass., 310, 1880; 2 Amer. & Eng. R. R. Cases, 18.

99. Switches. Plaintiff, injured by a switch laid in a street, but rising a couple of inches above the crosswalk, sued the company for damages; and it appeared that he had often crossed at the point, and knew there was a switch there, but his attention had not been called to it specially, nor had he inspected it, or known that others had fallen there; and, at the time of the accident his attention was not diverted by carriages, or otherwise, but it was a place much frequented, and, at the time, he was looking up and down for cars and carriages. *Held*, that the question of contributory negligence, upon these facts, was a question for the jury. *Lourey v. Brooklyn City, etc., R. R. Co.*, 4 Abbott's New Cases (N. Y.), 32. 1878.

100. Wilful act of driver. Where plaintiff, for the purpose of crossing the street, stepped upon the platform of defendant's street car, to pass over the same, and the driver of the car wilfully seized and threw her from the car, whereby she was injured, *held*, the defendant was liable. *Shea v. Sixth Avenue R. R. Co.*, 5 Daly (N. Y.), 221. 1874.

VI. INJURIES TO PASSENGERS.

101. Assault upon passenger by employe. Plaintiff, while a passenger on one of the defendant's cars, was unjustifiably assaulted by the driver, who also acted as conductor. In an action to recover damages, *held*, that the defendant was liable. *Stewart v. Brooklyn and Cross-town R. R. Co.*, 90 N. Y., 588, 1882; 12 Amer. & Eng. R. R. Cases, 127.

102. Cable road. Facts considered sustaining a judgment for injury and death of a passenger upon a street railway operated by cable. *Cook v. Clay Street Hill R. R. Co.*, 60 Cal., 604, 1882; 6 Amer. & Eng. R. R. Cases, 175.

103. Children. If the conductor or driver of a street car refuses to stop the car when

requested by a child six years and a half old, such refusal will not of itself justify the child in leaving the car by getting off the front platform while the car is in full motion. *Cram v. Metropolitan R. R. Co.*, 112 Mass., 88. 1873. See, also, *Crissey v. Hestonville, etc., R'y Co.*, 75 Pa. St., 83, 1874; *Philadelphia City Passenger R'y Co. v. Hassard*, 75 Pa. St., 367, 1874; *Pittsburgh, etc., R'y Co. v. Caldwell*, 74 Pa. St., 421, 1873.

104. — Where a child four years old, in company with his brother, twelve and a half years of age, took a street car, and both sat down on the front platform with their feet on the step, and there was no other interference with their riding there except that the conductor claimed (which, however, was denied) that when he took their fare he told them to go into the car, and the youngest boy, in some way unexplained, got off the car while in motion and was run over, negligence cannot be imputed either to the parents of the children in permitting them to take the cars alone, or to the younger boy, or to the older boy without showing that he had more than the ordinary discretion and judgment of boys of his years, but the company was guilty of negligence in permitting the boys thus to ride, and liable in damages for the injury. *East Saginaw City R'y Co. v. Bohn*, 27 Mich., 503, 1873; 10 Amer. R'y Rep., 309.

105. — A passenger who is injured cannot recover damages of the company if his own neglect contributed to the injury; but duty can only be predicated on one who has capacity to understand and ability to perform it; and therefore a child not of an age or discretion to understand the danger in riding upon the front platform of a street car cannot be charged with negligence in so doing. *Id.*

106. — If a child, while riding with due care on the platform of the car of a street railway, not as a passenger for hire, but by invitation of the driver, and without collusion with him to defraud the company, is injured through his negligence in driving the car, the parent of such child may maintain an action against the company for the loss of services of the child occasioned by such injury. *Wilton v. Middlesex R. R. Co.*, 125 Mass., 130. 1878. See, also,

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Brennen v. Fair Haven and Westville R. R. Co., 45 Conn., 284. 1877.

107. — Parents have a right to assume that street railway companies will furnish reasonably safe conveyances, and have regulations which preclude persons from riding in unsafe places upon them; and they cannot, therefore, be charged with negligence in permitting their children to ride on the street cars without escort, if the company consent so to receive them. *East Saginaw City R'y Co. v. Bohn*, 27 Mich., 503, 1873; 10 Amer. R'y Rep., 300.

108. Collision. A passenger on a street car was struck and injured by a passing load of hay; held, that, to make the company liable, the passenger must prove not only that he was without fault, but that the company was negligent. *Federal Street and Pleasant Valley R. R. Co. v. Gibson*, 96 Pa. St., 83, 1880; 11 Amer. & Eng. R. R. Cases, 142.

109. — Evidence held sufficient to justify the submission of the case to the jury. *Watkins v. Atlantic Avenue R. R. Co.*, 20 Hun (N. Y.), 237. 1830.

110. — Where the tracks of a street railway cross those of a steam railway at grade, the driver of a car on the road of the former company is not justified in attempting to cross the track of the latter company without stopping, looking and listening, no matter what the action of the flagman of the latter company, stationed at the crossing, may be, if such driver have from other sources information which would lead a prudent man to infer that there was danger to be apprehended from an approaching train. *Philadelphia and Reading R. R. Co. v. Boyer*, 97 Pa. St., 91, 1881; 2 Amer. & Eng. R. R. Cases, 172.

111. — Plaintiff was a passenger in defendant's horse car; the driver recklessly and carelessly drove the car upon the tracks of the N. Y. C. and H. R. R. R. Co., directly in front of an approaching express train. All of the passengers in the car, with one exception, on perceiving the danger, rushed to the doors of the car and jumped off; plaintiff in so doing fell and was injured. The driver succeeded in getting the car across the track just in time to escape the train, the engineer thereon having reversed his engine and put on the brakes. Held, that a verdict

in plaintiff's favor was justified. *Twomey v. Central Park, North and East River R. R. Co.*, 69 N. Y., 158; 1877; 18 Amer. R'y Rep., 113.

112. — In an action against a railway company to recover damages for the death of a person caused by a collision between a train of the defendant and a street car in which the deceased was traveling, the plaintiff, in order to recover, must show that the death resulted directly from the negligence of the defendant's employees; that the servants of the street car company were guilty of no negligence. *Philadelphia and Reading R. R. Co. v. Boyer*, 97 Pa. St., 91, 1881; 2 Amer. & Eng. R. R. Cases, 172.

113. — The fact that a collision took place raises no presumption of negligence by the non-carrying company. *Ib.*

114. — In an action by a street railroad passenger (who was, in fact, without fault himself) for a personal injury, against a defendant whose negligence directly and proximately concurred with the negligence of the railroad company in producing the injury, the concurrent negligence of the company cannot be imputed to the plaintiff so as to charge him with contributing to his own injury. *Transfer Co. v. Kelly*, 36 Ohio St., 86, 1880; 3 Amer. & Eng. R. R. Cases, 335.

115. Concurrent negligence of two parties; neglect of driver. Where the life of a passenger in a street railway car is lost by the concurrent negligence of the driver of the car and other persons, such negligence of the driver is no defense in an action against the other persons, such driver not being the agent or servant of the decedent, nor subject to his government or control. *Louisville, Cincinnati and Lexington R. R. Co. v. Case*, 9 Bush (Ky.), 728. 1873.

116. Degree of care required. Common carriers of passengers are held to the exercise of the highest degree of care and skill to preserve the safety of passengers and prevent accidents and injuries, and such rule applies to the proprietors of hacks and stage coaches equally with other carriers. *Bonce v. Dubuque Street R'y Co.*, 53 Ia., 278, 1880; *East Saginaw City R'y Co. v. Bohn*, 27 Mich., 503, 1873; 10 Amer. R'y Rep., 300; *Chicago City R'y Co. v. Young*, 62 Ill., 238, 1871; 6 Amer. R'y Rep., 230.

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117. Elbow out of car window. A railway company was held liable for an injury resulting from the striking of the plaintiff's arm by another car, his elbow being a few inches out of the window. *Held*, also, that the plaintiff was not guilty of contributory negligence. *Summers v. Crescent City R. R. Co.*, 34 La. An., 139. 1882.

118. — It will not be held to be negligence *per se* to expose the elbow to some extent from the window of a street car drawn by horses. What is ordinary prudence, as to the position to be assumed by a passenger in such a car, cannot be determined by any arbitrary rule. *Miller v. St. Louis R. R. Co.*, 5 Mo. App., 471. 1878.

119. Evidence. In a suit for an injury caused by alleged unskilful driving, evidence of similar negligent acts on his part at other times is not admissible. *Maguire v. Middlesex R. R. Co.*, 115 Mass., 239. 1874.

120. — Upon the trial of an action against a street railway company for an injury sustained by careless driving over a sharp curve and sudden elevation, it was competent to show that the defendant had altered the curve since the accident. *Augusta and Summerville R. R. Co. v. Renz*, 55 Ga., 126. 1875.

121. — Where the injured passenger fell out without any apparent cause, and the reason for the fall was left wholly to conjecture, *held*, that the action should be dismissed. *Muller v. Second Avenue R. R. Co.*, 48 N. Y. Superior Ct., 546. 1882.

122. — Certain testimony stated in the opinion, although contradicted by other testimony, *held*, to be sufficient proof of negligence to sustain a verdict. The neglect consisted in starting a dummy engine with a violent jerk. *Spearman v. California Street R. R. Co.*, 57 Cal., 432, 1881; 8 Amer. & Eng. R. R. Cases, 192.

123. — In a suit to recover damages for injuries sustained while riding on the platform of a street car, the court will presume, in the absence of evidence to the contrary, that the car was a good one. *Andrews v. Capitol, North O Street and South Washington R. R. Co.*, 2 Mackey (Dist. Col.), 137. 1882.

124. — Witnesses who saw a lady thrown down by a street car after she had alighted

can state in evidence their opinion as to whether she had time to get clear of the car before it moved off. *Ward v. Charleston City R'y Co.*, 19 So. Car., 521. 1883.

125. — Declarations of a discharged employe held competent as impeaching evidence. *Schultz v. Third Avenue R. R. Co.*, 89 N. Y., 242, 1882; 9 Amer. & Eng. R. R. Cases, 412; reversing *Same v. Same*, 46 N. Y. Superior Ct., 211, 1830.

126. Fighting on the car; failure to preserve order. When passengers are injured by riotous fighting among other passengers, it is for the jury to say, under all the facts, whether the company was negligent in not providing a suitable conductor to preserve order. *Holly v. Atlanta Street R. R. Co.*, 61 Ga., 215. 1878.

127. Getting off the car. It appeared that the car was negligently started while plaintiff was alighting, thereby throwing her toward the ground, and that her fall was accelerated by the motion of the conductor's arm in endeavoring to save her. *Held*, that defendant was liable for all the injury suffered by plaintiff, though part thereof might have been caused by the intervention of the conductor. It seems that this would be so, even had it not been within the scope of the conductor's duty to so intervene. *Macer v. Third Avenue R. R. Co.*, 47 N. Y. Superior Ct., 461. 1831.

128. — Plaintiff, a passenger on defendant's street railway car, after the same had stopped, left it by the front platform, and, when six or eight feet from the car in the street, was thrown down and injured by the car horses, which had been detached from the car, after plaintiff had left, and were turning round. *Held*, that when plaintiff was injured she was no longer a passenger on defendant's car, and the fact that she had left such car by the front platform in violation of a regulation of defendant's road, known to her, did not make her guilty of contributory negligence. *Platt v. Forty-second Street and Grand Street Ferry R. R. Co.*, 4 Thompson & Cook (N. Y. Supreme Ct.), 406, 1874; 2 Hun (N. Y.), 124, 1874.

129. — In a suit for damages sustained in stepping off a car, the plaintiff then suffering from a prior injury, an instruction to find for the plaintiff if the jury find that the

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conductor refused to stop the car where asked, and that the plaintiff carefully, and without negligence, stepped off, is erroneous, because the plaintiff's condition at the time is ignored. *Wyatt v. Citizens' R'y Co.*, 62 Mo., 408. 1876.

130. — If a street car is stopped for any cause at a place where passengers are in the habit of alighting, a passenger will have the right to leave the car without making any request or obtaining any permission; and if the driver of the car knew, or by the exercise of due care could have known it, it will be negligence to start the car before a passenger in the act of leaving the car has had a reasonable time in which to alight. *Chicago West Division R'y Co. v. Mills*, 105 Ill., 63, 1882; 11 Amer. & Eng. R. R. Cases, 128.

131. — Where there is a conflict of testimony as to whether the car upon a street railroad was stopped at the request of the deceased, and again negligently started while he was in the act of alighting, the case should go to the jury, notwithstanding that it appears the passenger was unnecessarily upon the front platform, and attempted to alight therefrom. *Lax v. Forty-second Street R. Co.*, 46 N. Y. Superior Ct., 448. 1880.

132. — It is the duty of a conductor of a street car to give passengers a reasonably safe opportunity to alight. He must stop the car for a reasonable time, and if he starts it before the passenger has stepped down, or has had reasonable time for that purpose, it is negligence. *Poulin v. Broadway and Seventh Avenue R. R. Co.*, 61 N. Y., 621, 1874; *Chicago West Division R'y Co. v. Mills*, 105 Ill., 63, 1882; 11 Amer. & Eng. R. R. Cases, 128; *Chicago City R'y Co. v. Mumford*, 97 Ill., 560, 1881; 3 Amer. & Eng. R. R. Cases, 312.

133. — It is the duty of a street railway company to cause its cars to come to a full stop for passengers to get off. *Crissey v. Hestonville, etc., R'y Co.*, 75 Pa. St., 83. 1874.

134. — The court cannot rule that when a street car had stopped or was about to stop at the signal of an alighting passenger, another passenger who wished to alight at the same time was guilty of negligence, as a matter of law, in not giving notice of his wish. *Rathbone v. Union R. R. Co.*, 13 R. I., 709. 1882.

135. — Evidence held insufficient to establish defendant's liability. *Brown v. Congress and Baker St. R'y Co.*, 49 Mich., 153, 1882; 8 Amer. & Eng. R. R. Cases, 383.

136. — Whether the act of stepping from a street car when slowly moving is contributory negligence is a question for the jury under all the circumstances of the case. *Fortune v. Mo. R. R. Co.*, 10 Mo. App., 252, 1881; *Fleck v. Union R'y Co.*, 134 Mass., 480, 1883; *Wyatt v. Citizens' R'y Co.*, 55 Mo., 485, 1874.

137. — When a city railway car stops at a place where the conductor makes his report and waits for the return of the car, and a passenger attempts to get off without notice of such intention, and it does not appear that such place is one where passengers usually get on and off, or that those in charge knew that persons are actually getting off, and they start the car, whereby a passenger is thrown and injured, the railway company will not be chargeable with negligence in starting the car forward. The passenger, before attempting to get off, should know that the stoppage is for the purpose of letting persons get off, or make his intention to get off known. *Chicago West Division R'y Co. v. Mills*, 91 Ill., 39. 1878.

138. Getting on the cars. Defendant's street car stopped on a signal from plaintiff, who was approaching across the other tracks of the company, and while plaintiff was getting on the car it started, pulling him along, with his hand on the handle, for eight or ten feet, when he was struck and injured by another car running in an opposite direction. There was evidence tending to show an invitation from the conductor of the car to plaintiff to get on on that side. In an action for injuries, held, that under the circumstances it was not negligence *per se* for the plaintiff to attempt to enter the car between the tracks, but that it was a question for the jury whether plaintiff was guilty of contributory negligence. *Dale v. Brooklyn City, Hunter's Point and Prospect Park R. Co.*, 3 Thompson & Cook (N. Y. Supreme Ct.), 686; 1 Hun (N. Y.), 146, 1874; affirmed, 60 N. Y., 638, 1875.

139. — If the car is at rest or on the point of rest, although some motion remains, the getting on by the front instead of the

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rear platform is not, as a matter of law, contributory negligence. *Maher v. Central Park, etc., R. R. Co.*, 39 Superior Ct., 155, 1875; 67 N. Y., 52, 1876.

140. — The evidence held sufficient to justify a verdict against a street railway company for an injury to a child in getting on the cars. *Mowrey v. Central City R'y Co.*, 66 Barbour (N. Y.), 43. 1867.

141. — Where the plaintiff, in attempting to get on an open car while it was slowly moving, the driver holding on to the brake for that purpose, but before he got his foot placed safely on the car step the driver let go the brake and the horses started with a sudden jerk of the car, throwing the plaintiff's foot from the step down upon the track, where it was mutilated by the car wheel, held, that the railroad company was liable. *Eppendorf v. Brooklyn City and Newtown R. R. Co.*, 51 Howard's Practice (N. Y.), 475, 1876; affirmed, 69 N. Y., 195, 1877.

142. — Plaintiff hailed a car going up when it was about seventy-five feet below the upper street crossing; at this time a car, then about one hundred feet off (which he saw), was rapidly approaching on the down-track; he crossed the down-track, and when he reached the space intervening between the two tracks (which was barely, if at all, sufficient to allow of standing there in any safety), he stood there waiting for the up-car to stop, which it did about seventy-five feet above the upper crossing; its platform was crowded, which he knew; while in the act of getting on its platform the horses of the down-car, having been pulled by the driver into this space, knocked him down. Held, as a matter of law, contributory negligence. *Halpin v. Third Avenue R. R. Co.*, 40 N. Y. Superior Ct., 175. 1875.

143. Homicide by drunken passenger. P. complained to the conductor of annoyance to ladies by a drunken passenger. The conductor directed the man to keep quiet. As P. left the car the drunken man attacked him with a car-hook and killed him. Held, that although high vigilance in maintaining order is required of a carrier, there was no evidence of want of care in this case. *Putnam v. Broadway and Seventh Avenue R. R. Co.*, 55 N. Y., 108, 1873; reversing 36 N. Y. Superior Ct., 195, 1873.

144. Injury to person waiting for a car. Where the negligence with which the evidence tended to charge plaintiff was to be found mainly in his conduct before he saw the danger, *i. e.*, in his standing in the street waiting for a car, without looking or listening or taking any precaution to ascertain whether danger was approaching or not, until it was too near for him to escape, an instruction upon the question of plaintiff's negligence which limited the jury to the consideration of plaintiff's conduct after he saw his danger was erroneous. The attention of the jury should have been directed to his entire conduct on the occasion, as well before as after he discovered the car approaching. *Chicago West Division R'y Co. v. Haviland*, 12 Bradwell (Ill.), 561. 1883.

145. Intoxication of passenger. The fact that a passenger injured by the negligence of the driver of a street car was intoxicated at the time of the accident will not prevent his maintaining an action for damages unless his intoxication contributed to the injury. *Maguire v. Middlesex R. R. Co.*, 115 Mass., 239. 1874.

146. Leased lines. The charter of a horse railway company provided that the company should be liable for any injury any person might sustain by reason of the carelessness or misconduct of its agents or employees. A subsequent statute authorized it to lease its line and franchise, and to contract with any "responsible" person for the management of its road, but provided that such lease or contract should not release or exempt the company from any duty or liability to which it would otherwise be subject. The company leased its road, the lessee providing horses, cars and servants. By the negligence of an employe of the lessee a passenger was injured. Held, that an action for such injury could be maintained against the corporation. *Quested v. Newburyport Horse R. R. Co.*, 127 Mass., 204. 1879.

147. Newsboy. A newsboy who enters a car to sell papers, paying no fare, is not a passenger, and the street railway company does not owe him the duties to which a passenger is entitled. Held, that, where a newsboy was injured by reason of the absence of a step in the front platform, the company was not liable. *Blackmore v.*

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Toronto Street R'y Co., 38 Upper Canada (Queen's Bench), 172. 1876.

148. Ordinance of city. In the absence of contributory negligence, a carrier of passengers is liable for personal injuries resulting directly from its violation of a city ordinance passed for the safety of passengers. *Fortune v. Mo. R. R. Co.*, 10 Mo. App., 252. 1881. See, also, *Drain v. St. Louis, Iron Mountain and Southern R'y Co.*, 10 ib., 531. 1881.

149. Platform of car. Riding on the front platform of a street car, when there is room inside, is not of itself conclusive evidence that a passenger injured by the negligence of the driver of the car was not in the exercise of due care. *Maguire v. Middlesex R. R. Co.*, 115 Mass., 239, 1874; *Augusta and Summerville R. R. Co. v. Renz*, 55 Ga., 126, 1875. See, also, *Nolan v. Brooklyn City and Newtown R. R. Co.*, 87 N. Y., 63, 1881; 3 Amer. & Eng. R. R. Cases, 463; *Germantown Passenger R'y Co. v. Walling*, 97 Pa. St., 55, 1881; 2 Amer. & Eng. R. R. Cases, 20.

150. — It is not negligence in a passenger on a railway car to occupy a dangerous place on the car, if it is the only one that he can find, and his so doing is assented to by the company's agent. *Walling v. Railway Co.*, 12 Philadelphia, 309. 1873. See, also, *Ginna v. Second Avenue R. R. Co.*, 8 Hun (N. Y.), 494, 1876; affirmed, *Same v. Same*, 67 N. Y., 596, 1876. But see *Downey v. Hendrie*, 8 Amer. & Eng. R. R. Cases (Mich.), 386. 1831.

151. — Where there is abundant standing room inside of a street car, in which there are pendent straps which a passenger may hold while standing, he is guilty of contributory negligence who rides upon the platform; and if an injury result to him, which would not have occurred had he been in the inside of the car, he cannot maintain an action for such injury. *Andrews v. Capitol, North O Street and South Washington R. R. Co.*, 2 Mackey (Dist. Col.), 137, 1892; *Wills v. Lynn and Boston R. R. Co.*, 129 Mass., 351, 1880; 2 Amer. & Eng. R. R. Cases, 27.

152. — The fact that the front platform is not inclosed is a fact with others to be considered whether there is negligence in leaving the front door open when the car is

filled with passengers. *Philadelphia City Passenger R'y Co. v. Hassard*, 75 Pa. St., 387. 1874.

153. — In an action against a street passenger railway company, the evidence showed that the plaintiff, while riding in a car of the defendant, got up and gave his seat to a lady. The car being crowded he was obliged to pass out on to the front platform. While standing there the car ran off the track, and at the request of the driver, the plaintiff, with others on the platform, got off and assisted in getting the car again on the track. When this was done, the passengers got on the front platform again by stepping over an inclosure three feet high surrounding the same; and while the plaintiff was in the act of getting on the platform in the same manner, the driver, without a signal or warning, started the horses. By the sudden jerk in starting, the plaintiff was thrown down on the side of the car and was dragged some distance and his foot crushed by the wheel. The accident occurred in the day-time, and there was proof tending to show that the driver might have seen the plaintiff in the act of boarding the car. Proof was also offered to show there was a notice on the inside of the car, requiring passengers to enter and leave the car by the rear platform. *Held*, that, conceding there was negligence on the part of the plaintiff in attempting to enter the car by the front platform, the question was whether the driver of the defendant's car, by the exercise of proper care and prudence, might have seen the position of the plaintiff, and thereby have avoided the injury. *People's R'y Co. of Baltimore v. Green*, 56 Md., 84, 1880; 6 Amer. & Eng. R. R. Cases, 168.

154. — Whether the plaintiff was exercising ordinary care in standing upon the platform of the car, should be considered with reference to the question whether there was a vacant seat in the car which he might have occupied, and whether standing on the platform was more dangerous than occupying a seat in the car. The fact that the conductor knew he was occupying the more hazardous position, or that it was customary for others to do the same thing, will not relieve the plaintiff from the charge of contributory negligence. *Chicago West Divis-*

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ion R'y Co. v. Klauber, 9 Bradwell (Ill.), 613. 1881.

155. — It is not contributory negligence *per se* for a passenger to ride on the steps of the front platform of a crowded street car with the consent of the conductor or driver. In such case the measure of duty on the part of the passenger is ordinary and reasonable care, and what that is, in any given case, and whether the passenger complied with it, is a question for the jury. *German-town Passenger R'y Co. v. Walling*, 97 Pa. St., 55, 1881; 2 Amer. & Eng. R. R. Cases, 20.

156. — Plaintiff, who was riding upon the rear platform of a crowded car, was struck by the pole of the car following and seriously hurt. *Held*, that in riding in this place he was not guilty of contributory negligence; that although the accident would not have happened had he not been in that position, yet the position was but a condition and not the cause of the injury, and that the court properly withheld from the jury the question of contributory negligence. *Thirteenth and Fifteenth Street Passenger R'y Co. v. Boudrou*, 92 Pa. St., 475, 1880; 2 Amer. & Eng. R. R. Cases, 30.

157. — Where a passenger falls off a street car, when in full motion, in front of the wheels, and the servants in charge of the same know that he is off the car and holding on to the iron rail to save himself from being run over, it is culpable negligence if they do not stop the car and thereby save him from injury. *Chicago West Division R'y Co. v. Hughes*, 69 Ill., 170. 1873.

158. Sick passenger. The rule to be applied to steam cars in regard to accommodations to sick or decrepit persons is not a proper rule to be applied to horse railways. What might be permitted on the former, where the journeys are long and continuous, could not be practiced on the latter without great inconvenience to the company and the passengers. If the passenger is known by the conductor to be sick (and good faith requires that he be informed by the passenger of that fact in order that proper and reasonable allowance may be made for what may seem unusual or obnoxious in his conduct), and he is shown good treatment, the company will not be required to provide, without a special contract, any extra means

for his accommodation. *Lemont v. Washington and Georgetown R. R. Co.*, 1 Mackey (Dist. of Columbia), 180, 1881; 1 Amer. & Eng. R. R. Cases, 263.

159. Starting the car. A carrier of passengers by street cars must either wait a reasonable time for the passenger to be seated, or must start the car with a gradual motion. Where the car is started with an unusual jerk, which throws the passenger against the car window and lacerates his hand before he has time to be seated, and it appears that, by a proper use of the reins and brake, the car could be started without any jerk, this makes a *prima facie* case of negligence against the carrier. *Dougherty v. Mo. Pacific R. R. Co.*, 9 Mo. App., 478. 1881.

VII. EXPULSION OF PASSENGERS.

160. Car in motion. Whether it is proper care to attempt to remove a person from a street car, while the same is in motion, is a question of fact for the jury, and not of law for the court. *Healey v. City Passenger R. R. Co.*, 28 Ohio St., 23, 1875; 14 Amer. R'y Rep., 63. This rule also applies to the expulsion of an intoxicated passenger. *Murphy v. Union R'y Co.*, 118 Mass., 228, 1875; 9 Amer. R'y Rep., 282.

161. — Where the injury complained of results from neglect of the driver in running of the car, and not from the force and violence used in ejecting a person from the car, the company would be liable, whether the driver had or had not authority to collect the fare. *Ib.*

162. Evidence. Incompetent evidence having been admitted the court granted a new trial to plaintiff in case of expulsion of a passenger. *Perlmutter v. Highland St. R'y Co.*, 121 Mass., 497. 1877.

163. Intoxicated persons. A conductor on a street railway car may eject a person who is intoxicated and has vomited in the car, provided no more force is used than is necessary. *Converse v. Washington and Georgetown R. R. Co.*, 2 MacArthur (Dist. of Columbia), 504. 1876.

164. — sick person supposed to be drunk. An instruction which implies that vomiting in a street car from intoxication is the only

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form of that evil which will authorize the conductor to expel the offending passenger is erroneous, as it takes from the minds of the jury all other forms of the evil, which, in the proper management of the car, might justify the conductor in ejecting the passenger. *Lemont v. Washington and Georgetown R. R. Co.*, 1 Mackey (Dist. of Columbia), 180, 1881; 1 Amer. & Eng. R. R. Cases, 263.

165. — A sick passenger on a street car must conform to the reasonable regulations of the company; he has no prerogative to misbehave and to subject the other passengers to annoyance by his offensive conduct, and it will be no protection against his expulsion from the car, that his misconduct is not wilful or voluntary. The absence of an evil intention is a good defense to an indictment, but it cannot exonerate a person who is honestly supposed to be drunk, and who repeatedly disobeys the request of the conductor to behave himself. *Id.*

166. **Tickets.** A ticket provided for a "continuous ride from 65th street to Harlem." Under the rule of the company this ticket should have been used immediately, but the plaintiff did not use it for several hours, when he offered it and it was refused. He declined to pay fare, and was expelled from the car. *Held*, in the absence of any notice of the rule to the plaintiff, his expulsion was wrongful. That the ticket by its terms was good for a continuous ride from 65th street without reference to the particular car upon which the ride was to be taken. *McMahon v. Third Avenue R. R. Co.*, 47 N. Y. Superior Ct., 282. 1881.

VIII. MISCELLANEOUS.

167. **Assault upon person crossing the platform of the car.** Where a street car is stopped so as to obstruct the passage of a traveler on foot desiring to cross the street, it is not a trespass on his part to step upon and pass over the platform of the car in order to avoid the obstruction; he has the right so to do. And an assault committed upon such person by an employe of the street car company at such time will be actionable as against the corporation. *Shea v. Sixth Avenue R. R. Co.*, 62 N. Y., 180, 1875; 12 Amer. R'y Rep., 154.

168. **Constitutional law.** The constitutional provision prohibiting the legislature from authorizing the construction of a street railway did not affect the provision of the Railroad Act of 1839 (§ 1, ch. 218, Laws of 1839) authorizing railroad corporations to contract with other like corporations. "for the use of their respective roads;" and that a contract between a railroad company which had acquired the right and had constructed and was operating a road over Atlantic avenue in the city of Brooklyn, and the defendant, by which the latter was authorized to run its trains over the road of the former on said street, was not forbidden by said constitutional provision. *People v. Brooklyn, Flatbush and Coney Island R'y Co.*, 89 N. Y., 75, 1882; 9 Amer. & Eng. R. R. Cases, 454.

169. **Contract for exclusive privileges.** The city of New Orleans has no power, under its charter and the laws of Louisiana, to grant a street railroad company the sole and exclusive right in the use of the public streets of the city for a street railroad. When the city of New Orleans has made a contract, granting to a street railroad company certain franchises to run and maintain a railroad, and binds herself not to grant franchises over the same streets to any other company or person during the period of said contract, she is not thereby estopped from granting to others the privilege of running lines across any of the streets mentioned in the contract, nor for such short distances along such streets necessary to make connections and turn-outs for other lines running mainly along other streets and between entirely different termini. *New Orleans City R. R. Co. v. Crescent City R. R. Co.*, 12 Federal Reporter, 308. 1881.

170. **Contract with conductor; penalty; liquidated damages.** A provision in a written contract of hiring between a railway company and a conductor on its cars provided that, if the latter received any fare from any passenger (a fare being five cents), he should be liable to a fine of \$15, which might be deducted from his wages; *held*, that the \$15 were intended to be liquidated damages and not a penalty, and that the agreement for payment of it could be enforced. *Held*, also, that the company did not waive the right to insist upon the pay-

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ment of such amount as damages out of the wages by retaining in its employment such conductor after discovery of a breach by him, rendering the damages payable. *Birdsall v. Twenty-third Street R'y Co.*, 8 Daly (N. Y.), 419. 1879.

171. Defect in highway; husband and wife. Under the St. of 1871, ch. 381, § 21, providing that street railway companies "shall be liable for any loss or injury that any person may sustain by reason of any carelessness, neglect or misconduct of its agents and servants in the construction, management and use of its tracks," a husband may maintain an action against such a company for loss of services and society of and expenses of curing his wife, who is injured by a defective construction of its tracks, even though the tracks are constructed to the satisfaction of the superintendent of streets. *Osgood v. Lynn and Boston R. R. Co.*, 130 Mass., 492, 1881; 3 Amer. & Eng. R. R. Cases, 395.

172. Individual managers. Individuals, like corporations, may manage street railways, ferries, turnpikes or bridges, the franchises of which may nevertheless be perpetuated. *McKee v. Grand Rapids, etc., R'y Co.*, 41 Mich., 274. 1879.

173. Injunction. It is settled in Pennsylvania that a private citizen may prevent the construction of a street railway, provided he can show, first, special damage to himself, and secondly, that the railway company has no authority to construct the proposed road in question. *Shipley v. Continental R. R. Co.*, 13 Philadelphia, 128. 1879.

174. — An injunction against a railway company to prevent it from using a public street cannot be sued out in the name of the state by a county attorney. Such suit should be brought or sanctioned by the attorney-general. *State ex rel. v. Paris R'y Co.*, 55 Tex., 76. 1881.

175. — Where the court has the opinion of the proper city officers that heavy weights (boilers) can be drawn over a street without danger, and the route is one which will not interfere with the public, an injunction asked by a street railway company will not be continued to restrain their use. *Second and Third Street R. R. Co. v. Morris*, 8 Philadelphia, 304. 1871.

176. Injury to employes; vicious horse. A., who was a hostler for a street car company, received an injury from the kick of a vicious mare, while engaged in grooming her, as was his duty. The fact of the mare's being vicious was known by A., by other employes of the company and by the officers thereof. A. had once before been kicked by the same mare, but had not asked to have her taken from under his care. At the time of the accident A. was not using a strap which he ordinarily used when grooming the mare to prevent her from kicking. In an action by A. against the company to recover damages for the injury done him, *held*, that the plaintiff was not entitled to recover. *Green and Coates Street Passenger R'y Co. v. Bresmer*, 97 Pa. St., 103, 1881; 4 Amer. & Eng. R. R. Cases, 647.

177. Injury to persons driving sleighs. Plaintiff's sleigh was upset by striking a switch laid by defendant in a street to connect its track with that of another road over which it ran its cars. The evidence tended to show that the switch was higher above the pavement than was necessary; that defendant had put salt on its track, which had melted the snow and caused the slush to run down and cover the switch from sight. Accidents had frequently happened to other passing vehicles from the same cause. *Held*, that the evidence justified the submission of the question of defendant's negligence to a jury. *Wooley v. Grand Street and Newtown R. R. Co.*, 83 N. Y., 121, 1880; 3 Amer. & Eng. R. R. Cases, 398.

178. — The evidence showed that, as between the defendant and the other company with whose tracks the switch made a connection, the defendant was to keep the switch in good condition. The court was asked to charge that, if the switch was properly put down, defendant was not chargeable. The request was refused, but the court charged that if the switch was skilfully put down, and was in itself no obstruction which a person could not, with ordinary care and prudence, avoid, the proposition would be correct. *Held*, no error; that although the switch was a proper one and well laid down, if it subsequently, from any cause, was raised to an undue height above the pavement or the pavement had sunk unduly be-

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low it, it was defendant's duty to put it in good condition. *Ib.*

179. Jurisdiction. The provision of the St. of 1877, ch. 234, § 3, that any person injured by a defect in a highway may bring a suit in tort therefor in the superior court, does not apply to an action of tort under the St. of 1871, ch. 381, § 21, against a street railway company for an injury caused by a defective construction of its tracks; and the supreme court has jurisdiction of such an action brought before the St. of 1880, ch. 28. *Brookhouse v. Union R'y Co.*, 132 Mass., 178. 1880.

180. Lease; ultra vires. The lessee of a street railway cannot recover of the lessor for the expenses of renewing the road, except in an action upon the contract of lease, and if this contract is *ultra vires*, no action can be maintained in any form. *Middlesex R. R. Co. v. Boston and Chelsea R. R. Co.*, 115 Mass., 347, 1874; 7 Amer. R'y Rep., 469.

181. License. If a person carrying on a business for which a license is required neglects or refuses to take out a license, he may be subject to criminal prosecution, or may be held to agree to pay a specific penalty instead of the amount of the license. But he certainly owes nothing for a license until he has taken one out. An action to recover an amount alleged to be due as a license cannot be maintained. *Santa Cruz v. Santa Cruz R. R. Co.*, 56 Cal., 143. 1880.

182. — The city of Covington was authorized and had the right to exact a *bonus* from the Covington Street R'y Co. of \$250 per annum for the privilege of using its streets for railway purposes, and the obligation of the company to pay such *bonus* may be enforced. *Covington Street R'y Co. v. City of Covington*, 9 Bush (Ky.), 127. 1872.

183. — The New York license law construed. *Mayor v. Broadway and Seventh Avenue R. R. Co.*, 17 Hun (N. Y.), 242, 1879; *Mayor of New York v. Forty-second and Grand Street R. R. Co.*, 52 Howard's Practice (N. Y.), 106, 1876.

184. Location. Under the St. of 1864, ch. 229, § 15, the selectmen of a town may revoke the location in the town of a street railway which is chartered to extend beyond the limits of the town. *Medford and*

Charlestown R. R. Co. v. Inhabitants of Somerville, 111 Mass., 232. 1872.

185. — The plaintiff and defendant, street railway corporations, made a contract whereby the plaintiff leased its railway to the defendant, and the defendant covenanted to assume all the liabilities imposed on the plaintiff by its charter. A town through which the line was located directed the track to be altered, but the defendant refused on the ground that the work ought to be done and paid for by the plaintiff, and thereupon the town revoked part of the location, and threatened to revoke the rest. *Held*, that the plaintiff could not maintain a bill in equity against the defendant to compel it to alter the track, inasmuch as the plaintiff might alter the track itself and sue at law. *Ib.*

186. Negligence. The act of March 10, 1854, for the redress of injuries arising from the neglect or misconduct of railway companies and others, is applicable to the proprietors of any kind of railway, whether impelled by horse or steam power, or whether constructed with iron or any other kind of rails. *Johnson v. Louisville City R'y Co.*, 10 Bush (Ky.), 231. 1874.

187. — contributory negligence. The general rule as to contributory negligence held to apply to street railways. *Omaha Horse R'y Co. v. Doolittle*, 7 Neb., 481, 1878; *Government St. R. R. Co. v. Hanlon*, 53 Ala., 70, 1875. But see *Tanner v. Louisville and Nashville R. R. Co.*, 60 Ala., 621. 1877.

188. Rates; omnibuses. A tramway company scheduled to their act of parliament distinct agreements with municipal authorities not to charge tramway passengers above a fixed fare; but they afterwards obtained legislative authority to substitute omnibuses on certain routes in lieu of the tramways, and to charge a higher fare on these routes. *Held*, that the company had no power to increase the fare of passengers using the tramways only. *Edinburgh Tramway Co. v. Torbain*, Law Reports, 3 Appeal Cases, 58; 24 Eng. (Moak), 24. 1877.

189. Sale on execution. A street railway company is a "corporation authorized to receive toll" within the meaning of Comp. L., § 3436, providing for the sale on execution of the property and franchises of such a cor-

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poration. *McKee v. Grand Rapids, etc., R'y Co.*, 41 Mich., 274. 1879.

190. Snow-plow; frightened teams. Where a team was frightened by a railway snow-plow, and owing to the inattention of its driver ran away, *held*, that the contributory negligence of the driver was such that he could not complain of an allowance of only nominal damages in his favor. *Gray v. Second Avenue R. R. Co.*, 65 N. Y., 561. 1875.

191. Stables. The allegation in a bill in chancery that land is held subject to certain restrictions against building, and that adjoining land is believed to be held under like restrictions, without showing such a relation between the owners of the two parcels as would enable the one to enforce such restriction against the other, discloses no ground for relief. So *held* in an action to enjoin the erection of stables for a street railway. *Seabury v. Metropolitan R. R. Co.*, 115 Mass., 53. 1874.

192. Tickets; transfer checks. The provision of the St. of 1871, ch. 381, § 36, that a passenger upon a street car in Boston shall, upon paying a sum in addition to the regular fare, receive a check entitling him to a passage on the same day only, in any car run in the city between any two points therein, without paying more than a sum named "for both of the passages aforesaid," does not entitle a passenger, who has received such a check and who has once changed cars and surrendered the check in the second car at the request of the conductor, to a passage in a third car proceeding farther upon the same line, although he is told by the conductor of the second car that he may ride on the third car without payment of additional fare. *Wakefield v. South Boston R. R. Co.*, 117 Mass., 544, 1875; 6 Amer. R'y Rep., 238.

193. Time of completion. Where a railway company was authorized by its charter to construct and maintain a railway in a certain part of the city of Chicago, over and along such streets, etc., as the common council had or might authorize, in such manner and upon such terms and conditions as the common council had or might contract with the company, and, by ordinance of the city, license was given to lay a single track along a certain street to the city limits

within fifteen months, and the same was constructed half the way within the time required, *held*, that the common council had the right and power to waive the condition as to the time for completing the same, it being a provision in favor of the city to secure the public interests. *Chicago City R'y Co. v. The People*, 73 Ill., 541. 1874.

194. — contract to build. If property holders along the line of a street contract with a street railroad company to pay it certain sums of money, if, within a certain time, it constructs a railroad along the street, the fact that the road is not built within the time is not an excuse for the non-payment of the money if the road is actually built; but the subscribers may recoup the damage they sustain by the failure to complete in time. *Front Street, Mission and Ocean R. R. Co. v. Butler*, 50 Cal., 574, 1875; 12 Amer. R'y Rep., 183.

195. Use of track by teams, etc. A horse railway company, chartered by the legislature, may, while legally operating its road, enjoin a rival coach company, organized under the general corporation act, and licensed by the city where the tracks are laid, from regularly using its tracks with coaches adapted thereto, in competition with it in its business in transporting passengers and goods for hire, and from obstructing it in the use of such tracks by impeding the passage of its cars, by stopping thereon to take up and let down passengers. *Camden Horse R. R. Co. v. Citizens' Coach Co.*, 31 N. J. Eq., 525. 1879.

196. — The public right to use a horse-railroad track in the streets of a city for vehicles, incidentally in traveling through the streets, does not authorize a transportation company to use it in competition with the railroad company. *Camden Horse R. R. Co. v. Citizens' Coach Co.*, 28 N. J. Eq., 145. 1877. See, also, *Cottam v. Guest*, 1 Amer. & Eng. R. R. Cases (Eng., Q. B. D.), 574. 1880.

STREETS.

See EMINENT DOMAIN; HIGHWAYS; INJURIES TO DOMESTIC ANIMALS; INJUNCTION; STREET RAILWAYS.

1. Abutting property; railway; damages. That plaintiff, in an action for dam-

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ages, can recover nothing more than the damages to the property resulting from the trespass between the building of the railway and the commencement of the action; such a recovery will be no bar to a future recovery by plaintiff or his grantee for subsequent damages to the property by the continued maintenance of the road. Evidence of the permanent depreciation in the value of the land is inadmissible. *Carl v. Sheboygan and Fond du Lac R. R. Co.*, 46 Wis., 625; 21 Amer. R'y Rep., 412. 1879.

2. — The measure of damages is not the mere value of the use of that part of the street occupied by the railway, but includes the difference between the value of the use of the whole lot without the railway and its value with such track in the street in front thereof, with any other special and temporary damage sustained by plaintiff in the use of the lot, occasioned by such road. *Ib.*

3. — The fact that only a part of the width of defendant's track was upon plaintiff's land will not affect the rule of damages. *Blesch v. Chicago and Northwestern R'y Co.*, 43 Wis., 183. 1877.

4. — The damages recoverable could not exceed the difference between what would have been the rental value of the premises (during the continuance of the trespass, down to the commencement of the action), in case there had been no railway on the street, and its actual rental value with the track constructed and operated as it was. *Blesch v. Chicago and Northwestern R'y Co.*, 43 Wis., 183, 1877; *Grand Rapids and Indiana R. R. Co. v. Heisel*, 47 Mich., 393, 1882; 10 Amer. & Eng. R. R. Cases, 260.

5. — Where a railway company occupies a street without proceedings for its condemnation, its occupancy is a continuous wrong to abutting owners, who may recover the amount of damages accruing year by year. *Grand Rapids and Indiana R. R. Co. v. Heisel*, 47 Mich., 393, 1882; 10 Amer. & Eng. R. R. Cases, 260.

6. — It is for a jury to determine the damages to an adjacent proprietor from the malicious and unnecessary operation of a railway in the public street. *Ib.*

7. — The value of premises for dwelling purposes is a question of fact, in a suit for injury to the owner from the unauthorized

use of an adjacent highway by a railway company. *Ib.*

8. — An abutting owner who sues for damages resulting from the operation of a railway in a street is entitled to show such damages as would have been properly open to consideration by a jury of inquest impaneled to assess compensation upon the condemnation of the street for that purpose. *Ib.*

9. — Where a railway track has been laid in a public street without authority to use the street for that purpose, any adjacent proprietor who has not consented to such use is entitled to damages for such injury as he may have suffered in consequence thereof. *Ib.*

10. — The fact that plaintiff had parted with the title to the property would not prevent his recovery for damages sustained by him while owner. *Carl v. Sheboygan and Fond du Lac R. R. Co.*, 46 Wis., 625, 1879; 21 Amer. R'y Rep., 412.

11. — The complaint alleged that plaintiff owned in 1869, and continued to own until 1873, a city lot with dwelling; that in 1869 defendant constructed its road, with embankment, ditches, etc., along and on each side of the center of the street in front of said lot, and maintained the same to the commencement of the action, and thereby obstructed access to the house and lot and diminished their value; that, by reason of the premises, plaintiff, before the commencement of this action, was compelled to sell, and did sell, the property for a sum less by \$1,000 than could otherwise have been procured for it, and that defendant had refused, on demand, to make compensation for the injuries so sustained, and had taken no steps under its charter to have the damages ascertained. Judgment was asked for \$1,000. *Held*, that the action must be treated as one for damages for a continuing trespass, and that the complaint states facts sufficient to sustain such action. *Ib.*

12. — In a suit by a lot owner against a railroad company to recover damages to his lot caused by the use of a street fronting the same for railroad tracks, and thereby preventing ingress and egress to and from the same, etc., the statements of the officers of the road as to the intended future use of the street are not admissible in behalf of the

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company, as being hearsay, and a matter of opinion. An actual direction as to its use might be proper evidence in such case. *Pittsburg, Ft. Wayne and Chicago R. R. Co. v. Reich*, 101 Ill., 157. 1881.

13. — A lot owner has a right of action to recover damages to his lot from the unauthorized laying of additional railroad tracks in the street fronting his lot, whereby the use of the street for all ordinary purposes of a railway is destroyed, and access to the lot is cut off, and for the creating of a nuisance by allowing stock cars to stand in the street adjoining the lot. *Ib.*

14. — alleys. An abutting owner may recover damages for the occupation of an alley by a railway company for its track. *Central Branch Union Pacific R. R. Co. v. Andrews*, 5 Amer. & Eng. R. R. Cases, (Kans.), 370. 1882.

15. Action for possession. An action for the recovery of the possession of real estate may be maintained against a railway company occupying such real estate, being a street in a city occupied by virtue of a grant from the city council. *Sharpe v. St. Louis and Southeastern R'y Co.*, 49 Ind., 296. 1874.

16. Adverse enjoyment. J., in 1835, deposited in the office of the town clerk of New Haven a map of certain streets and lots, including a street called Myrtle street, and in 1840 made a quitclaim deed of all the streets to T., in trust for the city. In 1858 the city voted to accept a deed of the streets from T., who soon after gave the city a quitclaim of all his interest as trustee in the same. At the time of the deposit of the map, a railway had been laid out through the tract, one hundred feet wide, crossing Myrtle street, and the track was laid in 1836. In 1840, after J. had made the trust deed to T., he quitclaimed to the railway company the one hundred feet taken by it through the tract. In 1852 the company laid an additional track, and in 1859 another one, on each side of the old track, and the three tracks had been in constant use until 1876. Down to that time Myrtle street had never been used as a public street, but its existence as a highway had been repeatedly recognized by J. by reference to it in deeds of land in the vicinity. In that year the city attempted to open it as a public street, and the railway

company applied for an injunction. *Held*, that the company having, by its deed from J., in 1840, acquired a title in fee, and the city, having so long acquiesced in its claim of title, the land could not be taken for a public highway except by proceedings under the statute for laying out highways. *New York, New Haven and Hartford R. R. Co. v. New Haven*, 46 Conn., 257. 1878.

17. — The constant and exclusive use by a railway company of part of a street, as and for a right of way, cannot in any time ripen into an absolute ownership of such part. *Indianapolis, Peru and Chicago R. R. Co. v. Ross*, 47 Ind., 25. 1874.

18. Charter of corporation using streets. A municipal corporation has the same right to question the corporate existence and the rights of a railway company seeking to use its streets as a private owner would have where the use of his property is sought. *Brooklyn Steam Transit Co. v. City of Brooklyn*, 78 N. Y., 524. 1879.

19. Contract. A contract made with a city for right of way through the streets held valid. *Indianola v. Gulf, Western Texas and Pacific R'y Co.*, 11 Amer. & Eng. R. R. Cases (Tex.), 314. 1881.

20. Contract by city to close a street. Where a municipal corporation has exchanged lots with a railroad company, under a contract that a street running through the land conveyed to said company should be forever closed, and the company has expended large sums of money in improving said lot, building depots, tracks, etc., thereon, and the city now threatens to open the street, paying the usual damages therefor under the provisions of its charter, asserting that the municipal authorities had no power to make the contract above referred to, *held*, that a demurrer to a bill by the company, setting forth the above recited facts, praying the cancellation of the contract of exchange of lands, or, if that be impracticable, that it have such relief as a court of equity can alone give, was properly overruled. *Mayor, etc., of Atlanta v. Macon and Western R. R. Co.*, 59 Ga., 251. 1877.

21. Control by city. A city has the power to allow the construction of a railroad upon or over its streets, and the public will be

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bound by whatever may be lawfully done in regard to the streets by the city. *Chicago and Northwestern Ry Co. v. The People*, 91 Ill., 251. 1878.

22. Crossing of railways. Proceedings to open a street across the land of a railway company were held invalid where the company was not named in the proceedings and did not appear, even though damages were awarded to it for the land taken. *Detroit, Monroe and Toledo R. R. Co. v. Detroit*, 49 Mich., 47. 1882.

23. Crossings. Without the statute of 1871, ch. 186, a railway company would be liable to a city for the amount of damages which such city had been compelled to pay by reason of a defect in one of its streets caused by the negligence or unlawful act of such company in the construction or maintenance of a railway crossing; and if the company had been properly notified of the original suit, and the suit was defended by the city in its behalf and at its request, it would be liable for the costs as well as the damages. There is sufficient consideration for a contract on the part of such company with the city for the defense of such a suit, and for a promise to repay the city such sum as it should be compelled to pay therein. *City of Portland v. Atlantic and St. Lawrence R. R. Co.*, 66 Me., 485. 1877.

24. — A statute which simply authorizes a railway company to cross a street at grade abridges, but does not take away, the power of the county commissioners to prescribe what alterations may be made in the way, the time and manner of making them, etc. *Brewer v. Boston, Clinton and Fitchburg R. R. Co.*, 113 Mass., 52. 1873.

25. — When county commissioners have acted upon such subject within their jurisdiction, their record cannot be attacked collaterally, but is conclusive upon all parties in an action at law. *Ib.*

26. — Where, long after the construction of a railroad, a street was extended so as to cross the same, and the city passed an ordinance requiring the railway to make a safe and proper crossing by grading the approaches of the street at the crossing, there being nothing in the charter of the company imposing such a duty, or any such duty imposed by any general law in force at the time

the company was created, *held*, that the company was not liable to this new burden any further than might have been required of an individual, and that, as the whole burden was sought to be placed upon the company without regard to benefits, the ordinance was in violation of the constitution, and could not create any liability upon the company, and that the legislature itself could not impose such burden without making compensation. *Illinois Central R. R. Co. v. City of Bloomington*, 76 Ill., 447. 1875.

27. — Where a special railway act provided that the line should be made according to the levels shown on the deposited plans, and that it should be lawful for the company to carry the line across a specified street on the level of the street, *held*; that the latter provision was not obligatory, and did not prevent the company from carrying its line across the street according to the provisions of the general act. *Warden of Dover Harbour v. London, Chatham and Dover Ry Co.*, 3 De Gex, Fisher & Jones, 559; 64 Eng. Ch., 558. 1861.

28. — A bridge of forty feet and two inches in width held to be a sufficient crossing where the street was sixty-six feet in width. The fact that the bridge was narrower than the street would not necessarily constitute it a nuisance. *Regina v. Great Western Ry Co.*, 12 Upper Canada (Queen's Bench), 250. 1855.

29. — Under the condemnation of a right to lay streets across a railroad track or to lay the track of one railroad across another, nothing is required but a right of way. The place of crossing will remain in common use of the parties for the exercise of their several franchises. A right affecting so slightly the exercise of the franchises of the corporation whose track is crossed may be deduced from a mere grant of the power of condemnation. *New Jersey Southern R. R. Co. v. Long Branch Commissioners*, 39 N. J. Law, 28, 1876; 14 Amer. Ry Rep., 211.

30. — By the act of 1854 the plaintiff was authorized to build its bridge across the Allegheny river and connect its road with the Pennsylvania Central on Liberty street, in Pittsburgh. *Held*, that the right to cross Penn street was implied. *Pittsburgh, Fort Wayne and Chicago R. R. Co. v. Pittsburgh*, 1 Pittsburgh, 392. 1858.

Dedication — Extension Across Railways.

31. Dedication. A deed in which it is agreed that a street shall be kept open forever between certain lots as a highway for the common use of the persons owning the lots was held not to be such a dedication as would empower the city to authorize a railway company to construct its railway over the land. *Talbott v. Richmond and Danville R. R. Co.*, 31 Grattan (Va.) 685. 1879.

32. — No particular form of words is required to the validity of a dedication. The assent of the owner, and the use of the premises for the purposes intended by the appropriation, are sufficient, and estop him from revoking the dedication. *Morgan v. Railroad Co.*, 96 U. S., 716. 1877.

33. — The making of deeds by land owners, recognizing the existence of a street, is conclusive evidence against them of the dedication of the street to the public use, either by the grantors themselves, or by those under whom they claim. *State v. City of Elizabeth*, 37 N. J. Law, 433. 1874.

34. Defective condition; action against lot owner. When a municipal charter authorizes the city council to regulate the care of the sidewalks for the public benefit, and provides that lot owners shall be liable to the city for all damages which the city may be compelled to pay for the default in neglecting to observe such regulations, no action against a lot owner can arise, if at all, until after the city has been held liable in a suit against it. *Taylor v. Lake Shore and Michigan Southern R. R. Co.*, 45 Mich., 74, 1881; 9 Amer. & Eng. R. R. Cases, 127.

35. Depot grounds. Under a general power to lay out and open streets in a city, the city council has no authority to lay out and open a street through the depot grounds of a railroad company, in such manner as to destroy or essentially impair the value of the company's easement therein, theretofore acquired under and in pursuance of an express legislative grant for that purpose. *Milwaukee and St. Paul R'y Co. v. City of Faribault*, 23 Minn., 167. 1876.

36. Eminent domain. Service on the attorney of a railway company in proceedings to open a street across its premises is not authorized by statute. *Detroit, Monroe and Toledo R. R. Co. v. Detroit*, 49 Mich., 47. 1832.

37. — When the land appropriated by a corporation is lawfully acquired pursuant to its charter, and is actually used and needed for a public purpose, it is not material that it was acquired by purchase instead of by regular condemnation proceedings. *St. Paul Union Depot Co. v. City of St. Paul*, 30 Minn., 359. 1883.

38. — Where the charter of a municipal corporation provides for the assessment of the damages to the owners of lots taken for public use, with the right of appeal by the dissatisfied party to the superior court, it is constitutional. *Mayor, etc., of Atlanta v. Central R. R. and Banking Co.*, 53 Ga., 120. 1874.

39. — The benefits accruing from opening a street may be set off against the damages. *Long Island R. R. Co. v. Bennett*, 10 Hun (N. Y.), 91. 1877.

40. Extension across railways. A municipal corporation, under an authority to condemn lands for public streets, has no power to lay streets longitudinally over grounds acquired by a railroad company under its charter, on which is laid a track in use for the deposit and unloading of freight cars. *New Jersey Southern R. R. Co. v. Long Branch Commissioners*, 39 N. J. Law, 28, 1876; 14 Amer. R'y Rep., 211.

41. — Where the official authorities of a city of the third class attempt to take private property for public use, and the compensation therefor has been determined by the assessment of five disinterested householders of the city, and the land owner has appealed to the district court, he is entitled, in the absence of provisions of law to the contrary, to the possession of his land during the pendency of the appeal, and to an injunction, if necessary, to protect such possession. So held in proceedings to condemn a portion of a switch yard for a street. *City of Kansas v. Kansas Pacific R'y Co.*, 18 Kans., 331, 1877; 15 Amer. R'y Rep., 355.

42. — Where a city lays its streets across a railway it must so construct the crossing as to do as little injury as possible to the railway. *Northern Central R'y Co. v. Baltimore*, 46 Md., 425, 1876; 18 Amer. R'y Rep., 461. In such case viaducts over the railway must be constructed and maintained by the city. *Ib.*

Excavation — Grant to Railway.

43. Excavation ; injury to house. Damage done to the house of a party by reason of the excavation of a street by a railroad company, made under lawful authority, is not *damnum absque injuria*, and he may recover therefor without showing that the power delegated to the company has been illegally or negligently exercised. *Baltimore and Potomac R. R. Co. v. Reaney*, 42 Md., 117, 1874; 14 Amer. R'y Rep., 330.

44. Flagman. The act approved March 10, 1873 (Pamph. L., p. 327, § 4), authorizing the township of East Orange to pass ordinances to compel any railroad company to station and maintain flagmen wherever such railroad may cross any streets or highways in said township, is a valid exercise of legislative power, as a police regulation for the safety of the public and passengers on the trains. *State v. East Orange*, 41 N. J. Law, 127. 1879. See, also, *Long Island City v. Long Island R. R. Co.*, 8 Hun (N. Y.), 58. 1876.

45. Grade. A railway company is liable for injury occasioned by reason of the construction of a grade along a street of a city, thereby causing the water to flow upon adjacent real estate, and also for injury caused by reason of the construction of an embankment on a street approaching a street crossing in front of a lot in a city occupied by a dwelling-house, thereby rendering the approach to the lot in the front on such street impossible for carriages, wagons and vehicles, and inconvenient for foot passengers. *Indianapolis, Bloomington and Western R'y Co. v. Smith*, 52 Ind., 423. 1876.

46. — A change of grade by a city, rendering property less desirable, cannot be set up by a tenant against his landlord as ground for abatement of rents. *Gallup v. Albany R'y Co.*, 65 N. Y., 1. 1875.

47. — Where an action on the case is brought to recover damages for an injury to real estate by the construction of railroad tracks in a street in close proximity to the plaintiff's lots, and by depressing the grade of the street fronting the same, and the declaration charges damages exceeding \$1,000, and the evidence tends to prove them in excess of that sum, an appeal may be properly allowed by the appellate court to the supreme court from the final judgment

of the former court affirming a judgment in favor of the defendant. *Baber v. Pittsburgh, Cincinnati and St. Louis R. R. Co.*, 93 Ill., 342. 1879.

48. — By a railway act (6 and 7 Will. 4, c. 106, s. 9), a company was empowered to raise or lower any roads or ways in order the more conveniently to carry the same over or under or by the side of the railway. By s. 100, where any bridge should be erected by the company over any public carriage road, not being a turnpike road, the center of the arch must be of a height from the surface of the road of not less than sixteen feet. By s. 120, nothing in that act is to derogate from any of the rights or privileges of any parish over which the railway shall pass, acting under any local act. By a local paving act (12 Geo. 3, c. 38), it was enacted "That no person shall alter the form of any pavements which shall be now made by virtue of this act, without the consent of the commissioners, or in anywise encroach thereon, or put up any posts, boards," etc. *Held*, that the company was entitled, in carrying a railway by a bridge over a street under the control of the commissioners, to lower the street so as to give the height to the center of the arch required by the statute. *Regina v. Eastern Counties R'y Co.*, 3 Eng. R. R. & Canal Cases, 22. 1842.

49. — The assessment made under charter of village of Passaic, which provides that the whole cost of improvement shall be assessed upon lands fronting on the improvement in proportion to the benefit received by each lot, is illegal, as it requires such lots to bear the whole burthen of the cost without limitation to actual benefits, and the mode of its distribution, merely, being according to benefits. *State v. Village of Passaic*, 37 N. J. Law, 137. 1874. See *Village of Passaic v. State*, ib., 538. 1875.

50. Grant to railway ; construction. A grant by a county court, under § 26 of the corporation act (Or. Laws, 530, of the use of a street to a railway corporation for the purpose of constructing and operating a railway thereon, is a grant of a franchise, and the order or agreement making the same must be construed most strongly against the corporation and in favor of the public, so that nothing shall pass thereby but what

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clearly appears to have been intended. *Burns v. Multnomah R. R. Co.*, 15 Federal Reporter, 177, 1883; 10 Amer. & Eng. R. R. Cases, 280.

51. — Where an agreement authorized a corporation proposing to construct a railway from Albina to Vancouver, to lay its track through the former place upon certain streets therein, "beginning at the ferry landing at the foot of Mitchel street," and it appearing that said ferry landing and Mitchel street were different and not contiguous places, *held*, that the ambiguity must be resolved against the corporation, and the agreement construed as if it read, simply, "at the foot of Mitchel street." *Id.*

52. — The grant of the use of a street for railway purposes must be construed most strongly against the company and in favor of the public. *Burns v. Multnomah R'y Co.*, 8 Sawyer (U. S. C. C.), 543, 1883; 10 Amer. & Eng. R. R. Cases, 289; 15 Federal Reporter, 177. So any question of ambiguity must, in like manner, be resolved against the corporation. *Id.*

53. — An ordinance granting a railway company license to lay its track across and along the streets and alleys of a city, upon the condition that it shall permit any other companies, not exceeding two in number, to use its main track upon such fair and equitable terms as may be agreed upon, will not be construed as prohibiting the company from leasing the use of its track in the city to more than two other companies. Such provision is a limitation, not upon the right of the company to admit other companies to a joint use of its track, but upon the exclusive enjoyment of the estate granted by the city. *Chicago v. Chicago and Western Indiana R. R. Co.*, 105 Ill., 73, 1882; 10 Amer. & Eng. R. R. Cases, 306.

54. — A city ordinance granting permission to a railroad company to construct and operate a railroad within the city limits is not void because it fails to designate the precise line upon which the road may be constructed, and omits to designate the precise points at which the road may be constructed across and upon the several streets to be intersected by it. *Chicago and Western Indiana R. R. Co. v. Dunbar*, 100 Ill., 110, 1881; 5 Amer. & Eng. R. R. Cases, 253.

55. — A railroad company having submitted to construct its road through a city under an ordinance reserving the right to alter and amend, must submit to such alterations, etc., as are reasonable and necessary. But such an ordinance shall not be amended or repealed so as to affect essential and vested rights, or be allowed to act retrospectively to take away rights previously granted. *Chicago, Milwaukee and St. Paul R'y Co. v. Minnesota Central R. R. Co.*, 14 Federal Reporter, 525, 1882; 4 McCrary, 606.

56. — Where a village council and a railway company agree, under the statute, as to the terms upon which the company may use the streets of the village for its road, whereby the company bound itself to grade and gravel the streets so used, in a manner "to the acceptance of the council," *held*, that a subsequent ordinance repealing the contract ordinance, passed with intent to rescind the entire contract, being inoperative, without the assent of the company, to rescind the grant of the right of way, is also inoperative to release the company from its obligation to grade and gravel streets. *Cincinnati and Springfield R'y Co. v. Village of Carthage*, 36 Ohio St., 631, 1881; 5 Amer. & Eng. R. R. Cases, 306.

57. Improvement of streets. A city ordinance of December 30, 1873, authorized the department of highways to contract with a competent person, who should be selected by a majority of the owners of property fronting on Lehigh avenue, to pave said avenue between certain points, the cost to be collected by the contractor from the owners of the property fronting on said avenue. On October 2, 1873, previous to the passage of this ordinance, a majority of the owners on said avenue signed a paper selecting plaintiff as paver. Subsequently, on January 7, 1874, a number of those who had signed this paper formally withdrew their assent thereto, and gave notice to the highway department. That department, notwithstanding, awarded the contract to plaintiff, who proceeded with and finished the work, and who issued a *scire facias* to recover the portion of the cost due from defendant. *Held*, that it was competent for the property owners who had signed the paper selecting plaintiff to do the work, to revoke that selection, and that

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their revocation and notice to the highway department were a bar to plaintiff's recovery. *Held*, further, that the highway department had no authority to enter into a contract with any one who was not selected by a majority of owners. *City of Philadelphia v. Philadelphia and Reading R. R. Co.*, 88 Pa. St., 314. 1879.

58. — Where a railway company occupied and used one side of a street for a right of way, and owned real estate contiguous to said side, the real estate was liable to assessment for the improvement of said street. *Indianapolis, Peru and Chicago R. R. Co. v. Ross*, 47 Ind., 25, 1874; *Peru and Indianapolis R. R. Co. v. Hanna*, 68 Ind., 562, 1879. See, also, *New York and New Haven R. R. Co. v. New Haven*, 42 Conn., 279, 1875; 10 Amer. R'y Rep., 162.

59. — In opening and improving a street, a city graded beyond the limits of the street as located by law, and built a stone wall to sustain the street, one-half of which was within the street line and the other half on railway property. *Held*, that the wall was built in violation of law and the taking of the ground was a trespass. *Held*, further, that the city could not recover from the property owner for any portion of the cost of the wall. *Western Pennsylvania R'y Co. v. City of Allegheny*, 92 Pa. St., 100. 1879.

60. — Assessors or commissioners determining the assessment to be laid on the land of adjoining owners for benefit by a local improvement cannot take into consideration the fact that structures on the land of owners assessed,—e. g., the embankment of a railroad company,—even if wrongfully erected, enhance the expense of the improvement. *People ex rel. v. Assessors of Troy*, 2 Abbott's New Cases (N. Y.), 86. 1877.

61. — A road-bed of a railway cannot be assessed for a benefit in laying a street across it. *N. Y. and Harlem R. R. Co. v. Morrisania*, 7 Hun (N. Y.), 652. 1876.

62. — The effect of § 9 of the act of 1873 for the taxation of railroads is to subject the property of all railroad corporations of a character to be benefited by local improvements to special assessment for the costs of such improvements, when the public work benefits the property in the uses to which it is applied. *State v. Jersey City*, 42

N. J. Law, 98, 1880; *State v. Mayor and Aldermen of Jersey City*, 1 Amer. & Eng. R. R. Cases, 406, 1880.

63. — A lien for street improvements attaches only where there is a sufficient description of the property in the estimate which constitutes the assessment; and where the description, taken in connection with the ordinance providing for the improvement and the contract awarded under the ordinance, is such as would enable a person somewhat acquainted with surveying to find and identify the land, it is sufficient to create the statutory lien. *Peru and Indianapolis R. R. Co. v. Hanna*, 68 Ind., 562, 1879.

64. — **paving.** Where a railway runs much below the level of the highway the company is not, in respect to its line and slopes, the owner of land "abutting on the highway," within the meaning of ch. 102 of 25 and 26 Vict. *Great Eastern R'y Co. v. Hackney Board of Works*, Law Reports, 8 Appeal Cases, 687. 1883.

65. — A line of railway was situated in a deep cutting at a place where a road passed over the line. The road was carried on a bridge from one boundary of the line to the other, but supported on stone piers erected on the slope of the cutting. On an information under s. 77 of the Metropolis Management Amendment Act, 1832, against the railway company for not contributing to the paving of the road, *held*, that the line and slopes of the cutting did not bound or abut upon the road within the meaning of the act. *London, Brighton and South Coast R'y Co. v. St. Giles*, Law Reports, 4 Exchequer Division, 239, 1879; 31 Eng. (Moak), 486.

66. — An assessment on a railroad company, for paving a street crossing its railroad, set aside on the ground that the company derived no benefit therefrom in the improvement of its lands for the uses to which they were appropriated. *State v. City of Elizabeth*, 37 N. J. Law, 330. 1875.

67. — Where a city ordinance authorizes the majority of the property owners to select the contractor for paving, and the highway department makes a contract in violation of the wishes of the property owners, the contractor cannot recover for the work, he having notice of the facts. *City of Philadelphia*,

Injury Caused by Excavation — Location Over Railway.

v. Philadelphia and Reading R. R. Co., 12 Philadelphia, 479. 1877.

68. — The board of public works had no authority to enter into a contract for paving a sidewalk on one of the streets around the capitol, which was provided for in the sundry civil appropriation act of March 3, 1873 (17 Stats. at Large). *Washington and Georgetown R. R. Co. v. Dist. of Columbia*, 3 MacArthur (Dist. of Columbia), 11. 1879.

69. — A municipality cannot support a claim for paving against the road-bed of a railway company, and it is immaterial whether the company has simply the right of way or owns the bed in fee. *Junction R. R. Co. v. City of Philadelphia*, 88 Pa. St., 424. 1879.

70. — The right of way of a railway company across a street cannot be classed as property abutting on the street, in the sense of the statute providing for the assessment of property abutting on a street for street improvement. *Chicago, Burlington and Quincy R. R. Co. v. South Park Commissioners*, 11 Bradwell (Ill.), 562. 1882.

71. **Injunction.** A court of equity will not, at the suit of private citizens, enjoin the laying of a railway in a street. Such act, if a nuisance, should be restrained by the public, or on information of the solicitor-general for the circuit. *Coast Line R. R. Co. v. Cohen*, 50 Ga., 451. 1873. See, also, *Cairo and Vincennes R. R. Co. v. The People*, 92 Ill., 170, 1879; *Truesdale v. Peoria Grape Sugar Co.*, 5 Amer. & Eng. R. R. Cases (Ill.), 248, 1881.

72. — Where the construction of a railway in a street of a city will work material injury to the abutting property, such construction may be enjoined, at the suit of the owners, until the right to construct such road in the street shall first be acquired, under proceedings instituted against such owners, as required by law for the appropriation of private property. *Scioto Valley R'y Co. v. Lawrence*, 7 Amer. & Eng. R. R. Cases (Ohio), 93. 1883.

73. **Injury caused by excavation; action over against company.** Nor will the fact that the action was brought by the injured party against the municipality, instead of directly against the person engaged in such work, enable the latter, in an action over

against it, to set up absence of negligence as a defense on the ground that the municipality granted permission to do the work. The effect of such a grant is only to prevent the grantee from being a trespasser in the bare act of breaking up the street; but it gives no exemption from liability for injury resulting to others in the execution of the work. *District of Columbia v. Baltimore and Potomac R. R. Co.*, 1 Mackey (Dist. of Columbia), 314, 1881; 4 Amer. & Eng. R. R. Cases, 179.

74. — Where a municipality is mulcted in damages for injuries received by a party in falling into an excavation made by a railroad company in one of its streets, the latter is liable over for the amount paid. *Ib.*

75. **Liability of city for construction of railway.** If a city has such authority, it incurs no liability by reason of the fact that a company authorized by it to build and operate its road upon a street has so constructed an embankment in the street as to cause a pond of water to be formed upon adjacent land, provided the embankment conforms to the established grade of the street and is otherwise so constructed as to cause no damage or inconvenience beyond that necessarily occasioned by the appropriation of a portion of the street for the purpose. *Swenson v. City of Lexington*, 69 Mo., 157. 1878.

76. — The city incurs no liability for damages done to real estate by the occupation of the street upon which it fronts for a railroad, with its permission, unless they are such as would not have resulted if the road had been properly constructed and operated. *Ib.*

77. **Location over railway.** Cities and incorporated villages, in the exercise of the power to lay off and establish streets, and to take land for that purpose, conferred by the general act of May 3, 1852 (50 Ohio L., 223), are authorized to lay streets across railway land, provided the second use for which the land is so taken is, in the circumstances of the particular case, reasonably consistent with the former use. The land may, in such case, be subjected to the additional use, but the former use may not thereby be defeated. *Little Miami, etc., R. R. Cos. v. City of Dayton*, 23 Ohio St., 510. 1872.

Nuisance — Park Commission.

78. Nuisance; equity. Where certain persons sustain an injury from a public nuisance, where the injury is distinct from that sustained by the public in general, a bill in equity for relief will be entertained. *Spencer v. London and Birmingham R. R. Co.*, 8 Simons (Eng. Ch.), 193. 1836.

79. — A railway constructed in a public street of a city, without authority of law, is a continuous obstruction, which amounts to a public nuisance. *Denver and Swansea R'y Co. v. Denver City R'y Co.*, 2 Colo., 673, 1875; 20 Amer. R'y Rep., 339.

80. Obstruction; damages. Where the wrong done by the railway company is temporary in its nature, as in leaving cars unnecessarily on its track, or while engaged in the work of laying down its track, something existing to-day and not to-morrow, fluctuating in extent and depending on the ever-repeated action of the company, only such damages as have fully accrued prior to the commencement of the suit are recoverable, and none based upon any presumed continuance or repetition of the wrong. *Central Branch Union Pacific R. R. Co. v. Twine*, 23 Kans., 585. 1880.

81. — But where the wrong is of a permanent nature, and springs from the manner in which the track, as fully completed, affects approach to a lot, then the lot owner may treat the act of the company as a permanent appropriation of the right of access to his lot, and recover as damages the consequent depreciation in value of the lot. *Ib.*

82. — The same rules applied to the permanent obstruction of an alley. *Central Branch Union Pacific R. R. Co. v. Andrews*, 26 Kans., 702. 1882.

83. — In an action for damages to real estate caused by a railroad company in using a public avenue for loading and unloading freight, witnesses who are acquainted with the value of property in the same locality may testify as to their opinion of the depreciation of said property, due to the use of said avenue for the purpose of a freight delivery. *Trook v. Baltimore and Potomac R. R. Co.*, 3 MacArthur (Dist. of Columbia), 392. 1879.

84. — In such action the plaintiff is not confined to structural damage to the building, or physical injury and harm to the land.

He may also recover any other damage growing out of the unreasonable and unlawful use of the avenue. *Ib.*

85. — The measure of damages is not the diminution in value of the abutting property by the wrongful obstruction, the injury not being to the freehold nor permanent in its nature, but should be confined to compensation for the injury occasioned by the unlawful obstruction up to the time of the commencement of the suit. *Brakken v. Minneapolis and St. Louis R'y Co.*, 29 Minn., 41, 1881; 7 Amer. & Eng. R. R. Cases, 593.

86. — The building commissioners have no right to obstruct the Market Street Railroad in its route along Market street. The railroad company has no right to alter its course, nor can the commissioners confer such right upon it. *West Philadelphia R'y Co. v. Perkins*, 10 Philadelphia, 20. 1873.

87. — In an action against a city for injury to plaintiff caused by a dangerous obstruction upon a sidewalk, *held*, that the fact that the obstruction was created by a railroad company, which, under lawful authority, was constructing its track across the street at the place where the obstruction was located, did not exonerate the city. *Wilson v. Watertown*, 5 Thompson & Cook (N. Y. Supreme Ct.), 579. 1875.

88. — Where, under a license from the city, dirt on a railroad crossing is piled upon the street by the railroad company until the city shall remove it, and is left there at night without a light having been placed thereon, in violation of a city ordinance, the railroad company is liable for injuries suffered in consequence of the absence of a light. *Lyon v. St. Louis, Iron Mountain and Southern R. R. Co.*, 6 Mo. App., 516. 1879.

89. Opening of street. The Philadelphia, Baltimore and Wilmington R. R. Co. have no right to prevent the opening of Fifteenth street, through their property at Broad street and Washington avenue. Although it will be a great inconvenience, it will not destroy any franchise of the company. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Philadelphia*, 9 Philadelphia, 563. 1872.

90. Park commission. The park commission has power to use the name of the city of Philadelphia in any proceeding at law or

Repair — Trespass.

in equity that may be necessary to carry into effect the objects referred to in the act creating the commission. *Philadelphia v. Germantown R'y Co.*, 10 Philadelphia, 165. 1874.

91. Repair; occupancy of railway. By a city charter, the council have full power over the streets and sidewalks, and authority to keep them in repair. A railway company, after constructing its road through certain of the streets, neglected, though requested by the street commissioner, to restore such streets, and the sidewalks thereon, to their former condition of usefulness, as the statute requires; and the commissioner procured the necessary repairs to be made, for which payment was made by the city. *Held*, that the city may recover from the company all reasonable expenses so incurred. *City of Oconto v. Chicago and Northwestern R'y Co.*, 44 Wis., 231. 1878.

92. — Provisions of the charter establishing the general policy of repairing streets and sidewalks, under the direction of the street commissioner, at the expense of adjoining lots, held inapplicable to the repairs in question. *Ib.*

93. — The railway company, whose neglect of its own legal duty compelled the city to make repairs, is not in a position to question, on technical grounds, the authority of the council to appropriate city funds to pay for the same. *City of Oconto v. Chicago and Northwestern R'y Co.*, 44 Wis., 231. 1878.

94. Restoration to usefulness. It is the duty of a railway company in constructing its track across a street to restore the street to its former state, or to such a state as not unnecessarily to impair its usefulness, and to keep such crossing in repair. *Peoria, Decatur and Evansville R. R. Co. v. Lyons*, 9 Bradwell (Ill.), 350, 1881; *Pittsburg, Ft. Wayne and Chicago R. R. Co. v. Reich*, 101 Ill., 157, 1881.

95. Speed of trains. The statute requires that all railway companies shall "cause the bell on the engine to be rung before crossing any of the streets" of an incorporated city, and that their trains shall not go faster than six miles an hour until "they have passed all traveled streets of said city." *Held*, that these provisions apply to all actually traveled streets within the city limits, though such

only by user, and not merely to streets dedicated by recorded plats or laid out and adopted by the municipal authorities. *Ewen v. Chicago and Northwestern R'y Co.*, 38 Wis., 613. 1875.

96. — An ordinance of the city of St. Louis limiting the rate of speed of engines over its streets to six miles an hour is not void as being in conflict with the franchise of the Missouri Pacific R'y Co. *Neier v. Missouri Pacific R'y Co.*, 12 Mo. App., 25. 1882.

97. Transfer of license to use. Where a city grants to a railroad company the right to use certain parts of its streets for railroad tracks, the grant containing no clause restricting the use of the streets to the grantee, the right to such use of the streets may be transferred to another railroad company. *City of Quincy v. Chicago, Burlington and Quincy R. R. Co.*, 94 Ill., 537. 1880.

98. Trespass; abutting property. It is *res adjudicata* in this case that plaintiff is entitled to recover all the damages sustained up to the commencement of the action from defendant's trespass in constructing and operating its railroad on his land in a public street (only six inches in width of the track being upon said land), and that the fact that a part of the road was at the same time constructed and operated upon adjoining lands not owned by the plaintiff cannot be considered for the purpose of lessening the damages. *Blesch v. Chicago and Northwestern R'y Co.*, 48 Wis., 168. 1879.

99. — Where a railway company, without the consent of the owner, and without legal proceedings, takes possession of land for which it is liable to make compensation (in this case, land forming part of a public street, but the fee of which was in the plaintiff), it is liable in an action of trespass; and the neglect of the owner to proceed by injunction to restrain the company from constructing its road on the land is not a waiver of his right of action for the trespass. *Blesch v. Chicago and Northwestern R'y Co.*, 48 Wis., 183. 1877.

100. — Under the constitution and laws of Wisconsin, where lands are taken for railway purposes, the "just compensation" which the company must pay includes "the value of the lands actually taken, and the

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damages sustained by the owner by reason of the taking thereof" for such purpose; and the fact that the value of the owner's other lands, adjoining those taken, and used in connection with them, would be diminished by the proximity of the road, if it were built close to but not upon his land, cannot be considered for the purpose of lessening the damages; and an equally liberal rule in favor of the land owner applies in case of a trespass by an illegal taking for the same purpose. *Blesch v. Chicago and Northwestern R'y Co.*, 48 Wis., 168. 1879.

101. Use of streets. The plaintiff having no authority in its charter to use steam power in propelling its trains through Richmond, *held*, that the city had the right to prohibit the use of steam on its streets. *Richmond, Fredericksburg and Potomac R. R. Co. v. Richmond*, 26 Grattan (Va.), 83. 1875. See, also, *Crosby v. Owensboro and Russellville R. R. Co.*, 10 Bush (Ky.), 288, 1874; *Newport and Cincinnati Bridge Co. v. Foote*, 9 Bush (Ky.), 264, 1872.

102. — The charter of Long Island City (ch. 431, Laws of 1871, tit. 3, ch. 1, § 14) gives power to regulate the use of streets by vehicles and railways, and to enforce obedience thereto by penalties, with the reservation that it shall have no power to prohibit or control the use of steam power on any railroad from any part of Long Island to the East river; and it is declared that such railroad companies shall have the unobstructed right to run to the East river, "but shall furnish suitable guards or signals at the street crossings." The common council passed an ordinance requiring railroad companies running cars drawn by steam power, within the city limits, to place flagmen at every crossing; and for every violation of the ordinance imposed a penalty of \$50. Defendant's road was in operation before the enactment of the charter. Its road passed through the city to the East river, crossing one of the city streets. In an action to recover a penalty for not placing a flagman at the crossing, *held*, that plaintiff was not entitled to recover; that it had no control over the defendant's road, and had no power to regulate by ordinance the duty imposed upon defendant to furnish proper guards and

signals. *Long Island City v. Long Island R. R. Co.*, 79 N. Y., 561. 1880.

103. — Where the authorities of a city acquiesced for nineteen years in the use of a public street by a railroad company in maintaining an arch over the street, and then made an agreement in writing whereby the right to so use the street was continued until it should be necessary to rebuild the arch, it was held that the city, by these acts of recognition and acquiescence, was estopped from compelling the company to remove the arch and obstruction, until it should become necessary to rebuild the same. *Chicago and Northwestern R'y Co. v. The People*, 91 Ill., 251. 1878.

104. — A railway company may, notwithstanding a city ordinance, be prevented from making an oppressive use of a street. So held where the company tore down the awning in front of plaintiff's house. *Laviosa v. Chicago, St. Louis and New Orleans R. R. Co.*, 1 McGloin (La.), 299, 1881; 4 Amer. & Eng. R. R. Cases, 129.

105. — The use of a street for railway purposes cannot be authorized unless the street has been lawfully established. Or. Laws, 530. *Burns v. Multnomah R'y Co.*, 8 Sawyer (U. S. C. C.), 543, 1883; 10 Amer. & Eng. R. R. Cases, 239; 15 Federal Reporter, 177.

106. — The city authorities have the power to establish such reasonable appliances in the public thoroughfares where railroads pass along as will, by a temporary arrest of travel, protect the public from the danger of meeting passing trains. *Textor v. Baltimore and Ohio R. R. Co.*, 59 Md., 63. 1832.

107. — The use of a post and gate at a crossing held proper. *Id.*

108. — An ordinance having been passed by a city, authorizing the use of a street for railway purposes, a court of equity will not enjoin the repeal of such an ordinance before the completion of the road. *Cape May and Schellenger's Landing R. R. Co. v. Cape May*, 9 Amer. & Eng. R. R. Cases, 474; 35 N. J. Eq., 419. 1882.

109. — The consent of the municipal authorities is all that is required to authorize a railway company to use a public street. The consent of abutting property owners is not

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necessary unless so provided in the statutes. *Wiggins Ferry Co. v. East St. Louis Union R'y Co.*, 107 Ill., 450. 1883.

110. — A city ordinance granting a railroad company a right of way over a street provided that the grant should become null and void if the company should ever remove its machine shops from the city. Held, that this was a condition subsequent, in which no one had any legal interest but the company and the city, and if the company violated the condition by removing the shops, this did not *ipso facto* terminate the right of way so as to entitle the owner of a lot abutting upon the street to maintain an action of damages against the railroad company as for an unlawful occupation of the street. *Knight v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 70 Mo., 231. 1879.

111. — After a railroad has been in operation in a street for many years, any technical defect in the title to its road-bed, if not cured by lapse of time, must be taken advantage of by the people to enjoin the road as a nuisance. *People v. Long Island R. R. Co.*, 9 Abbott's New Cases (N. Y.), 181. 1850.

112. — The attorney-general may direct the discontinuance of a suit brought in the name of the people to restrain the use of a street by a railway company. *People v. Central Cross Town R. R. Co.*, 21 Hun (N. Y.), 476. 1880.

113. — The legislature has the power to judge of the relative benefits resulting to a municipal corporation and a railroad company from an alteration in a public avenue over which the railroad track passes, and its judgment is not subject to review by the courts. *People v. Mayor of City of New York*, 3 Hun (N. Y.), 97. 1874.

114. — The city of St. Louis has no power to authorize the use of any street for a railroad. An ordinance for that purpose is, therefore, a nullity, and cannot create between the city and the company the relation of licensor and licensee, so as to make the company's action amount to an acceptance of a license. *Atlantic and Pacific R. R. Co. v. City of St. Louis*, 66 Mo., 228. 1877.

115. Vacation. While equity will interfere in some cases at the instance of private real estate owners to restrain the attempted vacation of a road or street, yet it

will interfere only when such owners have a special interest therein, and their property would be directly injured by the vacation. *Heller v. Atchison, Topeka and Santa Fe R. Co.*, 28 Kans., 625, 1882; 7 Amer. & Eng. R. R. Cases, 636.

116. Waste water. Where a railway company has been in the habit of running the waste water from a tank upon a street of a city for some time, a party cannot acquire a right of action against the company by going upon the street under permission from members of the city council and piling lumber there in such manner that the water from the tank in its usual course will flow upon it. *Chicago and Northwestern R'y Co. v. Hoag*, 90 Ill., 339. 1878.

117. — A railway company can acquire no prescriptive right to let the waste water from its tank on to a public street of a city, as against the city or one in its legitimate use as a street. *Ib.*

STRIKES.

1. Delays. Delay in the carriage of property, occasioned by the violence of a mob during a strike, will not render the carrier liable. *Lake Shore and Michigan Southern R'y Co. v. Bennett*, 89 Ind., 457, 1883; 6 Amer. & Eng. R. R. Cases, 391, 1882; *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Hollowell*, 65 Ind., 188, 1879.

2. — A reply alleging that such alleged insurrection was composed wholly of employes of the defendant, who, peaceably and without arms or violence, and on account of an unjust and oppressive reduction by the defendant of their wages, refused to continue in the defendant's employ until their former rate of wages was restored, and who had peaceably assembled in a small body to petition therefor, is insufficient. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Hollowell*, 65 Ind., 188. 1879.

3. — The reply in such action, alleging that the cause of such pretended insurrection was an unjust and oppressive reduction by the defendant of the wages of its employes, which induced them to strike and refuse to work, and to assemble in a peaceable body to demand a restoration of their

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former rate of wages, but without offering any resistance to the civil authorities, is insufficient. *Ib.*

4. **Destruction of goods.** A railway company is not liable for destruction of goods by a mob during a strike of its employees. *Sherman v. Pennsylvania R. R. Co.*, 3 Amer. & Eng. R. R. Cases (U. S. C. C.), 274. 1881.

5. **Mandamus.** A railway company may by *mandamus* be compelled to operate its road, and it is no defense that its employees are demanding a small increase of wages. *People v. New York Central and Hudson River R. R. Co.*, 9 Amer. & Eng. R. R. Cases (N. Y.), 1. 1882.

SUBSCRIPTIONS BY CITIES AND TOWNS.

See BONDS OF RAILWAY COMPANIES; FEDERAL COURTS; PLEADINGS; SUBSCRIPTIONS BY COUNTIES; SUBSCRIPTIONS BY TOWNSHIPS.

I. AUTHORITY TO SUBSCRIBE.

II. PROCEEDINGS.

III. PROCEEDINGS TO PREVENT THE ISSUANCE OF BONDS.

IV. CONDITIONAL SUBSCRIPTIONS.

V. BONDS.

VI. LOCATION OF RAILWAYS.

VII. TAXATION.

VIII. MISCELLANEOUS.

I. AUTHORITY TO SUBSCRIBE.

1. **Certiorari.** Upon a *certiorari* to review proceedings for the purpose of bonding a town in aid of a railroad, under Laws 1868, ch. 811; Laws 1869, ch. 241; 1871, ch. 127, *held*, that it was incumbent upon the officers issuing the bonds to show that the lawful authority existed for bonding the town in aid of the railroad at the time of the institution of the proceedings. *People ex rel. v. Walter*, 4 Thompson & Cook (N. Y. Supreme Ct.), 683, 1874; 2 Hun (N. Y.), 385, 1874; reversed on appeal on the ground that the writ had been directed to the commissioners instead of the county judge. *Same v. Same*, 68 N. Y., 403. 1877.

2. **Change of law.** It is not within the power of one legislature to bind future legis-

latures. *Olson v. Green Bay and Lake Pepin R. R. Co.*, 36 Wis., 383. 1874.

3. — A change in the statute will not affect previous subscriptions. *Red Rock v. Henry*, 106 U. S., 596, 1882; *Syracuse Savings Bank v. Town of Seneca Falls*, 21 Hun (N. Y.), 304, 1880; *Same v. Same*, 83 N. Y., 317; 7 Amer. & Eng. R. R. Cases, 216, 1881.

4. **Charter.** A clause in the charter of a railroad company which says, "It shall be lawful for all persons of lawful age, or for the agent of any corporate body, to subscribe to the capital stock of said company," manifestly refers to private corporations, and confers no power upon municipal corporations to subscribe for such stock. *Campbell v. Paris and Decatur R. R. Co.*, 71 Ill., 611. 1874.

5. — A special charter authorizing subscriptions construed. *Glenn v. County Commissioners*, 6 So. Car., 412. 1873.

6. — The act amending the charter of the city of Keokuk, approved January 22, 1853, did not confer upon the city the power to become a subscriber to the capital stock of a railway company. *Williamson v. City of Keokuk*, 44 Ia., 88. 1876.

7. — The act of January 25, 1855, did not contain a grant of power to municipal corporations to issue bonds in aid of railway companies, but simply attached some limitations to the exercise of the power where it had already been conferred. *Ib.*

8. **City council.** An appropriation in aid of the construction of a railroad may be made by city councils without a popular vote, and may be limited to a part of the road. *Perry v. Keene*, 58 N. H., 40. 1876.

9. **Constitutional law.** The legislature has the constitutional right to authorize towns to aid in the construction of railways. *Town of Bennington v. Park*, 50 Vt., 178, 1877; *First National Bank of St. Johnsbury v. Town of Concord*, ib., 257, 1877; *Brocaw v. Commissioners of Gibson County*, 73 Ind., 543, 1881; 3 Amer. & Eng. R. R. Cases, 573; *Perry v. Keene*, 56 N. H., 514, 1876; 20 Amer. R'y Rep., 184; *Taylor v. City of Ypsilanti*, 12 Amer. & Eng. R. R. Cases (U. S. S. C.), 549; 105 U. S., 60, 1881; *City of Opelika v. Daniel*, 59 Ala., 211, 1877. *Contra, Thomas v. City of Port Huron*, 27 Mich., 320. 1873.

10. — The ordinance passed by the city

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councils of Philadelphia, on the 16th day of February, 1854, authorizing a subscription of fifteen thousand shares in the North Western R. R. Co., is not in violation of the provisions of the act of February 2, 1854, known as the Consolidation Act, nor in violation of the vested rights of the citizens of the then county of Philadelphia; nor is it contrary to their constitutional right to be exempt from taxation, except by their representatives. *Riddle v. Philadelphia and North Western R. R. Co.*, 1 Pittsburgh, 158. 1854.

11. — The act authorizing the city of San Antonio to issue bonds in aid of the San Antonio and Mexican Gulf R. R. Co., *held*, unconstitutional, as it embraces more than one subject. *Giddings v. City of San Antonio*, 47 Tex., 548, 1877; *Peck v. San Antonio*, 51 ib., 490, 1879. A Texas statute held unconstitutional as embracing more than one subject. *San Antonio v. Mehaffy*, 96 U. S., 312. 1877.

12. — Under the constitution of Illinois of 1848, a bill passed by both houses of the legislature became a law when it was approved and signed by the governor of the state within ten days after its presentation to him; and this, notwithstanding the fact that, when the bill was so approved and signed, the legislature had adjourned *sine die*. *Seven Hickory v. Ellery*, 103 U. S., 423. 1880. See, also, *Amoskeag National Bank v. Town of Ottawa*, 12 Amer. & Eng. R. R. Cases (U. S. S. C.), 546; 105 U. S., 667. 1881.

13. — Under the constitution of 1848, the legislature could properly confer upon a city the power to contract indebtedness and issue its bonds for a corporate purpose without any vote of the people, but it could go no further. It could not compel a city or incorporated town to incur a debt, unless the legislative department of the city or town saw proper to do so. *Chicago, Burlington and Quincy R. R. Co. v. City of Aurora*, 99 Ill., 205, 1881; 5 Amer. & Eng. R. R. Cases, 191.

14. — The section of the constitution of Illinois entitled "Municipal subscriptions to railroads or private corporations," which took effect July 2, 1870, did not invalidate township bonds which, pursuant to a vote cast at an election of the voters of the township lawfully held on that day, before closing the polls of the general election, were

issued to pay a previously voted donation that was to be raised by special tax. *Louisville v. Savings Bank*, 104 U. S., 469, 1881; 12 Amer. & Eng. R. R. Cases (U. S. S. C.), 589.

15. — The constitution of the state which came into operation July 2, 1870, annulled the power of any city, town or township to make donations or loan its credit to a railroad company, and, after that date, rendered the act of 1867 ineffective. As the town had no authority to make a contract to give, and the acceptance by the company was an undertaking to do nothing which it was not bound to do, before the authority of the town to make or to engage to make a donation, came into existence, no valid contract arose from such offer and acceptance. The bonds so issued are void. *Concord, Town of, v. Portsmouth Savings Bank*, 92 U. S., 625. 1875. Overruled and contrary doctrine held in *Fairfield v. Gallatin County*, 100 U. S., 47, 1879; following *Chicago and Iowa R. R. Co. v. Pinckney*, 74 Ill., 277, 1874.

16. — Where, pursuant to the authority conferred by a legislative enactment, such a donation was voted by a county in Illinois, before the adoption of that constitution, the donation may be thereafter completed by the issue of the requisite bonds. *Fairfield v. County of Gallatin*, 100 U. S., 47, 1879; *Town of Prairie v. Lloyd*, 97 Ill., 179, 1881; 3 Amer. & Eng. R. R. Cases, 58; *Decker v. Hughes*, 68 Ill., 33, 1873; *Wright v. Bishop*, 88 Ill., 302, 1878; 21 Amer. R'y Rep., 301; *Quincy, Missouri and Pacific R. R. Co. v. Morris*, 84 Ill., 410, 1877; 16 Amer. R'y Rep., 494; *People v. Jackson County*, 92 Ill., 441, 1879.

17. — The act authorizing the city of Wheeling to subscribe to the capital stock of the Wheeling and Lake Erie R. R. Co. construed. *Held*, that the act was repealed by the adoption of the new constitution. *Held*, that as the voters had, prior to the repeal, voted in favor of the subscription, but that the subscription had not in fact been made at that time, the proceedings were inoperative, and further proceedings were enjoined. *List v. City of Wheeling*, 7 West Va., 501, 1874. But see *State ex rel. v. Town of Clark*, 23 Minn., 422. 1877.

18. — On January 1, 1875, when the amend-

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ment of the constitution (art. 8, § 11) went into effect prohibiting any town from loaning its money or credit in aid of any corporation, or from becoming the owner of any stock or bonds of a corporation, all action on the part of any town to issue its bonds in aid of a railroad not then completed at once become nugatory, unless where some previous vested right had accrued. *Falconer v. Buffalo and Jamestown R. R. Co.*, 69 N. Y., 491, 1877; 18 Amer. R'y Rep., 46.

19. — To an action on negotiable bonds issued by the defendant, it pleaded that the act incorporating it was unconstitutional: 1st, because the subject of the act was not expressed in its title; 2d, because under the constitution of Missouri the legislature could not amend the charter of the town corporation by making it a city corporation; 3d, because Plattsburg did not in fact have five thousand people when it was incorporated as a city, as required by the constitution of the state. *Held*, that neither of these objections was well taken. Such questions cannot be collaterally raised. *Judson v. City of Plattsburg*, 3 Dillon (U. S. C. C.), 181. 1874. See, also, *Aller v. Town of Cameron*, 3 Dillon (U. S. C. C.), 198. 1874.

20. — Section 11 of art. 8 of the state constitution has the effect of repealing all acts of the legislature relating to the bonding of towns for railroad purposes, except so far as they relate to existing contracts actually made and in force when the provision went into effect. *Buffalo and Jamestown R. R. Co. v. Town of Collins*, 5 Hun (N. Y.), 485. 1875.

21. — As long as a city exists, laws are void which withdraw or restrict its taxing power so as to impair the obligation of its contracts made upon a pledge expressly or impliedly given that it shall be exercised for their fulfilment. Although such laws be enacted, *mandamus*, to compel the city to exercise that power to the extent it possessed it before their passage, will lie at the suit of a party to such a contract who has no other adequate remedy to enforce it. *Wolff v. New Orleans*, 12 Amer. & Eng. R. R. Cases (U. S. S. C.), 625; 103 U. S., 358. 1880.

22. *Depots and side-tracks.* The act of the legislature of Kansas, entitled "An act to authorize counties, incorporated cities and

municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water-power or other works of internal improvement, and providing for the registration of such bonds, and the repealing of all laws in conflict therewith," approved March 2, 1872 (ch. 68, Laws of Kansas, 1872, p. 110), authorizes a township to issue its bonds to aid in constructing within its limits the depots and side-tracks of an existing railroad. *Township of Rock Creek v. Strong*, 96 U. S., 271. 1877.

23. *Donation.* The provisions of the act of May 4, 1869 (1 R. S. 1876, p. 299), "to enable cities to aid in the construction of railroads," etc., authorize a city incorporated under the general law of Indiana to extend such aid, in the construction of a railway, in either of two ways, viz.: *first*, by subscribing to the stock of such enterprise, or, *second*, by making a donation thereto. *Indiana North and South R'y Co. v. City of Attica*, 56 Ind., 476. 1877.

24. — The term "donation" as used in the act, means an absolute gift or grant of a thing, without any condition or consideration. *Ib.*

25. *Estoppel.* A town cannot at the same time deny the validity of its bonds and claim the proceeds of the same. *Town of Lyons v. Chamberlain*, 89 N. Y., 578, 1882; *Town of Bennington v. Park*, 50 Vt., 178, 1877.

26. — The fact that a city has received in exchange for void bonds issued under an enabling act the bonds of a railway company, in whose favor the city bonds were issued, does not make valid the unauthorized obligations of the city. A municipal corporation has no general authority to exchange promises with other corporations or persons; its contract, to be valid, must be within the scope of the authority conferred upon it by law, and for municipal purposes. *Thomas v. City of Port Huron*, 27 Mich., 320. 1873.

27. *Guaranty of railway bonds.* An act of the legislature authorizing the corporate authorities of a city to borrow money for works of internal improvements, *held*, to include a guaranty of the payment of bonds issued by a railway company for money to pay debts incurred for construction already

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made, and for future improvements. *Mayor and Aldermen of Savannah v. Kelly*, 12 Amer. & Eng. R. R. Cases (U. S. S. C.), 679. 1888.

28. Legalizing acts. Various legalizing acts construed and held to validate municipal subscriptions. *Quincy v. Cooke*, 107 U. S., 549, 1882; *Thompson v. Perrine*, 103 U. S., 806, 1880; 3 Amer. & Eng. R. R. Cases, 140. See *Same v. Same*, 106 U. S., 589. 1882. *Contra*, *Horton v. Thompson*, 71 N. Y., 513, 1877; *Town of Duanesburgh v. Jenkins*, 57 N. Y., 177, 1874.

29. — The supreme court of Illinois having decided that the legislature cannot, by subsequent legislation, render valid a note by a town to subscribe to railroad stock, if there was no law in force at the time of the subscription authorizing it, the federal court will follow that authority although in conflict with a prior decision of the United States supreme court. *Leslie v. Town of Urbana*, 8 Bissell (U. S. C. C.), 435. 1879. See *Thompson v. Perrine*, 12 Amer. & Eng. R. R. Cases (U. S. S. C.), 577; 106 U. S., 589. 1882.

30. — Ch. 20, Laws of 1877, to legalize the acts and proceedings of officers of the town of Rosendale in the assessment and collection of certain taxes authorized by act of 1871, is invalid, because, since the constitutional amendment of 1871, the legislature has no authority to pass any special law for the assessment and collection of taxes. *Kimball v. Town of Rosendale*, 42 Wis., 407. 1877.

31. Levy of tax. Where an act of the legislature authorized a city to issue its bonds in aid of a railroad company, and ratified a contract by which the city, having issued its said bonds, agreed to appropriate sufficient moneys from its treasury to pay the accruing interest thereon, the city was thereby authorized to levy a tax to pay said interest, and such authority carried with it the duty to make the levy. *Sibley v. Mobile*, 3 Woods (U. S. C. C.), 555. 1876.

32. — But when, at the time of the issue of the bonds, the constitution of the state limited the taxing power of the city to a certain per centum upon its taxable property, the city could not exceed that limit; but having first levied a tax sufficient to pay its current expenses, it was bound by

its contract to exhaust, if necessary, the residue of its taxing power in order to pay the interest on said bonds. *Ib.*

33. Machine shops. The provisions of the Indiana statute do not authorize a city to make a contract to aid a railway company to construct its line by delivering to it a certain sum in money or bonds, in consideration of the agreement of such company to erect and maintain its machine shops in or near such city. *Indiana, North and South Ry Co. v. City of Attica*, 56 Ind., 476. 1877. See, also, *New Orleans, Mobile and Chattanooga R. R. Co. v. Dunn*, 51 Ala., 128. 1874. *Contra* as to the statutes of Missouri. *Jarroll v. City of Moberly*, 5 Dillon (U. S. C. C.), 253. 1878.

34. Maine; statute. The statutes of Maine authorizing municipal aid construed. *Stevens v. Town of Anson*, 73 Me., 489. 1882.

35. Power to subscribe. A municipal corporation cannot subscribe to the capital stock of a railroad company and issue its bonds in payment of such subscription unless the power so to do has been expressly conferred by law. *Lewis v. City of Clarendon*, 5 Dillon (U. S. C. C.), 329, 1878; *Wells v. Supervisors*, 102 U. S., 625, 1880; 2 Amer. & Eng. R. R. Cases, 605; *Barnes v. Town of Lacon*, 84 Ill., 461, 1877; *Pitzman v. Village of Freeburg*, 92 Ill., 111, 1879; *Tax-payers of Milan v. Tennessee Central R. R. Co.*, 11 Lea (Tenn.), 329, 1883.

36. Railway lying in another state. The subscription to the capital stock of a railroad lying wholly in another state is for a corporate purpose; as in the case of the city of Quincy, situated on the western border of the state, subscribing to the stock of a railroad to be constructed from a point on the Mississippi river, opposite that city, in the state of Missouri, to a point westward, in Nebraska. *Quincy, Missouri and Pacific R. Co. v. Morris*, 84 Ill., 410, 1877; 16 Amer. Ry Rep., 494. See, *contra*, *Allen v. Louisiana*, 103 U. S., 80, 1880; 2 Amer. & Eng. R. R. Cases, 599.

37. Ratification. Corporate ratification, without authority from the legislature, cannot make a municipal bond valid which was void when issued for want of legislative power to make it. *Lewis v. City of Shreve-*

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port, 12 Amer. & Eng. R. R. Cases (U. S. S. C.), 683. 1883.

38. Roads already built. To be of any effect to bind a town to issue bonds to aid in the construction of a railroad under Laws 1877, c. 106, the agreement to issue bonds, provided for in section 7 of said chapter, must be arrived at and perfected before the construction of the road or piece of road, the construction of which such agreement is designed to aid. *State ex rel. v. Highland*, 25 Minn., 355. 1879.

39. Second subscription by city. The right of railway companies to ask from local communities assistance, involving the necessity of taxation, will not be enlarged by construction. Privileges of this character are in derogation of individual rights. They will not be implied, but must be clearly granted. But, when this has been done, the judiciary cannot interfere to defeat the legislative will. *Tyler's Executor v. Elizabethtown and Paducah R. R. Co.*, 9 Bush (Ky.), 510. 1872.

40. — A second subscription of stock in said company by the city of Louisville for the purpose of building a branch road is held to be valid. *Ib.*

41. Statutory authority. Under a statute authorizing a municipality to issue bonds in aid of a railroad, payable not later than ten years from the date of issuance, bonds made payable twenty years from their date are void. *Woodruff v. Okolona*, 57 Miss., 806. 1880.

42. — The legislature cannot compel a municipal corporation to subscribe for railroad stock and to issue its bonds in payment therefor; but where, under a mandatory act, the municipality has voluntarily and without the compulsion of judicial process subscribed for stock and issued its bonds, the latter are not invalidated by the compulsory character of the act; it operates as an authority and permission to do the acts, and, having been done, they will be considered as having been done voluntarily. *Williams v. Town of Duaneburgh*, 66 N. Y., 129. 1876.

43. — Where authority is given "to any incorporated town or city" in a county to subscribe to the capital stock of a railroad company, such authority is not limited to towns

and cities incorporated at the date of the passage of the act. *Lewis v. City of Clarendon*, 5 Dillon (U. S. C. C.), 329. 1878.

44. — Statutes construed and bonds held valid. *Wilkinson v. City of Peru*, 61 Ind., 1, 1878; *Converse v. City of Fort Scott*, 92 U. S., 503, 1875.

45. — Statutes construed and bonds held invalid. *Sykes v. Mayor of Columbus*, 55 Miss., 115, 1877; *Jarrott v. Moberly*, 103 U. S., 580, 1880; 3 Amer. & Eng. R. R. Cases, 113.

46. Subsequent organization of municipal corporation. An enabling act, authorizing any city or village in any county through any portion of which any part of a certain railroad should run, to issue bonds in aid thereof, is prospective in its intent, and is sufficient authority for a village, incorporated subsequently, and not existing at the time the enabling act becomes a law, to issue such bonds. *Long v. City of New London*, 9 Bissell (U. S. C. C.), 539. 1880.

47. Villages; Illinois statute. The act entitled "An act to provide for a general system of railroad incorporations," approved November 6, 1849, in so far as it provides for municipal subscription to the capital stock of railroad companies, has no reference whatever to villages, but applies only to counties and cities. *Pitzman v. Village of Freeburg*, 92 Ill., 111. 1879.

48. Void bonds. Where a bond is made by a city for two considerations, as to one of which it has power to make a bond, but as to the other has none, such bond is wholly void. The holder cannot recover on the bond as such. His remedy is an action for money had and received. *Gause v. City of Clarksville*, 1 Federal Reporter, 353. 1880.

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49. Acceptance. Formal acceptance by the corporation is unnecessary. The building of the road is a sufficient acceptance. *State ex rel. v. Town of Lime*, 23 Minn., 521, 1877; *State ex rel. v. Hastings*, 24 ib., 78, 1877.

50. Appeal. A petition was presented to the county board asking an appropriation for a township of \$75,000, to aid a railway, as provided by the statute. An election was held and the aid voted. In June, 1880, the

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board levied a tax of one per cent. accordingly. In June, 1881, another levy of one per cent. was ordered, and on trial of an appeal from this last order the appellant offered to show that a tax of one per cent. for the years 1880 and 1881 would not raise the \$15,000. *Held*, that the evidence was immaterial. *Held*, also, that the appeal raised no question upon the proceedings occurring before the order appealed from. *Gavin v. Comm'rs of Decatur County*, 81 Ind., 480. 1883.

51. Certiorari. Where the action of the county judge, authorizing the issue of bonds, was reversed upon *certiorari*, bonds issued while the *certiorari* proceedings are pending will be held invalid. *Stewart v. Town of Lansing*, 15 Blatchford (U. S. C. C.), 281. 1878.

52. Collateral attack. The county judge being required to act upon the petition for the issue of bonds, his judgment thereon cannot be collaterally assailed. *Munson v. Town of Lyons*, 12 Blatchford (U. S. C. C.), 589. 1875.

53. Commissioners; powers and liabilities. The railroad commissioners appointed under the act authorizing certain towns of Livingston county to issue bonds and take stock in the E. and G. V. R. R. Co. (ch. 442, Laws of 1868) had no relation to the county, and in no sense were they subject to the supervision by or subordinate to its board of supervisors. Said board had no jurisdiction to appoint a committee of its members for the purpose of an investigation to ascertain who were the railroad commissioners, under said act, and had no authority to require the attendance of witnesses before the committee upon such investigation (§ 1, ch. 190, Laws of 1858); and that, therefore, a subpoena requiring such attendance conveyed no mandate which imposed compliance, and disobedience thereto was not, within the meaning of the law, contempt. *Bradner, In re*, 87 N. Y., 171. 1881.

54. Consideration. Where, in an action of *mandamus*, the petition for the donation shows that the railway is not yet completed, and the donation is asked because the construction of such railway will enhance the value of the property of the petitioners, an answer alleging a want of consideration for

the donation is insufficient. *City of Kokomo v. The State*, 57 Ind., 152. 1877.

55. Consolidation of railways. The right to make a subscription to a railway company held to pass to its successor with which it was consolidated. *Empire v. Darlington*, 101 U. S., 87, 1879; *Lewis v. City of Clarendon*, 5 Dillon (U. S. C. C.), 329, 1878. See, also, *Illinois Midland R'y Co. v. Town of Barnett*, 85 Ill., 313, 1877; *Town of East Lincoln v. Davenport*, 94 U. S., 801, 1876.

56. Constitutional law. A popular vote authorizing a subscription does not constitute such a contract with a railway company as to come within the provisions of the federal constitution in relation to contracts. Where the power to subscribe is taken away after such a vote, but before actual subscription, the railway company cannot compel the subscription to be made. *Concord, Town of, v. Portsmouth Savings Bank*, 92 U. S., 625. 1875.

57. — The legislature, under the constitutional restriction that two-thirds of the qualified voters of a town in Mississippi, at a special election or regular election to be held in such town, shall assent thereto, may authorize a town to aid a railroad by issuing and delivering interest-bearing bonds, as a donation, to secure the permanent location in the town of a depot of the road. *New Orleans, St. Louis and Chicago R. R. Co. v. McDonald*, 53 Miss., 240. 1876.

58. — Proceedings considered under the provisions of the constitution of Texas. *Austin v. Gulf, Colorado and Santa Fe R. R. Co.*, 45 Tex., 234, 1876; 13 Amer. R'y Rep., 172.

59. Contract. A petition for an election by a municipal corporation to take stock in a railway company, and to issue bonds in payment, upon certain conditions, the notice of the election, and an affirmative vote thereupon, upon the faith of which money is expended and the road substantially built and equipped, is a contract between the corporation and the railway company. *People ex rel. v. Holden*, 82 Ill., 93. 1876.

60. Elections. Elections held invalid under the facts. *People v. Town of Laenna*, 67 Ill., 65, 1873; *People v. Town of Santa Anna*, 67 ib., 57, 1873; *People v. Cline*, 63 ib., 394, 1872; 7 Amer. R'y Rep., 373;

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Lippincott v. Town of Pana, 92 ib., 24, 1879.

61. — In the absence of an express authority, the condition upon which a municipal subscription is voted cannot be changed by a subsequent vote, either directly or indirectly. Such subsequent election is *ultra vires*, and the act void, being unsanctioned by law. *People ex rel. v. Town of Waynesville*, 88 Ill., 469, 1878; 21 Amer. R'y Rep., 339.

62. — In a suit by a railroad company to enforce the issuing of bonds by a municipality for its use, the burden of proof is upon the railroad company to show affirmatively that the issue of the bonds was authorized by a vote of the people, had pursuant to a law providing therefor, prior to the adoption of the present constitution; and the law under which the election is held must be substantially complied with, or the election will confer no authority. *Chicago and Iowa R. R. Co. v. Mallory*, 101 Ill., 583, 1882; 5 Amer. & Eng. R. R. Cases, 139.

63. — The provisions of the registry law (chap. 171, Laws of 1868) are mandatory and imperative. An election without registration of voters is void. *Nefzger v. D. and St. P. R'y Co.*, 36 Ia., 642. 1873.

64. — An election can be ordered only by the functionaries designated by the law. An election called by any other person or body is absolutely void, and so are all acts growing out of or performed under it. Bonds issued in pursuance of such an election are void, and taxes levied for their payment, or for the payment of interest thereon, are illegal and their collection may be enjoined. *Jacksonville, Northwestern and Southeastern R. R. Co. v. Virden*, 104 Ill., 339. 1892.

65. — Where the law, under which an election is had on the question of corporate subscription to a railroad, required only that a majority of legal voters of the municipality voting at such an election should vote in favor of the proposed subscription, held, that it was not essential that a majority of all the legal voters should vote for the proposition, but that it was sufficient that a majority of legal votes actually cast should be in favor thereof. *People v. Town of Harp*, 67 Ill., 62, 1873; *Reiger v. Comm'rs of Beaufort*, 70 N. C., 319, 1874. But see *Chester and Lenoir*

R. R. Co. v. Comm'rs of Caldwell County, 72 N. C., 486. 1875.

66. — The "assent" of the qualified voters required by § 14, art. 11, of the constitution of 1865, before a municipal subscription could be made to the stock of a corporation, was an affirmative, positive act. Mere inaction of the voters, by failing to vote, did not express assent within the meaning of that section. *State ex rel. v. Brassfield*, 67 Mo., 331. 1878.

67. — Ch. 953 of 1867, as amended by ch. 317, 1868, authorizing the village of Fort Edward to issue bonds, requires that notice of the special election should be published for at least two weeks previous to such election. No bonds can be issued under the provisions of said acts unless a majority of all the taxable inhabitants shall vote therefor. The consent of a majority of all those who attend the meetings is not sufficient. *Culver v. Village of Fort Edward*, 8 Hun (N. Y.), 340. 1876.

68. — A popular vote in favor of a municipal subscription for stock of a railroad company, cast at an election held without authority of law, does not bind the municipality nor confer the power to make the subscription. *Allen v. Louisiana*, 103 U. S., 80, 1880; 2 Amer. & Eng. R. R. Cases, 599.

69. — An irregularity in conducting the election will not defeat a recovery on the bonds or on the coupons thereto attached, nor overcome the presumption that the plaintiff, in the usual course of business, became at their date the holder of them for value. *Pana v. Bowler*, 107 U. S., 529. 1882.

70. — Where the statute authorized a town to subscribe to the capital stock of a railroad, upon a vote taken for that purpose at a regular town meeting, a vote taken at a special meeting, called for that purpose, will not confer authority upon the town to make such subscription. *Pana, Town of, v. Lippincott*, 2 Bradwell (Ill.), 466. 1877.

71. — The proposition submitted to the vote of the citizens, at the election held under statute, fairly construed, was whether the city should issue its bonds in aid of the railroad "to an amount not exceeding \$1,000,000," and the election having resulted in favor of the proposition, the city council had a discretionary power as to the amount of

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bonds to be issued, not exceeding \$1,000,000, and might confine the issue to \$500,000. *Winter v. City Council of Montgomery*, 65 Ala., 403, 1880; 7 Amer. & Eng. R. R. Cases, 307.

72. — The statute of Maine requiring a vote of two-thirds majority construed. *Portland and Ogdensburgh R. R. Co. v. Inhabitants of Standish*, 65 Me., 63, 1875; 10 Amer. R'y Rep., 111.

73. — Competency and sufficiency of the evidence determined. *Hannibal v. Fauntleroy*, 105 U. S., 408. 1881.

74. — Where an act provides that if a majority of the legal voters, voting at an election held for that purpose, shall be found to be in favor of such subscription, it shall be deemed and held that such town had taken stock in said company according to the proposals made, *held*, that the statute makes such a majority vote equivalent to, and a substitute for, a subscription by the town upon the books of the company. *Town of East Lincoln v. Davenport*, 94 U. S., 801. 1876.

75. — *estoppel*. A town and its taxpayers will be estopped by silence from questioning an election on the ground that it should have been by ballot, where no objection was made until after the work had been partly performed in consideration of the transfer of the bonds. *New Haven, Middle-town and Willimantic R. R. Co. v. Town of Chatham*, 42 Conn., 465, 1875; 10 Amer. R'y Rep., 168.

76. — It appeared that when the vote was taken the treasurer and managing director of the company was present, and saw how it was done, but that he was not acting officially, and that his knowledge was not conveyed to any of the other directors of the company. *Held*, that the company was not affected by his knowledge. *Ib*.

77. — Where an election to determine whether or not a township will subscribe to the stock of a railroad company was illegal and void, because not held and conducted by the proper officers, and the supervisor, after such election, made the subscription, it was urged that after such subscription, and the building of the road, the town was estopped from denying the validity of the same; *held*, that the town was not so estopped.

People v. Town of Santa Anna, 67 Ill., 57. 1873.

78. — *Held contra* where expenditures had been incurred on the faith of the subscription. *B., C. R. and M. R. R. Co. v. Stewart*, 39 Ia., 267, 1874; 20 Amer. R'y Rep., 89; *Lamb v. B., C. R. and M. R. R. Co.*, 39 Ia., 333, 1874.

79. — *notice; ballots*. Notice of the election which specifies the name of the company, and that the aid voted is to be expended by said company in "the construction of its road within Waterloo and Cedar Falls townships, on the west side of the Cedar river above Black Hawk creek in said county," is sufficiently specific as to the line of the road. *West v. Whitaker*, 37 Ia., 598. 1873.

80. — The notice also specified that "those in favor of aiding in the construction of said railroad will have written or printed on their ballots 'taxation,' and those opposed thereto 'no taxation.'" *Held*, that ballots having on them the word "taxation" were properly counted and returned as "for taxation." *Ib*.

81. *Fraud*. Assurances by the officers of a railway company, in writing, that if a vote by a town is in favor of subscription to its capital stock, the bonds will not be called for until satisfactory assurance is given of the completion of the road, cannot be regarded as a fraud operating to induce an affirmative vote. And when such a vote is had, if the supervisor enters into a further agreement to issue but half of the bonds voted, on satisfactory assurances, this will not release a new town, formed out of part of the original town, from the payment of its just proportion. *Hensley Township v. The People*, 84 Ill., 544. 1877.

82. — *estoppel*. The fact that the work on a railway had been performed and money expended without objection from the taxpayers would not estop them from subsequently denying the validity of a tax voted to aid in its construction, upon discovering that the vote had been procured by fraudulent representations. *Sinnett v. Moles*, 38 Ia., 25. 1873.

83. — Defective subscriptions may be validated by legalizing acts. *Rogers v. Rochester, Hornellsville and Pine Creek R. R. Co.*, 21 Hun (N. Y.), 44, 1880; *Rogers v. Roch-*

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ester, etc., R. R. Co., 28 Hun (N. Y.), 44, 1880; *Quincy v. Cooke*, 12 Amer. & Eng. R. R. Cases (U. S. S. C.), 645; 107 U. S., 549, 1882.

84. — But the legislature is powerless, by subsequent enactment, to validate a void election of a town, under the township system, for such subscription. *Williams v. Town of Roberts*, 88 Ill., 11, 1878; 21 Amer. R'y Rep., 268.

85. *Mandamus*. The assessors may by *mandamus* be compelled to examine the evidence and determine the facts which they are required to pass upon. *Howland v. Eldredge*, 43 N. Y., 457, 1871.

86. — Where a subscription is voted in favor of a railway company by a town, under a law which leaves no discretion in its officers but to make the subscription without unnecessary delay, a *mandamus* may be awarded to compel the issue and delivery of the bonds of the town, although no formal subscription has been made upon the books of the company. *Illinois Midland R'y Co. v. Town of Barnett*, 85 Ill., 313, 1877.

87. — There is no presumption that the law has been strictly complied with in proceedings of this character. Before the subscription can be enforced by *mandamus* it must appear that the law has been complied with in all respects. *Springfield and Illinois Southeastern R'y Co. v. Cold Spring T'p*, 72 Ill., 603, 1874.

88. — Where corporate authorities, when called upon to make a subscription and deliver bonds in pursuance to a vote, refuse to issue the same, no tender of certificate of stock is necessary before applying for a *mandamus* to compel their issue and delivery. A readiness to deliver such certificates is sufficient. *Illinois Midland R'y Co. v. Town of Barnett*, 85 Ill., 313, 1877.

89. *Notice; time*. Under Sp. Laws 1875, c. 132, notice of the time, place and object of a meeting to vote upon the question of issuing bonds to aid in the construction of a railway was required to be posted in three public places "at least ten days prior" to such meeting. *Held*, that notice posted on May 13th, of a meeting to be held on the 23d day of the same month, was sufficient. *Coe v. Caledonia and Mississippi R'y Co.*, 27 Minn., 197, 1880; *Hoyt v. Braden*, ib., 490, 1881.

90. — Ordinance examined and held valid under the statutes of Minnesota. *Warsop v. City of Hastings*, 22 Minn., 437, 1876; *State ex rel. v. Lake City*, 25 ib., 404, 1879.

91. *Petition and proceedings*. The sufficiency of the petitions for municipal aid determined in various cases. *Adams v. Mayor of City of Kokomo*, 12 Amer. & Eng. R. R. Cases (Ind.), 585, 1883; *City of Kokomo v. The State*, 57 Ind., 152, 1877; *Town of Wellsborough v. New York and Canadian R. R. Co.*, 76 N. Y., 182, 1879; *Craig v. Town of Andes*, 93 N. Y., 405, 1883; *People ex rel. v. Town of Oldtown*, 88 Ill., 202, 1878; 21 Amer. R'y Rep., 297; *Chicago, Danville and Vincennes R. R. Co. v. Coyer*, 79 Ill., 373, 1875.

92. — The proceedings for the bonding of a town under the laws of New York examined. *Mellen v. Town of Lansing*, 20 Blatchford (U. S. C. C.) 278, 1882; *Scipio v. Wright*, 101 U. S., 665, 1879; *Town of Springport v. Teutonia Savings Bank*, 5 Amer. & Eng. R. R. Cases, 199; 84 N. Y., 403, 1881; *Currie v. Town of Lewiston*, 15 Federal Reporter, 377, 1883; *Irwin v. Town of Ontario*, 3 ib., 49, 1880; *People ex rel. v. Spencer*, 55 N. Y., 1, 1873; *People ex rel. v. Barrett*, 18 Hun (N. Y.), 206, 1879; *People ex rel. v. Hutton*, 18 ib., 116, 1879; *Hardenbergh v. Van Keuren*, 16 ib., 17, 1878; *Calhoun v. Delhi and Middletown R. R. Co.*, 64 Howard's Practice (N. Y.), 291, 1882; *Craig v. Town of Andes*, 93 N. Y., 405, 1883; *Orleans v. Platt*, 99 U. S., 676, 1878; *Lyons v. Munson*, ib., 684, 1878.

93. — Commissioners' powers determined. *Falconer v. Buffalo and Jamestown R. R. Co.*, 7 Hun (N. Y.), 499, 1876; *Same v. Same*, 69 N. Y., 491, 1877.

94. — The adjudication and judgment of the county judge, that a majority of the taxpayers of a town consented to the issue of such bonds, creates no absolute right in the railroad company thereto. *Buffalo and Jamestown R. R. Co. v. Town of Collins*, 5 Hun (N. Y.), 485, 1875.

95. — No contract or legal obligation is created, as against a town, till the subscription for the railroad stock is made. *Id.*

96. — The statutes and constitution of Wisconsin in relation to municipal subscriptions construed. *Bound v. Wisconsin Central R. R. Co.*, 45 Wis., 543, 1878.

97. — Where the certificates of assent

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were made out in seven different parts and circulated for signature, and, after the names had been attached, these different parts were fastened together and presented to the commissioners for their action, it was held that this was a substantial compliance with law. *First National Bank of St. Johnsbury v. Town of Concord*, 50 Vt., 257. 1877.

98. — Where certain tax payers withdrew their assent to the issuing of bonds before the bonds had been issued, but the commissioners disregarded the withdrawal, *held*, that the decision of the commissioners was final and the bonds were valid. *First National Bank of North Bennington v. Town of Dorset*, 16 Blatchford (U. S. C. C.), 62. 1879.

99. — *Held*, that the filing of the assent of tax-payers was not sufficient. Under the statute such assent must also be recorded. *Essex County R. R. Co. v. Town of Lunenburg*, 49 Vt., 143, 1876; *Lamoille Valley R. R. Co. v. Town of Fairfield*, 51 Vt., 257, 1878.

100. — A review of a judgment in a subscription to a railway company refused. *Inhabitants of Brooks v. Belfast and Moosehead Lake R. R. Co.*, 72 Me., 365. 1881.

101. — Irregularities in proceedings held not to be fatal. *Felder v. Montgomery and Eufaula R. R. Co.*, 51 Ala., 178. 1874.

102. — The act to incorporate the Illinois Grand Trunk Railway, approved March 25, 1869, construed. *Walnut v. Wade*, 103 U. S. 683, 1880; 3 Amer. & Eng. R. R. Cases, 36. See, also, *Wade v. Walnut*, 105 U. S., 1. 1881.

103. — Bonds held not to be invalid because not issued until after the date when the assessment roll was by law required to be completed, the assent having been filed, and the subscription for the stock of the company made, the bonds executed and some of them sold, and the proceeds paid on account of the subscription before that date. *Scipio v. Wright*, 101 U. S., 665. 1879.

104. — Where a proceeding, instituted for the purpose of bonding a town, is adjudged to be illegal, after it has proceeded so far that certain bonds have been sold and their proceeds have been expended in the construction of a railway in good faith by the agent or trustee for the town, such agent or

trustee should be allowed for the money expended. *Town of Lyons v. Chamberlin*, 25 Hun (N. Y.), 49. 1881.

105. — If a municipal corporation is authorized to subscribe a certain amount in aid of a railway company and but a part is subscribed, it seems the power is not exhausted, but other subscriptions may be made to the amount named; and if the attempt to exercise the power proves ineffectual, by the non-observance of some essential requirement, the power may still be exercised. *People ex rel. v. Town of Waynesville*, 88 Ill., 469, 1878; 21 Amer. R'y Rep., 339.

106. — The fact that at the time a petition was presented, and thence until the commencement of the action for a mandate one of the members of the common council had been a stockholder, director and officer of the railway company, did not disqualify him to act upon the petition or the common council to pass an ordinance making the donation, and constitutes no defense to the action. *City of Kokomo v. The State*, 57 Ind., 152. 1877.

107. Signatures attached on Sunday. Where a town board of supervisors is authorized by law to issue bonds in aid of a railway only upon the presentation of a petition therefor signed by a certain number of tax-payers of the town, the procuring and affixing of such signatures on Sunday is "business," and is unlawful, and confers no authority upon the supervisors to issue such bonds. *De Forth v. Wisconsin and Minnesota R. R. Co.*, 52 Wis., 320, 1831; 5 Amer. & Eng. R. R. Cases, 28.

108. — The fact that plaintiff affixed his signature on Sunday will not prevent him from obtaining an injunction against the issue of the bonds. *Ib.*

109. Subscription to division of railway. Where the charter of a railroad company authorized certain municipalities to subscribe to the capital stock of the company, and a vote was taken to subscribe to a certain division of the road, *held*, that the vote was unauthorized, and the company could not compel the municipality thus voting to make the subscription to its capital stock. *McWhorter v. The People ex rel.*, 65 Ill., 290. 1872.

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110. — And where such company was authorized to receive such subscriptions on such terms and in such amounts as it might deem best in accordance with its by-laws, and the company, in its by-laws, divided the road into divisions, and a subscription was voted by a township to the first division of the road, *held*, that the charter of the company must govern, and as that only authorized the tax-payers to vote a subscription to the whole capital stock of the company, the vote was void, and conferred no right on the company to compel the subscription. *Id.*

111. Subscription to two companies in the alternative. Where the only object of the electors of a town in granting aid to a railway company is to procure the construction of a railway from a certain point to such town, the question may be submitted to them in such a form as to provide that the aid shall be given to that one of two companies which shall first complete its road between such points. *Lynch v. Eastern, Lafayette and Mississippi R'y Co.*, 57 Wis., 430. 1883.

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112. Injunction. A tax-payer of a town, on behalf of himself and other tax-payers therein, may maintain an action to enjoin the delivery of bonds of the town unlawfully issued by the town authorities in aid of a railway. *Lynch v. Eastern, Lafayette and M. R'y Co.*, 12 Amer. & Eng. R. R. Cases (Wis.), 652, 1883; *Noesen v. Port Washington*, 37 Wis., 168, 1875; *Curtenius v. Grand Rapids and Indiana R. R. Co.*, 37 Mich., 583, 1877.

113. — Where a donation of bonds has been made pursuant to a petition, and a tax has been levied to pay the interest on the bonds, and also to create a sinking fund to pay the principal, the collection of such tax can only be enjoined by a tax-payer in a suit against such city and its treasurer, on grounds sufficient to constitute a valid legal defense to the payment of the bonds in the hands of the present holders. *Wilkinson v. City of Peru*, 61 Ind., 1. 1878.

114. — Where a statute provides two

modes, one valid and the other invalid, for authorizing the officers of a municipal corporation to issue bonds of the corporation, inasmuch as the bonds when issued need recite only that they were issued under the statute, without specifying in which of the two modes the officers were authorized to issue them, and as there might be *bona fide* holders of bonds so issued, an action for injunction at the instance of a proper party will lie to restrain the issuance of the bonds by the municipal officers under the invalid mode provided by the statute. *Harrington v. Town of Plainview*, 27 Minn., 224. 1880.

115. — A county court has no jurisdiction of a contest of an election held within a city of the county on the question of voting aid to a work of internal improvement. *Foxworthy v. Lincoln and Fremont R'y Co.*, 13 Neb., 398. 1882.

116. Right of one tax-payer to sue for all. To authorize a plaintiff to sue in behalf of others not named, they must have a common or general interest with him in the result sought to be accomplished by the proceeding. Persons severally charged with a tax have no such common or general interest in resisting its collection as will authorize one to sue for all. *Fleming v. Mershon*, 36 Ia., 413. 1873. *Contra, Lynch v. Eastern, Lafayette and Mississippi R'y Co.*, 57 Wis., 430. 1883.

117. Void proceedings; cancellation of bonds. Where the bonds of a town have been issued to a railway company, in payment for stock, by commissioners appointed under a judgment, void for want of jurisdiction, rendered in proceedings under the act authorizing "municipal corporations to aid in the construction of railroads" (ch. 907, Laws of 1869), an equitable action is maintainable, under the act of 1872, for the protection of tax-payers, etc. (ch. 161, Laws of 1872), at the suit of a tax-payer of the town, to restrain the negotiation or payment of the bonds, and to compel their cancellation. *Metzger v. Attica and Arcade R. R. Co.*, 79 N. Y., 171. 1879.

118. Value of stock immaterial. In the absence of fraud it is no defense to an action to recover upon a valid subscription to the stock of a corporation that the stock sub-

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scribed for is valueless. *Lynch v. Eastern, Lafayette and Mississippi R'y Co.*, 57 Wis., 430. 1883.

IV. CONDITIONAL SUBSCRIPTIONS.

119. Amount of stock not specified in charter. Where the charter of a company does not provide that it shall have no power to act as a corporation until a certain amount of stock is subscribed for, a subscription which is not made dependent upon any such condition may be enforced, although the whole amount of stock authorized to be issued has not been subscribed for. *Lynch v. Eastern, Lafayette and Mississippi R'y Co.*, 57 Wis., 430. 1883.

120. Amount of work required. A proviso in a statute, that the corporate bonds shall not be delivered until an amount of work shall have been done on the railroad in the town equal in value to the amount of the bonds, will be construed, not as referring to earth-work alone, but the word "work" will embrace all that enters into the construction of the road-bed complete for the cars. *Illinois Midland R'y Co. v. Town of Barnett*, 85 Ill., 313. 1877.

121. — Where a city has power to subscribe to the stock of a railroad company, and to issue bonds in payment of the subscription, the proceeds of such bonds in all cases to be expended within the limits of the county in which such city is situate, *held*, that, as between the city and the railroad company, or its assignee with notice, such bonds cannot be enforced where no part of the proceeds of the subscription has been expended in the county, and no part of the railroad subscribed to has been constructed therein. *Faote v. Mount Pleasant*, 1 McCrary (U. S. C. C.), 101. 1878.

122. Assignment. Conditional subscriptions may be assigned before compliance with the conditions. *State ex rel. v. Hastings*, 24 Minn., 78. 1877. And the conditions may be performed by the assignee. *Lynch v. Eastern, Lafayette and Mississippi R'y Co.*, 57 Wis., 430. 1883.

123. Construction. The language in a condition upon which a subscription is voted by the legal voters of a township is to be construed according to its ordinary and pop-

ular meaning—in other words, as it would be understood by the voters. *People ex rel. v. Town of Clayton*, 88 Ill., 45, 1878; 7 Amer. R'y Rep., 281.

124. — Where a township voted a subscription with a condition that it was not to be paid until the company should run its first engine "over the projected line of road, and from Pekin, Ill., or from Morris, Ill., through Clayton township," it was held that the condition contemplated a substantial completion of the line for the movement of trains from either Pekin or Morris to and through the township, and that it was not intended that any of the subscription should be used in constructing any part of the road through such township, or between it and Pekin or Morris. *Ib.*

125. — Where a town, at an election for that purpose, accepts a written proposition for aid, made to it by a railway company, pursuant to ch. 182 of 1872, the terms and construction of the proposition cannot be modified by representations of the company made to the voters between the proposition and the election. *Town of Platteville v. Galena and Southern Wisconsin R. R. Co.*, 43 Wis., 493. 1878.

126. — An action cannot be maintained upon a subscription made upon two conditions, one of which is a condition subsequent that has been performed, and the other a condition precedent that has not been performed. *Bucksport and Bangor R. R. Co. v. Inhabitants of Brewer*, 67 Me., 295, 1877; 16 Amer. R'y Rep., 314.

127. Contract to repurchase stock from city. Where a railway company executed a contract to a town which had subscribed and issued \$10,000 of its bonds to aid in the construction of the road, which bonds the company had sold, and after reciting the above facts the agreement further recited that the company had entered into a contract for the construction of the road from a given point to another the following year, and then provided that if, from any cause, the company should fail to construct its road, it would pay to the town the money realized on its bonds and the accrued interest, upon tender, by the town, of the stock issued to it, *held*, that the company was bound to construct the road the following

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year, or refund the money with interest. *Chicago, Pekin and Southwestern R. R. Co. v. Town of Marseilles*, 84 Ill., 145; 16 Amer. R'y Rep., 442, 1876; *Same v. Same*, 84 Ill., 643, 1877.

128. — A railway company may, for legitimate purposes, purchase shares of stock which it has issued to inhabitants of municipal corporations, and such sale is a sufficient consideration to support an agreement to pay money. *Ib.*

129. Damages. The city of Fort Scott subscribed \$75,000 of stock in the Missouri, Kansas and Texas R'y Co., and issued \$75,000 of its bonds in payment therefor. It also, by virtue of the said contract, issued to the said company \$25,000 of its bonds for the purchase of the right of way through the city and grounds for machine-shops, engine-houses, etc. The subscription was made upon condition that the company should construct, within six months, a railroad from Sedalia, Missouri, through Fort Scott, to connect with the line running from Junction City in a southeasterly direction; that it should make the great through line to the Indian Territory and Texas, and construct no other line of road south of Fort Scott in the same direction, and that it should make Fort Scott the end of a division, and erect engine-houses and machine-shops at or near said place before doing so at any other point southwest of Sedalia on the through line of its road. The company complied with this contract, except that it did not make Fort Scott the end of a division, and did not erect the engine-house and machine-shop there, but did so erect them at Parsons. In an action by the city against the company for damages for failing to comply with this part of its contract, testimony was admitted for the purpose of proving the damage sustained, over the objection of the company, tending to show a decline in the population of Fort Scott, and a depreciation generally in the value of real estate through the city during a period commencing subsequently to the construction of the road, yet prior to the building of the shops and engine-houses at Parsons, and ending after the fact of such building had become known at Fort Scott. *Held*, that such testimony was improperly admitted, and that such matters did not

enter into or form a part of the proper measure of damages. *Missouri, Kansas and Texas R'y Co. v. City of Fort Scott*, 15 Kans., 435, 1875.

130. Failure to complete railway. The failure to complete a railway as provided in the agreement will be sufficient ground to restrain the issuance of the bonds of a city to a railway company. *Hodgman v. Chicago and St. Paul R'y Co.*, 20 Minn., 48, 1873.

131. — An agreement under which a tax was voted to aid in the construction of a railroad stipulated that it should be built and in operation on or before a certain day. *Held*, that if the road was in a condition to be operated at that time, although not completed, this was a sufficient compliance with the contract. *Muscatine Western R. R. Co. v. Horton*, 38 Ia., 33, 1873; *Brokaw v. Commissioners of Gibson County*, 73 Ind., 543, 1881; 3 Amer. & Eng. R. R. Cases, 573. See, also, as to sufficiency of river crossing, *Hodgman v. St. Paul and Chicago R'y Co.*, 23 Minn., 153, 1876.

132. — Time-essence condition construed, and *held*, that the railway company had failed to comply therewith. *Memphis, Kansas and Colorado R'y Co. v. Thompson*, 24 Kans., 170, 1880; 1 Amer. & Eng. R. R. Cases, 331.

133. — The company claimed that its failure to have its road completed, according to the contract specifications, on or before the 1st of July, was owing to an unusual amount of wet weather in May and June, and an extraordinary rain-fall in the latter month, which raised the river Neosho so as to overflow its banks and carry away a large amount of ties, timber and other material. *Held*, that, as the parties to this contract have made time of its essence, and as the company has placed all of its materials and labor upon its own grounds, and none upon those of the city, and has parted with nothing which the city has received, the facts stated do not waive the condition precedent, or authorize the courts to set aside the contract which the parties made and substitute another, which, perhaps, they might never have been willing to make. *Ib.*

134. Location of depot. Where the inhabitants of a township vote for subscription to a railroad on condition that the road

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shall be constructed and its depot built within a mile of a certain town, it is no excuse for non-compliance by the company with that condition that the non-performance was "at the request and desire" of the inhabitants of the town. *State ex rel. v. County Court of Daviess County*, 64 Mo., 30. 1876.

135. — In a contract between a railroad company and a township, which stipulated "that said company will not, and shall not, be entitled to draw out of the hands of the treasurer any money collected out of said tax, until said company shall have erected a depot within one mile of the village of New Hampton, in New Hampton township" the words "in New Hampton township," were merely descriptive. It was a compliance with the contract if the depot were erected within one mile of New Hampton village. *McGregor and Sioux City R'y Co. v. Foley*, 38 Ia., 588. 1874.

136. — Sp. Laws 1875, c. 132, authorized certain villages and towns in certain counties "to issue bonds . . . to aid in the construction of any railway running into, or proposed to be built through, either of the counties aforesaid." *Held*, that inasmuch as this act does not prohibit it, it is competent for the legal voters of such villages to impose such conditions upon an issue of such bonds voted by them under the act as they may deem best, provided such conditions are not in violation of any express provision of statute, or not prohibited by any general rule of public policy. *Held*, that it is proper for such villages to impose, as one of such conditions, a condition as to the place where the depot of the railway proposed to be aided shall be located. *Coe v. Caledonia and Mississippi R'y Co.*, 27 Minn., 197. 1880. See *Hoyt v. Braden*, *ib.*, 490. 1881.

137. Purchase of railway. If a subsidy in bonds is granted by a city to a railroad company to aid in the construction of a railroad from the city in the direction of another city, the bonds to be delivered when a certain number of miles of railroad are constructed, the company does not forfeit its right to the subsidy by the fact that it purchases and adopts as a part of its line a section of a railroad already constructed on a portion of the route on which the proposed

railroad was to be built. *Stockton and Visalia R. R. Co. v. City of Stockton*, 51 Cal., 328, 1876; 12 Amer. R'y Rep., 85.

138. Route. Where the conditions upon which a town was authorized to subscribe for a railroad were that such road should be built through the township within one-half mile of the court-house, and should terminate at or near the city of V., the building of a road across one corner of such township and terminating at a small village nine miles from V. is not a substantial compliance with the conditions of the vote for subscription, and bonds issued in pursuance of such vote are invalid, and no tax can be collected to pay interest thereon, though they may be in the hands of innocent holders. *Parker v. Smith*, 3 Bradwell (Ill.), 356. 1879.

139. — A subscription to the capital stock of a railroad corporation by a municipal township, in accordance with the terms and conditions of ch. 90, Laws of 1870, is not void because it is conditional upon the completion of the railroad through such township, and through and adjoining a large and growing village in the township, and the erection of a depot at or near such village, where it apparently is manifest that the condition is in furtherance of the interests of the corporation, and for the benefit and accommodation of the public in the matter of transportation and travel. *Atchison, Topeka and Santa Fe R. R. Co. v. Comm'rs of Jefferson Co.*, 21 Kans., 309. 1878.

140. — Under a statute of Michigan of March 22, 1869, authorizing cities to pledge their aid, "by loan or donation, with or without conditions," in the construction of any railroad by a company organized under the laws of the state, the electors of a city voted to issue its bonds to aid such a company upon certain conditions, touching the eastern terminus of the road, and providing that if any citizen should subscribe and pay for stock in the company the latter should deliver him such bonds therefor, and that the citizens should, within thirty days, have the right to subscribe for the stock to the amount of aid voted. The bonds were delivered to the company. *Held*, that the conditions were not unauthorized by the statute, and constitute no defense to an action on the bonds. *Taylor v. Ypsilanti*, 105 U. S., 60.

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1881. See *Township of Pine Grove v. Talcott*, 19 Wallace, 666. 1873.

141. — The petition of tax-payers required must be absolute in form; no power is given to them to make their request conditional upon the location of the railway upon a particular route, and a request coupled with such a condition is absolutely void. *Craig v. Town of Andes*, 93 N. Y., 405, 1883. *Contra*, under Stat. of 1871. *Falconer v. Buffalo and Jamestown R. R. Co.*, 69 N. Y., 491, 1877; 18 Amer. R'y Rep., 46.

142. — Where the subscription is upon condition that the railroad "be located through the town of Brewer satisfactory to the selectmen of said town," such location is upon a condition precedent, and must be complied with before a recovery can be had against the town for the sum subscribed. *Bucksport and Bangor R. R. Co. v. Inhabitants of Brewer*, 67 Me., 295, 1877; 16 Amer. R'y Rep., 344.

143. — In accordance with the petition of the tax-payers of a town in New York, dated March 25, 1872, the county judge appointed commissioners, who were empowered and directed to subscribe for stock in a railroad company when its road should be constructed through a certain village. The road was not so constructed until October 20, 1875. *Held*, that as by the terms of the petition and the proceeding of the judge thereon, the construction of the road was a condition precedent to the exercise by the commissioners of their power to make the subscription, they being merely agents of the town, had no authority to act in the premises until that condition was performed. *Railroad Co. v. Falconer*, 103 U. S., 821, 1880; 2 Amer. & Eng. R. R. Cases, 593.

144. — The construction of a railway to a point about a mile from a city, where it intersected another road, and the making of running arrangements over the latter road, is a substantial compliance with a contract to build to such city. *People ex rel. v. Holden*, 82 Ill., 93. 1876.

145. Sale of railway. The sale of the road, before its completion, by the corporation in whose favor the tax was voted, with the reservation that the vendor shall complete the road-bed and collect the tax, will

not defeat its right to the tax after the road is completed. *Muscatine Western R. R. Co. v. Horton*, 38 Ia., 33. 1873.

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146. *Bona fide holder*. Where a municipal corporation has the power to issue its negotiable bonds in aid of a railway, a *bona fide* holder may recover upon them, although the conditions upon which they were issued were not complied with. *Miller v. Town of Berlin*, 13 Blatchford (U. S. C. C.), 245, 1876; *Town of East Lincoln v. Davenport*, 94 U. S., 801, 1876; *First National Bank of St. Johnsbury v. Town of Concord*, 50 Vt. 257, 1877; *Town of Douglas v. Niantic Savings Bank*, 97 Ill., 228, 1881; 3 Amer. & Eng. R. R. Cases, 54; *Brooklyn v. Insurance Co.*, 99 U. S., 362, 1878; *American Life Insurance Co. v. Town of Bruce*, 12 Amer. & Eng. R. R. Cases (U. S. S. C.), 610; 105 U. S., 328, 1881.

147. — Whoever deals in municipal bonds is chargeable with knowledge whether the precedent conditions to the existence of the power of making the subscription and issuing the bonds have been complied with. *Williams v. Town of Roberts*, 88 Ill., 11, 1878; 21 Amer. R'y Rep., 268.

148. — Bonds, issued apparently without authority, are not validated by passing into the hands of a *bona fide* purchaser. *Smith v. Town of Ontario*, 15 Blatchford (U. S. C. C.), 267, 1868; *Barnes v. Town of Lacon*, 84 Ill., 461, 1877; *Force v. Town of Batavia*, 61 Ill., 99, 1871; *Sykes v. Mayor of Columbus*, 55 Miss., 115, 1877; *Wilson v. Town of Canadea*, 15 Hun (N. Y.), 218, 1873; *Williamson v. City of Keokuk*, 44 Ia., 88, 1876; *Township of East Oakland v. Skinner*, 94 U. S., 255, 1876; *Town of South Ottawa v. Perkins*, 94 U. S., 260, 1876; *Welch v. Post*, 5 Amer. & Eng. R. R. Cases (Ill.), 158, 1881.

149. — A purchaser is not bound to look beyond the official action of those to whom the law has confided the authority to ascertain and determine whether the requirements of the law, necessary to the loan, have been satisfied in the vote taken. *Vicksburg v. Lombard*, 51 Miss., 111. 1875.

150. — Negotiable city bonds stand on the same footing as bills of exchange. *City of Mt. Vernon v. Hovey*, 52 Ind., 563, 1876.

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Porter v. Janesville, 11 Bissell (U. S. C. C.), 64, 1880; *Vicksburg v. Lombard*, 51 Miss., 111, 1875.

151. — By the statute of Illinois, municipal bonds payable to bearer are transferable by delivery, and the holder thereof can sue thereon in his own name. *Roberts v. Bolles*, 101 U. S., 119. 1879. See *Williams v. Roberts*, 88 Ill., 11. 1878.

152. — Independently of that act, the bonds are not, in the hands of a *bona fide* purchaser, rendered invalid by reason of the departure from the statutory provisions touching the application for and the notice of the election. *Ib.*

153. — A person who succeeds to the title of a *bona fide* holder is entitled to stand upon such title, although not a *bona fide* holder himself. *Foote v. Town of Hancock*, 15 Blatchford (U. S. C. C.), 343. 1878. See, also, *New Buffalo v. Iron Co.*, 105 U. S., 73. 1881.

154. — The delivery of bonds to a contractor, in payment for work on the railroad, constitutes him a holder for value, although he took them upon an antecedent debt, if he took them in good faith. *Foote v. Town of Hancock*, 15 Blatchford (U. S. C. C.), 343. 1878.

155. — Where bonds are fraudulently issued, the burden is upon the holder to show that he acquired them for value and in good faith. *Bailey v. Town of Lansing*, 13 Blatchford (U. S. C. C.), 424, 1876; *Phelps v. Town of Lewiston*, 15 ib., 131, 1878; *Phelps v. Town of Yates*, 16 ib., 192, 1879; *Whiting v. Town of Potter*, 18 ib., 165, 1880; *Irwin v. Town of Ontario*, 18 ib., 259, 1880.

156. — The holder of bonds is presumed to have acquired them in good faith and for value. But if, in a suit upon them, the defense be such as to require him to show that the value was paid, it is not, in every case, essential to prove that he paid it; for his title will be sustained if any previous holder gave value. *Montclair v. Ramsdell*, 107 U. S., 147. 1882.

157. — If municipal bonds are issued without authority of law, and are therefore void, the subsequent levy of taxes and payment of interest thereon will not render them valid, even in the hands of innocent purchasers; but it is otherwise if the bonds

are voidable only for irregularity in the election of their issue. *Lippincott v. Town of Pana*, 92 Ill., 24. 1879.

158. Conditions. In voting town bonds under Sp. Laws 1875, c. 132, in aid of a railroad, it is competent for the town to stipulate, as a condition precedent to issuing the bonds, that the same shall be made payable at a place designated, and on or before the expiration of twenty years, at the option of the town. Such a condition is not repugnant to a clause in the statute providing that the bonds "shall be payable in no less than ten nor more than twenty years." *Hoyt v. Braden*, 27 Minn., 490. 1881. See *Coe v. Caledonia and Mississippi R. R. Co.*, ib., 197. 1880.

159. — Where a bond contains two conditions, one authorized by law and good, and the other unauthorized and bad, and the conditions are in their nature severable, the latter may be rejected and the other held good and the bond sustained. *Chicago, Burlington and Quincy R. R. Co. v. City of Aurora*, 99 Ill., 205, 1881; 5 Amer. & Eng. R. R. Cases, 191.

160. Consolidation of railways. Bonds voted in aid of one company, which, under the law then in force, was subsequently consolidated with another company, may be delivered to the consolidated company. *New Buffalo v. Iron Co.*, 105 U. S., 73, 1881; *Menasha v. Hazard*, 102 U. S., 81, 1880; 2 Amer. & Eng. R. R. Cases, 571. See, also, *City of Mt. Vernon v. Hovey*, 52 Ind., 563. 1876.

161. Constitutional law. The supreme court of the United States has held that bonds issued while a decision of the supreme court of Iowa holding in favor of the power of the corporation to issue the same, remained in force, it will be upheld as valid, notwithstanding a later decision the other way; but as to bonds issued after the promulgation of the latter decision, the supreme court of the United States will accept and follow the decision of the supreme court of the state. *Foote v. Mount Pleasant*, 1 McCrary (U. S. C. C.), 101. 1878.

162. — Where, in pursuance of legislative enactment, municipal bonds have been issued and transferred to purchasers for value, prior to the decision in *People v. Bachellor*,

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53 N. Y., 128, they are protected by the earlier decisions, and, as far as their validity depends upon the constitutional power of the legislature, will be sustained. *Williams v. Town of Duaneburgh*, 66 N. Y., 129. 1876.

163. — The legislature may change the remedy without impairing the contract itself. *Louisiana v. New Orleans*, 102 U. S., 203. 1880.

164. **Coupons.** Overdue coupons detached from a municipal bond which has not matured are negotiable by the law merchant. *Thompson v. Perrine*, 106 U. S., 589. 1882.

165. — Coupons bear interest from their maturity, and when severed from the bonds are negotiable, and pass by delivery. *Walnut v. Wade*, 103 U. S., 633, 1880; 3 Amer. & Eng. R. R. Cases, 86.

166. — Coupon bonds of a town in New York were by commissioners executed to a railroad company pursuant to an order of a county judge, which was annulled and reversed by the judgment of the supreme court in a proceeding whereof, before they were issued, the commissioners and the company had due notice. *Held*, 1. That, as between the company and the town, the bonds are invalid. 2. That, in an action on coupons detached therefrom, the plaintiff must, to make out his right to recover against the town, establish his *bona fide* ownership of them. 3. That upon the question of such ownership a judgment in his favor upon other coupons detached from the same bonds does not estop the town. *Stewart v. Lansing*, 104 U. S., 505, 1881; 7 Amer. & Eng. R. R. Cases, 225.

167. — Coupons, after their maturity, bear interest at the rate prescribed by the law of the place where they are payable. *Pana v. Bowler*, 107 U. S., 529. 1882. See, also, *Fountleroy v. City of Hannibal*, 5 Dillon (U. S. C. C.), 219. 1879.

168. — *Assumpsit* held to be the proper form of action upon coupons not under seal, the bonds being under seal. *First National Bank of North Bennington v. Town of Bennington*, 16 Blatchford (U. S. C. C.), 53. 1879.

169. **Decree against non-resident holder.** A decree *in personam*, rendered by an Illinois court declaring bonds to be void, does not bind a non-resident holder of them

who was not named as a party to the suit and did not appear therein, and who had no notice of the pendency thereof other than by a publication addressed to the "unknown holders and owners of bonds and coupons issued by the town of Pana." *Pana v. Bowler*, 107 U. S., 529, 1882; *Town of Virden v. Needles*, 98 Ill., 366, 1881.

170. **Delivery.** Where a town has ample authority for issuing its bonds to a railroad company, and the bonds are executed in proper form and made payable to the proper company, but are delivered to the secretary of a new company, and there is nothing pertaining to them, or which could have been ascertained from the record, indicating their delivery to one not entitled to receive them, the bonds cannot be held invalid by reason of such alleged improper delivery after they have passed into the hands of innocent holders. *Town of Prairie v. Lloyd*, 97 Ill., 179, 1881; 3 Amer. & Eng. R. R. Cases, 58.

171. **Discretion of officers.** Ch. 93 of 1867 did not confer upon the town officers any discretion as to the issuing the bonds after a submission by them of the relator's proposition to a vote of the electors and an acceptance thereof by such vote. *State ex rel. v. Jennings*, 48 Wis., 549. 1879.

172. **Estoppel.** The town, having retained the stock, is estopped from making the objection that its bonds and coupons are not made payable at the times directed by the statute. *Munson v. Town of Lyons*, 12 Blatchford (U. S. C. C.), 539, 1875; *First National Bank of Oswego v. Town of Wolcott*, 19 ib., 370, 1881.

173. — Where a municipality had issued its bonds, under the statute, and invested them in railroad stock, which it retained, and had for a long time paid interest on such bonds, *held*, that it was estopped, as against a *bona fide* holder for value of interest coupons thereon, from questioning the validity of such bonds or coupons, but its conduct was a direct ratification of the acts of those who had issued them. *Whiting v. Town of Potter*, 2 Federal Reporter, 517. 1880.

174. **Evidence.** Parol testimony held admissible to explain the vote of a town. *Douglas v. Town of Chatham*, 41 Conn., 211. 1874.

175. **Exchange of stock for bonds.** Under authority to issue corporate bonds and apply

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their proceeds as subscription to railroad stock, the railroad company may itself take the bonds at par in exchange for stock. *Decker v. Hughes*, 68 Ill., 33. 1873.

176. Guaranty by railway company. The Cleveland and Pittsburgh R. R. Co. had full power to execute a contract guarantying the punctual payment of the coupons attached to the bonds of Allegheny county, which were given by the county in payment of her subscription to the capital stock of the railroad company. *Evans v. Cleveland and Pittsburgh R. R. Co.*, 2 Pittsburgh, 483. 1864.

177. Injunction. An action having been brought for a specific performance of a contract of a town to issue bonds in payment of its subscription to the stock of a railway company, the court held the subscription not binding. Defendants are therefore entitled to positive relief by injunction restraining all persons claiming under the company or the plaintiff from asserting any claim against the town by reason of such stock subscription. *Perkins v. Port Washington*, 37 Wis., 177. 1875.

178. Legalizing act. Bonds irregularly issued may be legalized by the legislature. *Horton v. Town of Thompson*, 7 Hun (N. Y.), 452, 1875; *Rogers v. Smith*, 5 ib., 475, 1876. See, also, *Cooper v. Town of Thompson*, 13 Blatchford (U. S. C. C.), 434. 1876.

179. — The above case followed, notwithstanding the subsequent decision of the state court of appeals in *Horton v. Town of Thompson*, 71 N. Y., 513, in which the legalizing act was held unconstitutional. *Perrine v. Town of Thompson*, 17 Blatchford (U. S. C. C.), 18. 1879.

180. — Bonds issued *ultra vires* are not legalized by ch. 258, Acts of 1857, which seeks simply to cure the effects of irregular submission of the question of their issuance to the vote of the people. *Williamson v. City of Keokuk*, 44 Ia., 88. 1876.

181. Mandamus. Where the statute has been pursued in all its requirements, the election properly called, a proper notice thereof given, and an election held resulting in favor of a subscription by a township by a majority of the voters, as required by the statute governing in such case, and the railroad company has complied with all the conditions

imposed, the company will be entitled to the bonds so voted, and their issue will be enforced by *mandamus*. *People v. Town of Harp*, 67 Ill., 62. 1873. The remedy is by *mandamus* and not in chancery. *Chicago, Danville and Vincennes R. R. Co. v. Town of St. Anne*, 101 Ill., 151. 1881.

182. — Where the *mandamus* to compel the issue of town bonds in exchange for its stock was not asked for until nearly six years after the relator's right accrued, *held*, that, in exercising the discretion of the court in reference to the writ, the delay would not be treated as laches, in the absence of any evidence that the town was injured thereby, especially as the contract was mutual, and it had been at all times, since the relator's railway was built, in the power of the town to enforce an exchange of its bonds for stock of the company. *State ex rel. v. Jennings*, 48 Wis., 549. 1879.

183. — The pleadings must be governed by the same rules which prevail in other civil actions. *State ex rel. v. Jennings*, 56 Wis., 113. 1882.

184. Mistake; reformation. A town bond was issued payable in twenty years, when, by the terms of the statute, it should have been thirty years. The reformation of the bond was refused, the evidence of mistake being insufficient, and the holder remanded to his remedy at law. *Potter v. Town of Greenwich*, 92 N. Y., 662. 1883.

185. Mortgage to city; renewal. The city of Portland issued its bonds for a large amount in aid of the defendant, payable at a future time; the company giving mortgages and bonds to the city, conditioned "that the company would pay the interest and principal of all said bonds as the same should become payable and mature, and would save and hold the city harmless from the issue of the same." The company being unable to meet its engagements, the city, at the instance of and with the co-operation of the company, obtained liberty from the legislature to issue new bonds for the balance due in renewal, payable at a specified time in the future, and the bonds and mortgages (securities) were extended; the priority of security and the lien of the city to be in no way impaired. *Held*, the securities given by the company apply to and are available for

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the protection of the city for the new bonds issued by it in renewal of unpaid balances. *City of Portland v. St. Lawrence R. R. Co.*, 74 Me., 241. 1882.

186. National banks may purchase coupons. A national bank may purchase and hold coupons of bonds issued by towns in aid of railway companies. *First National Bank of North Bennington v. Town of Bennington*, 16 Blatchford (U. S. C. C.), 53, 1879; *Town of Lyons v. Lyons National Bank*, 19 ib., 279, 1881.

187. Negotiability. The bonds issued by the city of Troy in aid of the Mobile and Girard Railroad, under the authority of the special statute approved December 8, 1868, (Sess. Acts 1868, pp. 395-6), are not negotiable paper, because on their face they are made payable on a contingency which might never happen — that is, the completion of the railroad to Troy; and also because they are payable to bearer only. Not being negotiable, the title to such bonds cannot pass by delivery, nor, as against the real owner, otherwise than by his indorsement or assignment. *Blackman v. Lehman*, 63 Ala., 547. 1879.

188. — Where an act authorizing the issue of municipal bonds provides that they "shall be transferable only on the books of the city," a holder of the coupons for interest cannot recover thereon unless the bonds have been transferred to him as provided by the act. *Oelrich v. Pittsburgh*, 1 Pittsburgh (U. S. C. C.), 522. 1859.

189. Notice by pendency of suit. Where a suit was brought by the town in the county court against the company and others, and a decree rendered that the bonds and coupons were null and void and should be surrendered for cancellation, *held*, that the decree bound the parties who were personally served with process or who appeared, and did not affect the other holders of the securities who had only constructive notice of the suit. *Brooklyn v. Insurance Co.*, 99 U. S., 362, 1878; *Empire v. Darlington*, 101 ib., 87, 1879; *Roberts v. Bolles*, 101 ib., 119, 1879.

190. Proceedings to compel issue of bonds. Under an authority to a town to vote a donation in aid of a railroad company, and to levy and collect taxes to pay the

same, or to vote such aid and to borrow money to pay the same, and to issue interest-bearing bonds to pay such loans, the company cannot be compelled to take bonds of the town in payment, nor can it compel the town authorities to issue bonds to it. The company, in such case, has only a claim for money, and has no right to say how the money shall be raised. *Chicago, Danville and Vincennes R. R. Co. v. Town of St. Anne*, 101 Ill., 151. 1881.

191. Ratification. An issue of bonds by a municipal corporation, without authority of law, cannot be ratified by its officers without the sanction of the legislature. *Lewis v. Shreveport*, 3 Woods (U. S. C. C.), 205. 1878.

192. Recital in bonds; bona fide holder. Recitals in municipal bonds issued to aid in the construction of a railroad, stating the compliance with all the conditions precedent prescribed by law, are conclusive evidence in favor of a purchaser of such bonds without other information than that which appears on their face that such conditions precedent have been complied with. *Marshall v. Town of Elgin*, 3 McCrary (U. S. C. C.), 35, 1881; *Coloma, Town of, v. Eaves*, 92 U. S., 484, 1875; *Venice, Town of, v. Murdock*, ib., 494, 1875; *Marcy v. Township of Oswego*, ib., 637, 1875; *San Antonio v. Mehaffy*, 96 U. S., 312, 1877; *Leavenworth County v. Barnes*, 94 U. S., 70, 1876; *Comm'r's of Douglas County v. Bolles*, 94 U. S., 104, 1876; *Comm'r's of Johnson County v. January*, ib., 202, 1876; *Menasha v. Hazard*, 102 U. S., 81, 1880; 2 Amer. & Eng. R. R. Cases, 571; *Walnut v. Wade*, 103 U. S., 683, 1880; 3 Amer. & Eng. R. R. Cases, 36; *Lane v. Inhabitants of Town of Embden*, 72 Me., 354, 1881; *Williams v. Town of Roberts*, 88 Ill., 11, 1878; 21 Amer. R'y Rep., 268; *Milner v. Pensacola*, 2 Woods (U. S. C. C.), 632, 1875. *Contra*, *Cagwin v. Town of Hancock*, 5 Amer. & Eng. R. R. Cases, 150; 84 N. Y., 532, 1881; reversing *Same v. Same*, 22 Hun (N. Y.), 201, 1880.

193. — Where a municipal bond contains a recital that it is issued in payment of a subscription made in pursuance of a vote of the people at an election therein specified, and there was no law authorizing such election and subscription, the holder has notice, by such recital, of the illegality of such sub-

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scription. *Barnes v. Town of Lacon*, 84 Ill., 461, 1877; *Woodruff v. Okolona*, 57 Miss., 806, 1880; *Lippencott v. Town of Pana*, 92 Ill., 24, 1879; *Craig v. Town of Andes*, 93 N. Y., 405, 1883.

194. Recitals in ordinance. A city ordinance, authorizing a subscription to stock of a road company and issue of bonds to pay same, recited that the authority prescribed by the law as a prerequisite of such subscription had been given by an election held for the purpose. In a suit upon such bonds, *held*, that the city was estopped by such recital to show that the voters at such election were not duly sworn, and the election therefore void. Principle of estoppel by recitals in bonds applies to recitals in an ordinance authorizing the issue of bonds. *Gause v. City of Clarksville*, 1 Federal Reporter, 353. 1880.

195. Registry. Before railroad aid bonds can be properly registered under the act of April 16, 1869, it must appear that they were issued in pursuance of a vote of a majority of the legal voters in the municipality issuing them. But when once registered, it will be presumed they were rightfully registered, and the burden of establishing the contrary rests upon the party affirming it. *Town of Prairie v. Lloyd*, 97 Ill., 179, 1881; 3 Amer. & Eng. R. R. Cases, 58.

196. Seal. A town in New York subscribed for stock in a railroad company, and the commissioners, authorized to execute bonds in payment therefor, issued unsealed obligations, whereon a *bona fide* holder for value brought suit. *Held*, that the absence of a seal on the paper did not affect his right to recover. *Draper v. Springport*, 104 U. S., 501, 1881; 5 Amer. & Eng. R. R. Cases, 205.

197. Signature. It is not necessary that the coupons should be signed by all the officers who signed the bonds. The signature of some one of the officers, identifying them as a part of the bonds, is sufficient. *First National Bank of St. Johnsbury v. Town of Concord*, 50 Vt., 257. 1877. See, also, *Town of Weyauwega v. Ayling*, 99 U. S., 112. 1878. See *Anthony v. County of Jasper*, 101 ib., 693, 1879; *Bank of Statesville v. Town of Statesville*, 7 Amer. & Eng. R. R. Cases (N. C.), 178, 1881; *Lackawana Iron*

and Coal Co. v. Town of Little Wolf, 38 Wis., 152. 1875.

198. — A statute provided that certain town bonds were to be signed by the chairman of the board of supervisors, and countersigned by the town clerk. *Held*, where such bonds appeared to have been issued in strict conformity with the requirements of the statute, that the presumption would be that they were issued under the authority of the board of supervisors. *Burleigh v. Town of Rochester*, 5 Federal Reporter, 667. 1881.

199. Taxes collected; validity disputed. Railroad commissioners of a town, who have received from the collector of the town moneys raised by tax to pay interest coupons on bonds of the town, issued in payment of a railway subscription, cannot question the validity of the bonds, to justify them in refusing to pay over the moneys to the owners of the coupons. *First National Bank v. Wheeler*, 72 N. Y., 201. 1878.

200. Terms of bond. A bond authorized by statute must comply with the terms of the act. *Town of Wheatland v. Taylor*, 29 Hun (N. Y.), 70. 1883.

201. Time. A statute authorizing a subscription and issuance of bonds to run not exceeding ten years will not authorize the submission of a proposition whereby the bonds shall be payable in not less than twenty years. *Cairo and St. Louis R. R. Co. v. Sparta*, 77 Ill., 505. 1875.

202. — Where the law authorizing corporate subscriptions in aid of a railroad is silent as to what the petition for and notice of the election shall contain as to the length of time the corporate bonds shall run before their maturity, and the election is called according to law, it will not be essential to the validity of the election that the petition, notice of election and vote of the people should fix the time when the bonds will mature. *People v. Town of Harp*, 67 Ill., 62. 1873.

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203. Bonds. Bonds are not invalidated by reason of the fact that the railway has not been definitely located at the time of their issue. *Smith v. Town of Yates*, 15 Blatchford (U. S. C. C.), 89. 1878.

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204. Change. A company authorized to construct a railway through Wisconsin from the Illinois line to intersect the M. and P. du C. R. R. west of Monroe, made a proposition to the plaintiff town, stating that it had surveyed and located a line through certain sections in that town to a point designated in the village of Platteville, and proposed to build the road "on the route indicated," from Galena to the Wisconsin river; and it asked aid of the town to build the road "on the route indicated." The town accepted the proposition and issued its bonds. *Held*, that while the proposition does not disclose a survey and location of the line northward beyond the point designated, yet it bound the company to build a continuous line of road from Galena, over the surveyed line described in the proposition, to the point designated, and from that point to the Wisconsin river. *Town of Platteville v. Galena and Southern Wisconsin R. R. Co.*, 43 Wis., 493. 1878.

205. — A feeble company, of doubtful ability to construct any road between the terminal points of its charter, will be restrained, at the suit of a municipality which has subscribed for stock, and issued bonds, in aid of its proposed main line, from wasting its means in constructing branch roads so as to disable it to build its main line; and where a pretended branch is such that its completion will be a complete user of the company's original franchise, and will give it a continuous road between the termini originally named, but not passing through or near the plaintiff municipality as did the main line proposed, and there is no apparent design to continue the road on such main line, the construction of the pretended branch will be restrained as a "diversion" of the road from such municipality, within the meaning of § 23, ch. 119 of 1872. *Id.*

206. — The M., M. and G. B. R. R. Co. was authorized by its charter to build a railway from Milwaukee northerly via the cities of Sheboygan and Manitowoc to Green Bay, with power to change and relocate its road "so as not materially to change the route," and to connect its line with any other road; and any company having a road built, or partly built, running in the direction of the line above described, was authorized to lease

or sell any part of its road to said first mentioned company. After the defendant town had subscribed to the stock of said M., M. and G. B. Co., the latter, without the consent of the town, acquired the franchises of another company pertaining to a line of railway from Manitowoc to Appleton, about forty miles in length and running nearly at right angles with the line first above described; and this road the M., M. and G. B. Co. proposed to construct and operate. *Held*, that this was such a fundamental change in the character of the enterprise contemplated by that company as to release non-assenting subscribers from payment of their stock subscribed before the company had acquired, or was authorized by law to acquire, such additional line of road. *Noesen v. Port Washington*, 37 Wis., 168, 1875; *Perkins v. Same*, *ib.*, 177, 1875.

207. Condition. Where the location of a railway is a condition precedent to the right to issue bonds in its aid, and the location is not made as required, the bonds are invalid even in the hands of a *bona fide* holder. *Mellen v. Town of Lansing*, 19 Blatchford (U. S. C. C.), 512. 1881.

208. Route. It is competent for a railway company, in submitting a proposition for aid, to define therein, as a part of the proposition, the line of the proposed road. *Town of Platteville v. Galena and Southern Wisconsin R. R. Co.*, 43 Wis., 493. 1878.

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209. Farming lands in city. Farming lands, situated within the limits of a city, are liable for a tax voted to aid in the construction of a railroad. Such a tax is not a municipal tax. *Sears v. Iowa Midland R. R. Co.*, 39 Ia., 417. 1874.

210. Fraud. A railway tax that is procured to be voted upon representations that it will not be enforced, except as against non-resident property holders, will not be upheld. *Truesdale v. Green*, 7 Amer. & Eng. R. R. Cases (Ia.), 369. 1881.

211. Leased line. The collection of taxes illegally assessed upon a railway belonging to one, and by it leased to another company, under an agreement that all taxes legally assessed on such property, and paid by the

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lessee, should be chargeable against the lessor, may be enjoined in an action by the lessor. *Columbus, etc., Ry Co. v. Commissioners of Grant County*, 65 Ind., 427. 1879.

212. Levy. The omission of certain taxable property from the assessment will not render the levy invalid as to the property that has been assessed. *Goddard v. Stockman*, 5 Amer. & Eng. R. R. Cases (Ind.), 164. 1881. See, also, *Winter v. City Council of Montgomery*, 65 Ala., 403, 1880; 7 Amer. & Eng. R. R. Cases, 307.

213. — Where the statute authorizing a county to subscribe for stock in a railroad company, and issue its bonds therefor, limits its power to provide for the payment of them to an annual special tax of one-twentieth of one per cent., and other laws then and still in force empowered it to levy a tax for general purposes not exceeding one-half of one per cent. upon the assessed value of the taxable property of the county, held, that in the absence of further legislation, a *mandamus* will not lie to compel the levy of taxes beyond the amount so authorized. A holder of such bonds who has recovered judgment for the amount thereof does not thereby obtain an increased right to a levy of taxes. *United States v. County of Macon*, 99 U. S., 582. 1878. See *Ralls County Court v. United States*, 105 ib., 733. 1881.

214. — The levy of a tax in aid of a railway company is not void because made in the shape of a *percentage* instead of a gross sum. *Peed v. Millikan*, 79 Ind., 86. 1881.

215. Limitation of rate. A provision in the charter of the village which forbids it to borrow money, and provides that it shall not incur any debt or liability in any year greater than the amount of the tax allowed by the charter to be raised in such year, was not intended to embrace the case of bonds that might thereafter be issued in exchange for stock and in aid of a railway under a prior enabling act. *Long v. City of New London*, 9 Bissell (U. S. C. C.), 539. 1880.

216. — Where a proviso limits the authority of the town as to taxation, which limit is entirely inconsistent with a power previously given, the proviso controls. *Tatum v. Town of Tamaroa*, 9 Bissell (U. S. C. C.), 475. 1880.

217. Organization of company ; how determined. In a proceeding to enjoin the collection of a tax levied for the construction of a railway, it is not competent to inquire into questions pertaining to the organization of the company, they having been determined by the board of commissioners as jurisdictional matters. *Brokaw v. Commissioners of Gibson County*, 73 Ind., 543, 1881; 3 Amer. & Eng. R. R. Cases, 573.

218. Power of collector to dispute assessment. A town collector, who has collected a tax imposed under the statute, cannot question the validity of the proceedings under which the bonds were issued, or dispute the right of the railroad commissioners to the amount so collected. He acts under and affirms the validity of the warrant by collecting the tax, and, having received the money, cannot refuse to pay it over. *People ex rel. v. Brown*, 55 N. Y., 180. 1873.

219. Subscription ; bank stock. The Deposit Bank of Eminence, having its place of business in the town of Eminence, which had subscribed stock in the Cumberland and Ohio R. R. Co., and had issued bonds to pay for it under the charter of said company, authorizing the town to levy and collect a tax upon such taxable property in the town as is listed and taxed under the revenue laws of the state, is not liable, under such charter, to be taxed on the amount of its capital stock. The stock does not belong to the bank. *Trustees of Eminence v. Deposit Bank of Eminence*, 12 Bush (Ky.), 538. 1877.

220. — A municipal corporation being required by law to levy an annual tax to pay interest on certain designated bonds, and having levied and collected the tax for that purpose, has no right to divert the fund to other purposes, and, upon application by the holders of the bonds, will be enjoined from so doing. *Ranger v. New Orleans*, 2 Woods (U. S. C. C.), 128. 1875.

221. Interest. The raising by tax and payment to the commissioners appointed to pay interest on town bonds does not constitute a payment of such interest as between the town and the holders of the bonds. *Federgreen v. Town of Fallsburgh*, 25 Hun (N. Y.), 152. 1881.

Miscellaneous.

VIII. MISCELLANEOUS.

222. Action to compel accounting for stock. Under the act to extend the time for the completion of the Albany and Susquehanna R. R., etc. (§ 3, ch. 747, Laws of 1867), an action is properly brought by the supervisor of a town in his own name, as supervisor, against the railroad commissioners of a town, to require them to account for moneys received by them on sale of the stock of said railroad corporation belonging to the town; and it is not necessary for the continuance of the action that the successor of the original plaintiff be substituted. *Griggs v. Griggs*, 56 N. Y., 504. 1874.

223. Compromise. When the city of Troy had made a valid subscription of \$50,000 to the Atchison and Nebraska Railroad Co., and had issued \$25,000 of its bonds in payment of one-half the subscription, *held*, that it could make a valid contract whereby, in consideration of its stock in the company, and \$6,000 in five annual payments, it was relieved of any liability for the remaining \$25,000 of bonds. *Troy v. Atchison and Nebraska R. R. Co.*, 11 Kans., 519. 1873.

224. — This is true whether it has issued its bonds for said \$25,000 or not. *Same v. Same*, 13 Kans., 70. 1874.

225. Extinct corporation. The remedy of the creditors of an extinguished corporation is in equity against the corporation succeeding to its property and powers. *Mount Pleasant v. Beckwith*, 100 U. S., 514. 1879.

226. Garnishment. A city having subscribed for stock in a railway company, and having designated where its subscription should be expended, such expenditure cannot be diverted by a general creditor by trustee process. *Pike v. Bangor and Calais Shore Line R. R. Co.*, 68 Me., 445. 1878.

227. Limitations. Where a contract for the issuance of aid bonds did not limit the time within which the road should be completed, and no notice was given by the town that unless it was completed within a reasonable time the aid would not be furnished, the company does not lose its rights under the contract by lapse of time or by the statute of limitations. *Lynch v. Eastern, Lafayette and Mississippi R'y Co.*, 57 Wis., 430. 1883.

228. — A town, on July 24, 1869, voted a subscription of \$30,000 to a railroad, to be paid by the issue of its bonds, and the line of the road was permanently located through said town October 15, 1875, and the road constructed through the same on August 1, 1880, and on April 12, 1870, the town did subscribe to the stock of the company to the amount of \$10,000, \$6,000 of which was paid by the issue of the bonds of the town; and on November 1, 1871, the balance of the bonds voted were deposited with a trustee, but were afterward withdrawn by the consent of the company, in 1875, and destroyed, the supervisor and town clerk giving their obligation that the town should execute to the company bonds to the amount of \$24,000 upon the completion of its road. Application was made for a *mandamus*, in 1881, to compel the issue of such bonds. *Held*, that the case came within the express provisions of the acts of 1874 and 1877, limiting the time for the enforcement of such liabilities. *People v. Town of Granville*, 104 Ill., 285. 1882.

229. School districts. Trustees of school districts are not known to the constitution as municipal corporations which may be vested with power to collect taxes. Though the legislature might confer upon them, the authorities of school districts, power to assess and collect taxes for the purposes of instruction, it had none to authorize such taxation for the construction of railroads. *Trustees v. The People ex' rel.*, 63 Ill., 299. 1872.

230. Transfer of railway. The object of a corporation, at the time of a subscription to its stock, was to build a railway between certain points. It caused a portion of such line to be built, and transferred to another company the right to operate such portion, retaining, however, all its rights and franchises to build the remaining portion of the road. *Held*, that there was no such fundamental change in the purpose of the corporation as would release those subscribers to the stock who did not assent thereto. *Lynch v. Eastern, Lafayette and Mississippi R'y Co.*, 57 Wis., 430. 1883.

231. — If a subscriber for stock contemplated that a change would be made in the object and purpose of the corporation, he cannot, on the ground of such change, avoid his subscription. *Id.*

Authority to Subscribe.

SUBSCRIPTIONS BY COUNTIES.

See BONDS OF RAILWAY COMPANIES; BRIDGES; CERTIFICATES; COLLATERAL SECURITIES; FEDERAL COURTS; INJUNCTION; MANDAMUS; SUBSCRIPTIONS BY CITIES AND TOWNS; TAXATION.

I. AUTHORITY TO SUBSCRIBE.

II. PROCEEDINGS.

III. CONDITIONAL SUBSCRIPTION.

IV. BONDS.

V. CHARTER.

VI. SWAMP LANDS.

VII. MANDAMUS.

VIII. TAXATION.

IX. MISCELLANEOUS.

I. AUTHORITY TO SUBSCRIBE.

1. **Amendment of law.** There is no vested right in a railroad company to a subscription until it be actually made, and until that event occurs the legislature may alter the method whereby such subscription is to be made, without infringing any right. *State ex rel. v. Garroutte*, 67 Mo., 445, 1878; *Cumberland and Ohio R. R. Co. v. Barren County Court*, 10 Bush (Ky.), 604, 1874.

2. — The amendatory act of March 23, 1861, prohibited such subscription after its passage, without such vote, to any railroad company, whether it had a pre-existing charter authorizing a subscription by counties or not. *State ex rel. v. Garroutte*, 67 Mo., 445. 1878.

3. — Repeals in particular cases examined and passed upon. *Wood County v. Lackawanna Iron and Coal Co.*, 93 U. S., 619, 1876; *Cumberland and Ohio R. R. Co. v. Washington County Court*, 10 Bush (Ky.), 564, 1874; *Clay v. Justices of Hawkins County*, 5 Lea (Tenn.) 137, 1880.

4. **Amount.** Under the general railroad law of 1849, municipal subscriptions to the capital stock of a railroad company could not exceed \$100,000. *Jackson County v. Brush*, 77 Ill., 59. 1875.

5. — When a county votes aid to a railway company in excess of the amount authorized by law, it is simply a void act, conferring no authority on the county commissioners to issue the bonds of the county in any amount whatever. *Reinemann v. Covington, Columbus and Black Hills R. R. Co.*, 7 Neb., 310. 1878.

6. **Authority.** Counties have no authority at common law to issue bonds. They are quasi corporations, mere governing agencies, charged with certain objects of necessary local administration. *Hamlin v. Meadville*, 6 Neb., 227, 1877; *Hawkins v. Supervisors of Carroll County*, 50 Miss., 735, 1874.

7. — The board of county commissioners have no power to make such subscription in behalf of the county without the approval of the legal voters expressed at an election called pursuant to law. *Packard v. Comm'rs of Jefferson County*, 2 Colo., 338. 1874.

8. — An act of the legislature of Wisconsin provided that the board of supervisors of the defendant county "shall have power, by resolution, to cause to be issued bonds . . . to an amount not exceeding \$50,000," "if a majority of the ballots cast" by the legal voters in said county "be 'for railroad aid.'" *Held*, where a majority of the ballots cast were "for railroad aid," that it still rested in the discretion of the board of supervisors whether such bonds should be issued. *Wadsworth v. St. Croix County*, 4 Federal Reporter, 378. 1880.

9. — A statute authorizing counties to take stock in railroads is applicable to a railroad duly organized under a subsequent statute. And a subscription can be made to a corporation not yet organized. *Stebbins v. Commissioners of Pueblo County*, 4 Federal Reporter, 292; 2 McCrary (U. S. C. C.), 196. 1880. See, also, *County of Daviess v. Huidekoper*, 98 U. S., 98, 1878; *County of Cass v. Johnston*, 95 U. S., 360, 1877.

10. — Various statutes authorizing subscriptions construed. *Ogden v. County of Daviess*, 102 U. S., 634, 1880; 5 Amer. & Eng. R. R. Cases, 145; *National Bank of Brunswick v. County of Yankton*, 2 Dak., 365, 1880; *Turner v. Commissioners of Woodson County*, 12 Amer. & Eng. R. R. Cases, 600; 27 Kans., 314, 1882; *County of Moultrie v. Fairfield*, 105 U. S., 370, 1881; 7 Amer. & Eng. R. R. Cases, 194; *Mo. River, Ft. Scott and Gulf R. R. Co. v. Comm'rs Miami Co.*, 12 Kans., 230, 1873.

11. — **evidence.** Authority given by a public act of the general assembly to a county to subscribe stock to a railroad company, and issue bonds to pay for the same, need not be pleaded. The courts of the

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United States will take judicial notice of the public acts of the states within which they sit. *Smith v. Tallapoosa County*, 2 Woods (U. S. C. C.), 574. 1874.

12. Change in boundary. Certain railroad bonds were authorized and issued by the county of Marion prior to the detachment of one township. By virtue of an act of the legislature of 1879, and after the detachment, the county of Marion took up these railroad bonds, and issued funding bonds in lieu thereof. Certain charges were made in the time, the amount, and the rate of interest of these bonds — changes all beneficial to the county. *Held*, that though these funding bonds were technically both authorized and issued after the detachment, yet, within the spirit of the law, and legally, the funding bonds are a charge against the detached territory, the same as the railroad bonds had been. *Comm'rs of Marion County v. Comm'rs of Harvey County*, 26 Kans., 181. 1881.

13. — The legislature detached from Sedgwick county a portion of its territory, and attached it to the new county of Harvey. It declared that this detached territory should continue liable for a certain proportion of the railroad bonded indebtedness of Sedgwick county, and that the county clerk of Harvey county should annually apportion on the property of this territory the amount of taxes necessary to pay such proportion of the indebtedness. Upon the failure of the clerk of Harvey county to make this apportionment, the board of county commissioners of Sedgwick county are proper parties plaintiff in a proceeding by *mandamus* against him to compel him to perform such duty. *Comm'rs Sedgwick Co. v. Bailey*, 11 Kans., 681. 1873.

14. — Where the division is only of railroad bonded indebtedness, and there is no proof of the amount of property of the other indebtedness of the county prior to the division, and no proof of the comparative population or wealth of the detached territory and the remaining portion of the county, it is impossible for this court to say that the division prescribed by the legislature is not just and equitable. *Ib.*

15. — *Mandamus* is the proper remedy to compel such apportionment. *Ib.*

16. Consolidation of railways. A county, having lawful authority, issued its bonds in payment of its subscription to a railroad company. Between the latter and another company a consolidation was about to take place, upon condition that the county court would, on an extension of time being granted, levy and collect a tax sufficient to pay the amount due on the bonds. The county court accepted the proposition, and gave the requisite assurance. The consolidation thereupon took place. *Held*, that the county was estopped from denying the validity of the bonds in the hands of a *bona fide* holder, to whom they were transferred for value by the consolidated company. *County of Tipton v. Locomotive Works*, 103 U. S., 523, 1880; 1 Amer. & Eng. R. R. Cases, 517. See, also, *County of Scotland v. Thomas*, 94 U. S., 682, 1876; *County of Henry v. Nicolay*, 95 ib., 619, 1877; *Menasha v. Hazard*, 102 U. S., 81, 1880.

17. Constitutional law. Under the constitution of 1870 corporate subscriptions to the capital stock of railroad companies may be made, where the same has been authorized by a vote of the people of the municipality before the adoption of the constitution. *People ex rel. v. Logan County*, 63 Ill., 374. 1872.

18. — The legislation of the state of Illinois reviewed, whereunder the county of Clay issued two series of bonds, one dated November 1, 1869, in payment of its subscription to the stock of the Illinois South-eastern R'y Co., and another dated January 4, 1871, whereby its donation voted before the year 1870 to that company was paid. *County of Clay v. Society for Savings*, 104 U. S., 579, 1881; 5 Amer. & Eng. R. R. Cases, 170.

19. — The bonds are valid, as they were issued in strict conformity to the conditions and requirements prescribed by statute, and pursuant to a popular vote cast at an election lawfully held before the year 1870. The constitution of Illinois, which took effect during that year, does not attempt to impair the obligation of any prior contract in regard to them, nor prohibit the issue of such as were necessary to give effect to a donation so voted. *Ib.*

20. — Capitol precinct, at an election held

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on October 16, 1875, voted bonds to the A. and N. R. Co. to aid in an extension of its line. The bonds were to be placed in the hands of a trustee until the company had so far completed its road as to be entitled to them. The company immediately made a preliminary survey of its line, and the same was completed prior to November 1, 1875. *Held*, that the right of the company to the bonds in question had become vested, at the time the constitution of 1875 took effect, to such an extent that the company could require the bonds to be issued as provided in the proposition and placed in the hands of the trustee to await the final action of the company. *State ex rel. v. Comm'rs of Lancaster County*, 6 Neb., 214. 1877.

21. — The powers of a railroad company in Missouri, in existence prior to the adoption of the constitutional provision of 1865, prohibiting subscriptions to the stock of any corporation by counties, cities or towns, unless two-thirds of the qualified electors thereof shall assent, are not affected by such provision, but remain the same as if it had never been adopted. *Calaway County v. Foster*, 93 U. S., 567, 1876; *County of Macon v. Shores*, 97 U. S., 272, 1877; *Huidekoper v. Dallas County*, 3 Dillon (U. S. C. C.), 171, 1875.

22. — The subscription to the stock of the railroad company having been actually made by that county, under the authority of a legislative act, in January, 1868, was legal, and the circumstance that the bonds were issued at a later date does not impair their validity. *Id.* See, also, *Louisiana v. Taylor*, 105 U. S., 454, 1881; *County of Schuyler v. Thomas*, 98 ib., 169, 1878.

23. — Where the charter of a railroad company, granted by Missouri prior to the adoption of the constitution in 1865, made it lawful for the county court of any county in which any part of the route of said railroad or of its authorized branches might be, or for any county adjacent thereto, to subscribe to the stock of the company, and to issue bonds of the county in payment therefor, the power of the county court so to subscribe did not become subject to § 14 of art. 11 of that constitution, which requires the assent of two-thirds of the qualified voters of the county to such subscription. *County of*

Henry v. Nicolay, 95 U. S., 619, 1877; *County of Cass v. Gillett*, 100 ib., 585, 1879. See, also, *Nicolay v. St. Clair County*, 3 Dillon (U. S. C. C.), 163. 1874.

24. — The railroad aid act of 1868 (Acts of 1868, p. 92) is unconstitutional. *Webb v. Lafayette County*, 67 Mo., 353, 1878; *Ranney v. Bader*, ib., 476, 1878.

25. — The fourteenth section of the constitution of Mississippi, ratified December 1, 1869, which declares that "the legislature shall not authorize any county, city or town to become a stockholder in, or to lend its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town at a special election, or a regular election, to be held therein, shall assent thereto," is wholly prospective. It does not abrogate previous acts of the legislature conferring authority to subscribe for stock. *Supervisors v. Galbraith*, 99 U. S., 214. 1878.

26. — A resolution of a board of supervisors appropriating bonds as a subscription in aid of a railway constitutes a contract, which will not be impaired by a subsequent change in the constitution of the state. *Moultrie County v. Rockingham Ten-Cent Savings Bank*, 92 U. S., 631. 1875. See *Railroad Co. v. Falconer*, 103 ib., 321. 1880.

27. — A popular vote, authorizing a railway subscription, does not give a vested right in the subscription to the railway company. A change of the state constitution forbidding such subscriptions will render such vote unavailing, if the subscription is not actually made prior to the constitutional change. *Wadsworth v. Supervisors*, 103 U. S., 534, 1880; *Railroad Co. v. Falconer*, 103 U. S., 321, 1880.

28. — Section 6, art. 8, of the constitution declares that "the general assembly shall never authorize any county, city, town or township, by vote of its citizens or otherwise, to become a stockholder in any joint-stock company, corporation or association whatever; or to raise money for, or loan its credit to, or in aid of, any such company, corporation or association." What the general assembly is thus prohibited from doing directly it has no power to do indirectly. *Taylor v. Commissioners of Ross County*, 23 Ohio St., 22. 1872.

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29. — The act of April 23, 1872, to authorize counties, townships, and the municipalities therein named, to build railroads, etc. (69 Ohio L., 84), authorizes the raising of money by taxation, which is equally applicable to the unlawful purpose of aiding railroad companies and others engaged in building and operating railroads, as it is to any lawful purpose, and gives to the officers intrusted with the control and application of the money thus raised no means or power of discrimination as to the lawfulness or unlawfulness of the work or purpose to which it is to be applied, and is unconstitutional. *Id.*

30. — Under the constitution (sec. 2, art. 11), neither the state, nor any county, city, town, township or school district, can make any donation or grant to, or in aid of, or become a subscriber or shareholder in, any corporation or company. *Colorado Central R. R. Co. v. Lea*, 5 Colo., 192. 1879.

31. — A general statute of Tennessee required the county courts, when authorized by a popular vote, to subscribe for stock in a railroad company. A special statute was subsequently passed, which, without requiring the submission of the question of subscription to a popular vote, conferred power on the county courts of the counties on the line of a particular railroad to make, and on the company to receive, a subscription for its stock. *Held*, that the special statute is not in violation of the provisions of § 8, art. 1, or of § 7, art. 11, of the constitution of Tennessee of 1834. *County of Tipton v. Locomotive Works*, 103 U. S., 523, 1880; 5 Amer. & Eng. R. R. Cases, 517.

32. — In the state constitution of South Carolina there is no restriction which deprives the legislature of the power to authorize counties to incur obligations and issue bonds for their payment. *State ex rel. v. C. and L. R. R. Co.*, 13 So. Car., 290, 1879; 5 Amer. & Eng. R. R. Cases, 220.

33. — In this case the power to levy a tax was conferred, the company performed all the conditions which, by the vote cast November 2, 1869, entitled it to receive the donation bonds, and they were delivered November 1, 1871, reciting the law authorizing their issue. *Held*, that, in a suit by a *bona fide* holder of the coupons cut there-

from, a recovery cannot be defeated upon the ground that, in order to pay the principal and interest and the county expenses, the assessment must exceed the constitutional limitation. *County of Moultrie v. Fairfield*, 105 U. S., 370, 1881; 7 Amer. & Eng. R. R. Cases, 194.

34. — Whatever may be individual opinions, it is at the present the settled policy of this state to tolerate the issue by municipalities of bonds in aid of railroads, and the settled law that bonds so issued, if issued in pursuance of express authority and in accordance with the prescribed forms, are valid. *Leavenworth, Lawrence and Galveston R. R. Co. v. Comm'rs of Douglas Co.*, 18 Kans., 169, 1877; 15 Amer. R'y Rep., 256.

35. — This court adopts the decision of the supreme court of Kansas, affirming the validity and binding effect of an act of the legislature of that state, approved February 10, 1865, entitled "An act to authorize counties and cities to issue bonds to railroad companies," although the yeas and nays were not called and entered on the journals of the respective houses on the final passage of the bill, and the enrolled bill was not signed by the presiding officer of the senate. *Leavenworth County v. Barnes*, 94 U. S., 70. 1876.

36. Construction of authority. While the power to issue railroad aid bonds is not one of the ordinary powers of a county, requires express authority, and must be exercised in conformity to prescribed forms, it is not penal in its nature, and the validity of its exercise does not demand all the strictness of the ancient rules of the criminal law. *Leavenworth, Lawrence and Galveston R. R. Co. v. Comm'rs of Douglas Co.*, 18 Kans., 169, 1877; 15 Amer. R'y Rep., 256.

37. Estoppel. A county is not estopped to maintain a bill to enjoin the president of a railway company from disposing of the bonds and to cancel them, by the acts of the board of supervisors in assuming control of the railroad stock received therefor, and levying taxes and paying the interest on the bonds, where the subscription was illegal for want of compliance with the law. *Supervisors of Madison County v. Paxton*, 57 Miss., 701. 1880.

38. — A county will not be estopped, by

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the completion of a railroad according to the terms of an attempted subscription, from denying the legality of the election. No notice that the want of power to make the subscription would be relied upon is required to be given when the bonds are called for in payment of the subscription; nor will the company be heard to urge, as against the right of the county to deny the existence of the power, that it had performed labor and incurred liabilities on the faith of the supposed subscription. *People v. Jackson County*, 92 Ill., 441. 1879.

39. — Where, at an election held according to law, the people of a county authorized their proper representatives to treat certain outstanding county obligations as properly authorized by law for the purpose of settling with the holders, and the settlement has been made, the validity of the obligations can no longer be contested. *County of Jasper v. Ballou*, 103 U. S., 745, 1880; 3 Amer. & Eng. R. R. Cases, 47.

40. — A county having issued certain railway aid bonds after a decree of the court had determined that the county had the power to do so, all persons purchasing such bonds become privies to the decree, and may rely upon its estoppels. *State ex rel. v. C. and L. R. R. Co.*, 13 So. Car., 290, 1879; 5 Amer. & Eng. R. R. Cases, 220.

41. — A judgment upon the merits, dismissing an action brought by certain taxpayers of a county against the county commissioners to enjoin the issue by them of certain railway aid bonds, is an estoppel to a subsequent action after the bonds have been issued, brought in the name of the state upon the relation of certain other taxpayers of the same county, against the county commissioners, the railway company and purchasers of the bonds, to have the bonds adjudged illegal and void. *Ib.*

42. **Legalizing act.** Where an election is void, a subsequent act of the legislature legalizing the former vote is of no effect. It is the settled doctrine of Illinois, that, under the constitution of 1848, the legislature had no power to enact a law rendering a void election and subscription for corporate purposes valid. *County of Richland v. The People*, 3 Bradwell (Ill.), 210, 1878; *Gaddis v. Richland County*, 92 Ill., 119, 1879.

43. — Certain bonds held to be validated by a curative act. *January v. Johnson County*, 3 Dillon (U. S. C. C.), 392. 1874.

44. — The curative act of February 25, 1868 (Gen. Stat., p. 892), was intended to cure irregularities in the proceedings had in any county on the question of county subscription to railroads, and to remove all technical hindrances to the carrying into effect of the will of the majority. It was not designed, and did not have the effect, to legalize illegal votes, or to authorize a county subscription of stock and issue of bonds without the vote of a majority of the qualified electors of the county voting upon the question. *Atchison, Topeka and Santa Fe R'y Co. v. Comm'rs of Jefferson Co.*, 17 Kans., 29. 1876.

45. **Limitation as to amount.** An act of the legislature of Arkansas, passed in 1868, authorizes any county to subscribe to the stock of any railroad company in that state, provided the subscription shall not exceed \$100,000, and the consent of the inhabitants of the county thereto shall first be obtained at an election held for that purpose. At an election held under that act the voters of a county voted to subscribe \$100,000 to the stock of company A. and \$100,000 to the stock of company B. *Held*, that the act does not restrict the county to a single subscription; that the power to subscribe is general, limited only by the subscription of \$100,000 to the stock of any one company. *County of Chicot v. Lewis*, 103 U. S., 164, 1880; 3 Amer. & Eng. R. R. Cases, 137.

46. **Ratification.** Where a county has no lawful right to issue its bonds in aid of a railway, a ratification of the issue is equally invalid. *Treadway v. Schnauber*, 1 Dakota, 236. 1875.

47. — A territorial statute authorizing a donation may be validated by subsequent congressional approval. *National Bank v. County of Yankton*, 101 U. S., 129. 1879.

48. **Ultra vires.** Authority to subscribe to aid in a particular line of railway, conferred by statute, will not authorize a subscription in aid of a different line. *New Brunswick Railway Co., Ex parte*, 2 Pugsley (New Brunswick), 78. 1873.

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49. Aid to two railways in one proceeding. Where an appropriation to aid in the construction of two railways has been voted by a county in one entire sum, to be apportioned in the amounts specified in the petition asking for such appropriation, *held*, that such vote is a nullity, and the collection of a tax levied to pay such appropriation may be enjoined. *Finney v. Lamb*, 54 Ind., 1. 1876.

50. Alternative subscriptions. The people cannot delegate to the county commissioners the authority to determine which of two companies shall be the recipient of aid voted. *Spurck v. Lincoln and Northwestern R. R. Co.*, 14 Neb., 293. 1883.

51. Election. All qualified voters who absent themselves from an election held on public notice duly given are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. *County of Cass v. Johnston*, 95 U. S., 360, 1877; overruling *Harshman v. Bates County*, 92 U. S., 569, 1875. See, also, *Douglas v. County of Pike*, 101 id., 677. 1879. But see *Jackson County v. Brush*, 77 Ill., 59. 1875.

52. — Where it is admitted by the pleadings that there was not a majority of the legal votes cast at the election in favor of subscription, the board of supervisors can neither make a valid subscription, nor make statements or pass resolutions to bind their county. *People ex rel. v. Logan County*, 63 Ill., 374. 1872.

53. — A proposition to vote bonds, modified one week before the election in such a manner as to become a new proposition, cannot be legally voted upon at that election, as there is not remaining sufficient time before the election in which to give the notice required by law. *Packard v. Comm'rs of Jefferson County*, 2 Colo., 338. 1874.

54. — In the absence of any prohibition in the statutes against more than one submission to the electors of the question of making a subscription, a second vote is not unlawful. *Supervisors v. Galbraith*, 99 U. S., 214. 1878.

55. — Where the record or written evidence of the notice of an election is lost, it

is competent to prove such facts by parol. *Maxey v. Williamson County*, 72 Ill., 207. 1874.

56. — Where the act authorizing a municipal corporation to make subscriptions in aid of a railroad provides that the election shall be called by the county court, an election called by a wrong authority, as by the board of supervisors, is void, and confers no authority to make such subscription. *County of Richland v. The People*, 3 Bradwell (Ill.), 210. 1878.

57. — The charter of the railway company provided that when it shall "request the county court of any county through or adjacent to which it is proposed to construct said railway to subscribe, either absolutely or upon special conditions, a specified amount to the stock of said company, the county court so requested may in their discretion order an election," etc. *Held*, that this provision gave the county judge no authority to submit the question to a vote of the people without having associated with him a majority of the justices of the county. *Bowling Green and Madisonville R. R. Co. v. Warren County Court*, 10 Bush (Ky.), 711. 1874.

58. — It is not necessary that all the details should be submitted to the voters. The substantial question is sufficient. *Austin v. Gulf, Colorado and Santa Fe R. R. Co.*, 45 Tex., 234, 1876; 13 Amer. Ry Rep., 172.

59. — If the general or special statute controlling the election requires the publication or posting of a notice thereof for thirty days prior to the holding of the election, and this is not done, the election will be invalid, and will confer no authority upon the board of supervisors either to make the subscription or to issue the bonds of the county. *Harding v. Rockford, Rock Island and St. Louis R. R. Co.*, 65 Ill., 90. 1872.

60. — Where the question of issuing bonds to any railroad company was submitted to the people of a county, but without accompanying the same by a proposition to levy a tax to meet the liability incurred, *held*, that bonds issued in pursuance of such vote were void. *Hamlin v. Meadville*, 6 Neb., 227. 1877.

61. — Under the law of Nebraska, public donations to aid in the building of railways

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can be made only by the people themselves, by means of an election properly called and held. *Spurck v. Lincoln and Northwestern R. R. Co.*, 14 Neb., 293. 1883.

62. Fraud. Where the company knew that there was not a majority of the legal votes cast in favor of subscription, and knew there was no legal power to make the subscription, or to issue the bonds, knowing of the fraud before incurring liability, it was as fully bound by it as if it had participated in its perpetration. *People ex rel. v. Logan County*, 63 Ill., 374. 1872.

63. — On *mandamus* to compel the authorities of a county to make a subscription to a railroad company, the return showed that the directors of the company, in contracting for the building of the road, gave to the contractors too large a sum. *Held*, that such fact was no defense; that the directors had the power to make contracts binding on stockholders, and that if they were fraudulently made, the stockholders might have them rescinded on bill in equity. *Ib.*

64. — Where the record shows that in September, 1871, a vote was had by which the county board was authorized to subscribe to the capital stock of a railway company, and that in September, 1873, two members of the board met without any request or call for a special session and without any notice to the third member, who was present in the county and could have been served with notice, and not at a regular or adjourned session, and where notice of such session was intentionally and fraudulently withheld by the company from said third member, and that at such session the two commissioners present passed a resolution directing a subscription to the capital stock of said company, and such subscription was accordingly made, *held*, that such subscription was not a legal and binding contract upon the county, and that it could maintain an action to have it set aside and canceled. *Paola and Fall River R'y Co. v. Comm'rs of Anderson Co.*, 16 Kans., 302, 1876; *Comm'rs of Anderson Co. v. Paola and Fall River R'y Co.*, 20 Kans., 534, 1878.

65. Change of conditions. The appellee, the Richmond, Irvine and Three Forks R. R. Co., was the judge of the character of propo-

sition it would present, and the county court had discretionary power, under § 15 of appellee's charter, to submit or not submit the question of subscription of stock to the voters of Madison county, who had the ultimate power of adoption or rejection. *Madison County Court v. Richmond, etc., R. R. Co.*, 80 Ky., 16. 1882.

66. — Appellee having proposed the conditions of the contemplated subscription, the county court having submitted them to the people, and a vote having been taken resulting in the adoption of the conditions, the county court cannot revoke its action and order a second vote. To do so would be to assume legislative functions. *Ib.*

67. Change in judicial decisions. Where municipal bonds have been put upon the market as commercial paper, the rights of the parties thereto are to be determined according to the statutes of the state as they were then construed by her highest court; and in a case involving those rights this court will not be governed by any subsequent decision in conflict with that under which they accrued. *Douglas v. County of Pike*, 101 U. S., 677, 1879; *Foot v. Johnson County*, 5 Dillon (U. S. C. C.), 281, 1878.

68. Construction of statute. Until the board of county commissioners subscribe to the stock of a railway company, and authorize the payment thereof in the bonds of the county, the vote of the legal electors of the county, authorizing such subscription to be made, goes for nothing. *People v. Comm'rs of Pueblo County*, 2 Colo., 360, 1874; 20 Amer. R'y Rep., 237.

69. — The power to tax is a high government power, and where the legislature grants it to another tribunal it can only be exercised in strict conformity to the terms in which the power is granted. A material departure will be fatal to the attempt to exercise it. *Bowling Green and Madisonville R. R. Co. v. Warren County Court*, 10 Bush (Ky.), 711, 1874; *Daviess County Court v. Howard*, 13 ib., 101, 1877.

70. — Various statutes in relation to voting aid to railways construed. *Winston v. Tenn. and Pacific R. R. Co.*, 1 Baxter (Tenn.), 60; 15 Amer. R'y Rep., 237, 1873; *Comm'rs of Johnson County v. Thayer*, 94 U. S., 631,

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1876; *Supervisors v. Wisconsin Central R. Co.*, 121 Mass., 460, 1877.

71. Irregularities. The validity of county bonds, issued for railroad subscription by the county, depends upon the power of the county court at the time to issue the bonds; mere irregularities will not render the bonds void. *Clay v. Justices of Hawkins County*, 5 Lea (Tenn.), 137. 1880.

72. Location. There must be a substantial location of the line of the railway before an election to vote aid can be lawfully held. *Winston v. Tenn. and Pacific R. Co.*, 1 Baxter (Tenn.), 60; 15 Amer. R'y Rep., 237. 1873.

73. Proceedings to set aside subscription. The validity of the proceedings should be attacked by *certiorari*, bill of review or writ of error. *Anderson County v. Houston and Great Northern R. R. Co.*, 52 Tex., 228. 1879.

74. — Bill alleging irregularities in the issue of bonds to a railroad company should point out specifically such irregularities to call attention of defendants to them and advise them of what they are to defend or explain. *Matthews v. Blount*, 3 Lea (Tenn.), 120. 1879.

75. Ratification. Irregularities in the making of the subscriptions and issue of bonds may be cured by ratification. *Leavenworth, Lawrence and Galveston R. R. Co. v. Comm'rs of Douglas Co.*, 18 Kans., 169, 1877; 15 Amer. R'y Rep., 256.

76. Survey. It was not essential to the validity of the popular election, ordered and held on the question of subscription to the stock, that there should have been a final and definite survey and location of the entire line of the company's road. All that was required was a substantial location, designating the termini and general direction of the road, and an estimate of the cost of constructing it. *County of Wilson v. National Bank*, 103 U. S., 770, 1880; 3 Amer. & Eng. R. R. Cases, 151.

77. What constitutes a subscription. An order of the county court directing the county judge to subscribe for stock upon contingencies therein named does not of itself amount to a subscription. *Cumberland and Ohio R. R. Co. v. Barren County Court*, 10 Bush (Ky.), 604. 1874.

78. — Where the county court made an order to subscribe to the capital stock of the company for the use of one of its branches, and issued county bonds which were accepted by the construction committee in payment, *held*, that an actual manual subscription on the books of the company was not necessary to entitle the county to the stock, or to bind it as a subscriber thereto. *County of Cass v. Gillett*, 100 U. S., 595. 1879.

79. — To constitute a "subscription" by a county to stock in a railroad company, it is not necessary that there be an act of chirographical subscribing. A resolution of the county declaring a subscription made, an acceptance of such subscription by the railroad company, and notice to the county of such acceptance; the delivery to the railroad company by the proper county officers of the county bonds, and acceptance by the county of the corresponding stock, voting as a stockholder and levying a tax to pay the interest on the bonds, estop the county (assuming that it had a legal right to subscribe) from denying its subscription. *Nugent v. The Supervisors*, 19 Wallace, 241. 1873.

III. CONDITIONAL SUBSCRIPTIONS.

80. Depot. A vote by a county to issue bonds to a given railroad company whose line runs to the county seat is not rendered invalid by a condition that a depot of the company shall be located within a specified distance of the county seat, nor by a condition that the railroad bridge over a large stream in the county shall be so constructed that it may be used as a free wagon bridge. *Union Pacific R. R. Co. v. Merrick County*, 3 Dillon (U. S. C. C.), 359. 1874.

81. Determination as to performance. Under the act of the legislature of Kansas, to authorize counties and cities to issue bonds to railroad companies, approved April 10, 1865, and that of February 25, 1868, the board of commissioners of a county is authorized to determine whether the condition precedent to the lawful issue of such bonds has been complied with. *Comm'rs of Douglas County v. Bolles*, 94 U. S., 104. 1876.

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82. — If the people of a county vote a subscription in aid of a railway company, to be paid in bonds of the county upon certain conditions precedent, the county authorities cannot delegate power to others to determine when the conditions are performed, but must determine that fact themselves, as the authorized agents of the people. This is an official trust, which cannot be delegated. *Jackson County v. Brush*, 77 Ill., 59. 1875.

83. **Estoppel.** A county in Illinois, a subscriber to the stock of a railway company, agreed to extend the time for completing the road from that originally fixed to a particular date. Before that date the county, by its proper officers, declared the road completed to its satisfaction, delivered its bonds and received the stock of the company in return therefor. *Held*, that its action constitutes a waiver and an estoppel which prevent it from raising the objection that the contract was not performed in time. *County of Randolph v. Post*, 93 U. S., 502. 1876.

84. **Forfeiture.** The statute of Indiana (§ 18, R. S. 1876, p. 740) in relation to forfeiture only applies to donations, and not where stock has been subscribed. *Commissioners of Tipton County v. Indianapolis, Peru and Chicago R'y Co.*, 89 Ind., 101, 1883; 12 Amer. & Eng. R. R. Cases (Ind.), 636, 1883.

85. **Injunction.** If a railroad company fails to comply with the conditions on which a county subscription has been made to its stock, injunction will lie to prevent it receiving bonds agreed to be issued in payment and to compel the surrender and cancellation of any already issued; and this remedy may be invoked by any one who is a citizen and tax-payer of the county. *Wagner v. Meety*, 69 Mo., 150. 1878.

86. **Rescission.** Where a county court makes an order for the subscription of stock to a railroad company, upon condition that the road shall be built within a specified time, *held*, that it is in the power of the county court, by a subsequent order, to suspend the delivery of bonds of the county, issued in payment of the subscription and remaining in the hands of a trustee, when it appears that the road has not been built within the time specified; the recitals in the order, however, like any other declarations made by one party to a contract, do not con-

clude the other party. *Cooper v. Sullivan County*, 65 Mo., 542. 1877.

87. **Route.** Where a proposition for county subscription to aid in building a railway from Quincy, by way of Payson and in the direction of Pittsfield, in Pike county, without any other conditions, was carried by vote of the people, and it appeared that the company, by its charter, was not bound to locate its road on that route, but had a large discretion as to the route to be selected, it was held that the board of supervisors, in making the subscription, had the right to impose conditions as to the permanent location of the road upon the route contemplated, and to make the delivery of the county bonds to depend upon the same, and that the company, by accepting such conditions, was bound by them in respect to its rights under the vote and subscription. *Alley v. Adams County*, 76 Ill., 101. 1875.

IV. BONDS.

88. **Action.** Where a court of county commissioners in Alabama, pursuant to the act of December 31, 1868, subscribed for stock in a railroad company, and issued the bonds of the county in payment therefor, the holder of them, or of the coupons thereto attached, is not required to present them when due to that court for allowance, before commencing suit to enforce their payment. *County of Greene v. Daniel*, 102 U. S., 187, 1880; 3 Amer. & Eng. R. R. Cases, 105.

89. — In an action on bonds issued to pay a subscription by a county to a railroad company every essential element of the power given to the county to make such a subscription must be stated in the petition. *Weil v. Greene County*, 69 Mo., 281. 1878.

90. — The complaint alleged a failure of the board of supervisors to issue certain bonds to the plaintiff at the times the same should have been issued, and that the plaintiff had suffered damage thereby. *Held*, that the facts alleged would not justify a judgment against the county. For a neglect or a refusal to perform a duty imposed on him by law, a supervisor is by § 4086, Political Code, made personally liable. *Santa Cruz R. R.*

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Co. v. County of Santa Clara, 62 Cal., 180. 1882.

91. Acceptance of subscription. The county court of Greene county, without a vote of the people, by order of June 20, 1870, subscribed \$400,000 to the capital stock of Kansas City and Memphis R. R. Co. Order modified October 4, 1870, so as to make subscription to Hannibal and St. Joseph R. R. Co. to aid in building the K. C. and M. R. R. April, 1871, order made rescinding former orders, and in July, 1871, order rescinding the rescinding order of April, 1871, and bonds issued, payable to H. and St. Jo. R. R. Co., or bearer. *Held*, that as there was no acceptance by the latter company of the subscription, there was neither a contract nor a consideration for one, and that it was incompetent for the K. C. and M. R. R. Co. to accept the subscription. *State ex rel. v. Garrouette*, 67 Mo., 445. 1878.

92. Bona fide holder. It is no defense that the company, which was a *de facto* corporation when the subscription was made, had not been organized within the time prescribed by its charter, and that when the bonds were issued a suit to restrain the issue of them was pending, however it may have ultimately resulted, if the holder had no actual notice thereof, and was a purchaser of them for value before they matured. *County of Macon v. Shores*, 97 U. S., 272. 1877. See, also, *Darlington v. La Clede County*, 4 Dillon (U. S. C. C.), 200. 1877.

93. — County bonds issued in Missouri by a *de facto* county court, which are sealed with the seal and signed by the *de facto* president thereof, cannot, when held by *bona fide* purchasers, be impeached by showing that he was not *de jure* a member of the court. It is no defense to a suit on such bonds so held, that the company, in payment of the county subscription to whose capital stock they were issued, was not organized within the period prescribed by law. *County of Ralls v. Douglass*, 105 U. S., 728, 1881; 7 Amer. & Eng. R. R. Cases, 212.

94. — The president of a railroad company is not an innocent purchaser of bonds issued in aid of the railroad by the board of supervisors of a county in violation of the constitution and the statute, which authorize their issuance only upon condition that two-

thirds of the legal voters of the county shall vote in favor thereof, if he receives them as bound to do under the charter, although he passes them to a creditor with notice, and takes them back as an individual purchaser. *Supervisors of Madison County v. Paxton*, 57 Miss., 701. 1880.

95. — An act of the legislature of the state of Illinois authorized all municipal corporations to take up and cancel outstanding bonds and other evidences of indebtedness, issued for the benefit of a certain railroad, under a prior act of the legislature, and fund the same. *Held*, that where a funded bond was regularly issued, and performance of all the essential conditions alleged in the bond, payment could not be refused a *bona fide* holder upon the ground that the original bond was issued by the county supervisors, instead of the county court, contrary to the terms of the original act. *Ballou v. Jasper County*, 3 Federal Reporter, 620. 1880.

96. — Negotiable county bonds are not within the rule of *lis pendens*. *Board v. Texas and Pacific R'y Co.*, 46 Tex., 316, 1876; 13 Amer. R'y Rep., 259; *County of Warren v. Marcy*, 97 U. S., 96, 1877; *Orleans v. Platt*, 99 id., 676, 1878; *County of Cass v. Gillett*, 100 ib., 585, 1879; *Thompson v. Perrine*, 103 ib., 806, 1880.

97. — The mere fact that some of the interest coupons were overdue at the time of plaintiff's purchase is not sufficient to put him upon inquiry or charge him with notice of any defenses to the bonds, especially where, during the time these coupons were running, the negotiation of the bonds had been restrained by an injunction which was finally dissolved. *Preble v. Board of Supervisors*, 8 Bissell (U. S. C. C.), 358. 1878.

98. — Where county bonds upon subscription to a railroad have been issued and got into circulation, all reasonable presumptions will be indulged in favor of their regularity until overcome and rebutted; and even if irregularities are shown they will not invalidate the bonds unless they go to the power of the county court to issue them. *Maxey v. Williamson County*, 72 Ill., 207. 1874.

99. — Notice to one of the trustees appointed by the company in its deed mortgaging its property, including the county bonds,

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to secure the payment of its bonds, issued and negotiated for value to third parties, does not, in a suit by the trustees to enforce the payment of the county bonds, operate to destroy the *bona fide* holding of such parties. *Comm'rs of Johnson County v. Thayer*, 94 U. S., 631. 1876.

100. — Bonds issued pursuant to legislative authority by a municipal corporation, in aid of a railroad company, are negotiable instruments. *Comm'rs of Marion County v. Clark*, 94 U. S., 278. 1876.

101. — Municipal bonds issued under an unconstitutional statute are void into whose-soever hands they may come. *Webb v. Lafayette County*, 67 Mo., 353, 1878; *Ogden v. Daviess County*, 102 U. S., 634, 1880; 5 Amer. & Eng. R. R. Cases, 145; *Anthony v. Jasper County*, 4 Dillon (U. S. C. C.), 186, 1876. See, also, *Sherrard v. Lafayette County*, 3 ib. (U. S. C. C.), 236. 1875.

102. — The certificate of the state treasurer indorsed on the bonds, as between the *bona fide* holder for value and the county, is conclusive that the bonds, which by their terms purport to be issued under the statute, and which absolutely and unconditionally covenant to pay a certain sum of money at a time and place therein named, are negotiable as the valid obligations of the county. *Lewis v. Commissioners*, 105 U. S., 739; 12 Amer. & Eng. R. R. Cases (U. S. S. C.), 615. 1881. *Contra*, *Lewis v. County Commissioners of Barbour County*, 3 Federal Reporter, 191. 1880.

103. Collateral proceedings. The recitals in the county records cannot be contradicted in a collateral proceeding: *Louisville and Nashville R. R. Co. v. State*, 8 Heiskell (Tenn.), 663, 1874; 19 Amer. R'y Rep., 107.

104. Consolidation of railways. The consolidation of the Kansas City and Cameron R. R. Co., formerly Kansas City, Galveston and Lake Superior R. R. Co., under act of March 11, 1867, "upon such terms as may be deemed just and proper," with H. and St. Jo. R. R. Co., did not operate to transfer to the latter company the franchises and unexecuted rights of former companies, so as to authorize a subscription to be made to H. and St. Jo. R. R. Co. without a vote of the people, and such subscription is void. The

effect of consolidation under the act was to work the extinction of the original company in whose favor the subscription was authorized to be made, and the power to subscribe to the original company perished with the company to which it was attached, and in such case there could be no innocent purchasers of the bonds. *State ex rel. v. Garrouthe*, 67 Mo., 445. 1878.

105. Coupons. Where a coupon is payable at a particular place, presentation for payment at that place is not a condition precedent to a recovery of judgment thereon by suit. *Smith v. Tallapoosa County*, 2 Woods (U. S. C. C.), 574. 1874.

106. — A purchaser with notice cannot recover upon detached interest coupons fraudulently issued after maturity. *Whitford v. Clark County*, 13 Federal Reporter, 644. 1882.

107. — If the bonds to which coupons are annexed are properly signed and sealed by the officers of the county, it is no defense to an action on the coupons that they are signed by only one of the county officers. *Thayer v. Montgomery County*, 3 Dillon (U. S. C. C.), 389. 1874.

108. Denomination of bonds. The court of county commissioners may cause the bonds to be executed in such denominations as may be agreed upon by it and the railroad company, provided the total amount for which they are issued does not exceed that set forth in the proposal, accepted by the vote of the qualified electors of the county. *County of Greene v. Daniel*, 102 U. S., 187, 1880; 3 Amer. & Eng. R. R. Cases, 105.

109. Discount. A municipal corporation cannot issue its bonds at a discount to pay a stock subscription. *Daviess County Court v. Howard*, 13 Bush (Ky.), 101. 1877.

110. Donations. Where a vote of the people of a county authorized the county commissioners to *subscribe* for stock in a railroad company, *held*, that such authority did not empower the commissioners to *donate* the bonds of the county to a railroad company. *Hamlin v. Meadville*, 6 Neb., 227. 1877.

111. Evidence. Bonds held valid under the evidence. *Williams v. Duck River Valley R. R. Co.*, 9 Baxter (Tenn.), 488. 1876.

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112. Fraud. Certain county bonds held, under the evidence, to have been fraudulently issued, and that defendant was not a *bona fide* holder, and the county had the right to their cancellation in equity. *Cass County v. Green*, 66 Mo., 498. 1877.

113. Injunction. Any tax-payer of the county may file a bill to enjoin the issue of illegal bonds of the county. *Winston v. Tenn. and Pacific R. R. Co.*, 1 Baxter (Tenn.), 60, 1873; 15 Amer. R'y Rep., 237.

114. — Where treasurers have in their possession moneys belonging to a county, which, unless restrained, they will pay to the holders of bonds of such county, issued without warrant of law, and void in the hands of holders, equity will interfere at the suit of the county to restrain such payment. *Mo. River, Fort Scott and Gulf R. R. Co. v. Comm'rs Miami Co.*, 12 Kans., 230. 1873.

115. Interest. County commissioners may provide for paying the interest on county bonds issued to railroad companies, although such bonds have not been registered with the auditor of state, as provided in the act of March 6, 1871. *Comm'rs of St. Louis County v. Nettleton*, 22 Minn., 356. 1876.

116. — The rate of interest not being specified in the proposition for subscription, and the charter providing for ten per cent. interest, *held*, that the bonds should bear ten per cent. interest. *People ex rel. v. Ford County*, 63 Ill., 142. 1872. See, also, *Beatlie v. Andrew County*, 56 Mo., 42. 1874.

117. Judgment. The validity of negotiable bonds of a county issued in satisfaction of judgments, in the hands of innocent holders for value, cannot be questioned by showing that the judgments were rendered upon warrants issued in excess of the constitutional limitation of five per cent., and a tax levied to pay the principal and interest of such bonds may be enforced. *Sioux City and St. Paul R. R. Co. v. Osceola County*, 52 Ia., 26. 1879.

118. — Where a county had filed a bill against a railroad company and its trustee to restrain the negotiation of bonds issued by the county to the company in aid of its construction, and the case had been decided against the county, it is estopped from setting up, against subsequent purchasers of such bonds, any grounds of illegality which

might have been set up in the bill. *Preble v. Board of Supervisors*, 8 Bissell (U. S. C. C.), 358. 1878.

119. Lien of county for bonds loaned. The act of the general assembly of Missouri, approved January 7, 1865, under which the county of St. Louis loaned its bonds to the extent of \$700,000 to the Pacific R. R. Co., create on its acceptance by the company and the county, an equitable lien or charge, in favor of the county, upon the earnings of the road, to the extent necessary to meet the interest upon the bonds as it accrues. The lien continues until the bonds shall be paid. *Ketchum v. St. Louis*, 101 U. S., 306. 1879.

120. — All purchasers of the property of the company, or of its bonds issued under a mortgage subsequently executed, are bound to take notice of that act. *Ib.*

121. Recitals. Recitals in bonds are conclusive in favor of a *bona fide* holder for value before maturity. *Westerman v. Cape Girardeau County*, 5 Dillon (U. S. C. C.), 112, 1878; *Jordan v. Cass County*, 2 ib. (U. S. C. C.), 245, 1875; *Huidekoper v. Buchanan County*, 3 ib. (U. S. C. C.), 175, 1874; *Polard v. City of Pleasant Hill*, 3 ib. (U. S. C. C.), 195, 1874; *County of Warren v. Marcy*, 97 U. S., 96, 1877; *County of Clay v. Society for Savings*, 104 U. S., 579, 1881; 5 Amer. & Eng. R. R. Cases, 170; *County of Henry v. Nicolay*, 95 U. S., 619, 1877.

122. — Where the recitals of the bonds show their illegality, there can be no recovery upon such bonds. *County of Bates v. Winters*, 97 U. S., 83. 1877.

123. Registry. Municipal bonds are not duly "issued," under the laws of Missouri, unless the same have been registered in the office of the state auditor. *Douglass v. Lincoln County*, 5 Federal Reporter, 775, 1880; *Anthony v. County of Jasper*, 101 U. S., 693, 1879.

124. Rights of stockholders. A statute authorized a county to subscribe for stock in a railway company, and to pay for it in the county's bonds, bearing interest, to be issued for that purpose, the county to make provision for the payment of interest as in case of its other bonds, and the company to receive bonds at par as cash. *Held*, that the act contemplated an exchange of the stock

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as a full equivalent for the bonds, and that the county should occupy no better position than other stockholders. *Pittsburgh and Steubenville R. R. Co. v. Allegheny County*, 79 Pa. St., 210. 1875.

125. Substituted bonds. The agent of the county and the presiding justice of the county court substituted engraved bonds, the signatures upon the coupons of which were lithographed, for printed bonds, the new bonds being of the same date and amount as the old, and the old being at the same time destroyed; there was no order of the county court for the substitution, but the county afterwards paid interest for two years, retained the certificate of stock, which was the consideration of the bonds, and entered of record other reasons than the substitution for ceasing to pay interest on the new bonds. *Held*, that the plea of *non est factum* was not sustainable as a defense to an action to recover coupons on the new bonds. *McKee v. Vernon County*, 3 Dillon (U. S. C. C.), 210. 1874.

126. Taxation. Where a statute (under which a county issued bonds, a series of which fell due annually for a period of ten years) provided that "as soon as" certain prescribed conditions were complied with, "and annually thereafter for a period of ten years," the court of county commissioners should levy and assess a tax sufficient to pay the series falling due each year, it was held that the failure to assess and collect the tax within the time prescribed did not thereafter limit or destroy the power to levy and collect the tax, but that the power existed as long as the legal obligation to pay the debt subsisted. *Commissioners' Court of Limestone Co. v. Rather*, 48 Ala., 433. 1872.

127. — The acts of June 10, 1868 (R. S., p. 134), and of March 9, 1877 (General Laws, p. 114), require that the taxes collected for the purpose of paying coupons and bonds issued under the acts be remitted to the treasurer of state, except taxes assessed, levied and collected to pay principal or interest on bonds issued prior to February 1, 1868. The county treasurer is not the disbursing officer of this fund, and holders of the coupons must apply to the state treasurer for their payment. *Morgan v. Pueblo*

and Arkansas Valley R. R. Co., 6 Colo., 478. 1883.

128. Trustee; bonds. A trustee to whom, pursuant to the terms of a proposition to vote bonds, submitted to the vote of electors, is delivered the bonds of a county, becomes the agent of both the board of county commissioners and the railway company, and as such agent is charged with the duty of holding the bonds, subject to the conditions of the contract of subscription. *Packard v. Comm'rs of Jefferson County*, 2 Colo., 338. 1874.

V. CHARTER.

129. Charter privilege. The power conferred upon counties along the route of the Louisiana and Missouri River R. R. Co. by the charter of that company of March 10, 1859, to subscribe for its stock without a vote of the people, was not taken away, as respects Callaway county, by the amendatory act of March 24, 1868. *Foster v. Callaway County*, 3 Dillon (U. S. C. C.), 200. 1874.

130. — The act of March 23, 1861, withdrew the power conferred on the county courts by the charter of the Leclède and Fort Scott R. R. Co. to subscribe to the stock of that company without first submitting the question to a vote of the people. *State ex rel. v. Dallas County Court*, 72 Mo., 329, 1880; 3 Amer. & Eng. R. R. Cases, 122.

131. Coal companies. A company is none the less a railroad company, within the meaning of the act of the general assembly of the state of Illinois, approved November 6, 1849, authorizing counties to subscribe to the capital stock of railroad companies, because its charter vests it with power to carry on, in addition to the business of such a company, that of a coal or a mining, or a furnace, or a manufacturing company. *Randolph, County of, v. Post*, 93 U. S., 502. 1876.

VI. SWAMP LANDS.

132. Rights of tax-payer. A party in interest, who permits an adjudication to be made without moving to protect his rights, until he finds it adverse to himself, in the absence of any excuse for his failure to in-

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tervene, is estopped to demand in another action that the judgment be set aside. This rule applied to a tax-payer who has not intervened in a suit between a railway company and the county in relation to a conveyance of swamp lands. *Tredway v. Sioux City and Pacific R. R. Co.*, 39 Ia., 663. 1874.

133. Grant. A railway company held to have failed to comply with the condition under which certain swamp lands had been granted to it by a county to aid in its construction. *Burlington, Cedar Rapids and Minnesota R'y Co. v. County of Benton*, 56 Ia., 89. 1881.

VII. MANDAMUS.

134. Contract. The people of a county, in their primary capacity, have no authority under the law to make a contract of subscription binding upon the county; the board of county commissioners, pursuant to the authority delegated by such vote, must enter into the contract of subscription before either the county is compellable by *mandamus* to surrender its bonds, or the railway company to deliver its stock. *People v. Comm'rs of Pueblo County*, 2 Colo., 360, 1874; 20 Amer. R'y Rep., 237.

135. County treasurer. The holder of county interest coupons is not obliged to obtain a warrant on the county treasury before demanding payment. It is the duty of the treasurer, if he has funds, to pay on presentation of the coupons at the treasury. If he refuses, he may be compelled by *mandamus*. The fact that the funds have been withdrawn by the county court since demand was made will be no defense to him; neither will the fact that the validity of the coupons is being contested by the county in another proceeding. *State ex rel. v. Craig*, 69 Mo., 565. 1879.

136. Election. Where the charter of a railroad company authorized a vote to be taken in a county on the question of subscribing to the capital stock of the company, and, in case of a majority of the legal votes being cast for subscription, imposed a duty upon the board of supervisors to make the subscription and issue the bonds of the county, the county can be compelled by

mandamus to make the subscription. In such case the board of supervisors have no discretion after the election has resulted in favor of the subscription. *People ex rel. v. Logan County*, 63 Ill., 374. 1872. But see *People v. Cass County*, 77 Ill., 438. 1875.

137. — When the law requires the trustees of a township to certify the result of an election to the county clerk, a petition for a *mandamus* to compel the county clerk to extend a tax to pay a railway donation, which alleges that a majority of the votes cast were in favor of such donation, and that that fact was certified by the town clerk to the county clerk, and that the town clerk was the proper officer to so certify, is bad on demurrer. *Springfield and Illinois South-eastern R'y Co. v. Wayne County*, 74 Ill., 27. 1874.

138. Injunction. A railway company obtained a writ of *mandamus* against a judge of the county court to compel him to issue county bonds in compliance with a subscription for stock, and before he had complied certain tax-payers brought suit in a court of equity against him, and enjoined him from issuing the bonds, but did not enjoin the company from enforcing the writ. *Held*, that the court issuing the writ of *mandamus* had the right and could not refuse to compel obedience to it, and the injunction interposed no legal obstacle to its enforcement. *Cumberland and Ohio R. R. Co. v. Washington County Court*, 10 Bush (Ky.), 564. 1874.

139. Proceedings to compel levy of tax. The act of 1872, empowering the auditor to make the levy, having been repealed by act of 1874, pending this appeal, terminates all proceedings against the auditor. And the company having failed to show that the neglect or refusal of the board to assess the tax was wilful and without good cause, a sufficient case, in the absence of the repeal of the law, is not made out to justify the auditor in making the assessment. *Musgrove v. Vicksburg and Nashville R. R. Co.*, 50 Miss., 677. 1874.

140. — The county commissioners of a county in Alabama who were required by statute to levy and assess a special tax to meet the semi-annual interest falling due upon certain bonds of the county, disre-

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garded their duty when a valid and sufficient levy of a tax had been made, and everything done to enable the collector to proceed; and the governor of the state was notified of the failure, if such were the case, of the collector to give bond for the collection of any taxes other than those levied for general purposes. The commissioners, being adjudged to be in contempt of that command, and imprisoned therefor by order of the circuit court, the supreme court, upon a writ of *habeas corpus*, directed that they be discharged. *Ex parte Rowland*, 104 U. S., 604. 1881.

141. — The extraordinary indebtedness incurred by a county in issuing bonds to pay a railroad subscription is not one of the "expenses of the county" within the meaning of Wagn. Stat., § 165, p. 1193, and cannot be paid out of the fund raised by taxation under that section. *State ex rel. v. Macon County Court*, 68 Mo., 29. 1878. But see *United States v. Clark County*, 96 U. S., 211. 1877.

142. Process. A county in Kansas is a body politic, whose powers are exercised by a board of county commissioners, and when it is sued, process must be served upon the clerk of the board. Where, therefore, a *mandamus* was awarded against it, service of a copy of the writ upon the clerk is service upon the corporation, and the members of the board who fail to perform the required act are subject to be punished for contempt. *Commissioners v. Sellew*, 99 U. S., 624. 1878.

143. Remedy. *Mandamus* to compel the issuance of county bonds and levy of taxes considered, and held proper. *Santa Cruz R. Co. v. Supervisors of Santa Cruz County*, 62 Cal., 239, 1882; *Atchison, Topeka and Santa Fe R. R. Co. v. Comm'rs Jefferson Co.*, 12 Kans., 127, 1873; *Humphreys County v. McAdoo*, 7 Heiskell (Tenn.), 585, 1872; *Commissioners' Court of Limestone County v. Rather*, 48 Ala., 433, 1872.

VIII. TAXATION.

144. County treasurer. Moneys collected by the county treasurer by way of taxes to pay the interest on railroad bonds issued by the county under the general law approved

December 31, 1868, by which counties, cities and towns were authorized to subscribe to the capital stock of railroad companies (Sess. Acts 1868, p. 514), are moneys belonging to the county, which it is his duty to receive, keep and disburse, according to law; and the sureties on his official bond are liable for any default in regard to such moneys. *Lewis v. Lee County*, 66 Ala., 480. 1880.

145. General funds. A county subscribed for stock and issued bonds in payment therefor, pursuant to a law which authorized a levy of a special tax to pay them, "not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year," but contained no provision that only the fund so derived should be applied to their payment. *Held*, that the bonds are debts of the county as fully as any other of its liabilities, and that for any balance remaining due on account of principal or interest after the application thereto of the proceeds of such tax the holders of them are entitled to payment out of the general funds of the county. *United States v. County of Clark*, 96 U. S., 211, 1877; *United States v. County of Macon*, 99 ib., 582, 1878.

146. Repeal of statute. Laws in force when bonds are issued, and which provide for taxation to pay them, enter into the contract between the bondholder and the state, and as against the former such laws cannot be repealed. Otherwise as to acts enlarging the taxing power, passed after the issue of such bonds. *United States ex rel. v. Howard County Court*, 2 Federal Reporter, 1. 1880.

147. Tax receipts in payment of passenger fares; *mandamus*. A holder of three tax receipts of the tax collector of Madison county, countersigned by the county court clerk, not issued to holder nor indorsed to him, tendered these tax receipts to the Mobile and Ohio R. R. Co., in payment of a passenger ticket to Mobile from Jackson, Tenn., and the company refusing to receive them in payment of the ticket, the holder asked for *mandamus* to compel the company to take the tax receipts and issue to him the ticket therefor. *Held*, the company, having made a contract to take such receipts for freight and passenger charges, by having received and expended the subscription of Madison county for \$250,000, which was

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made under the act of the legislature, containing a provision requiring railroads taking subscriptions under it to take the tax receipts from the tax-payers in payment for freight and passenger charges, the writ of *mandamus* is a proper remedy to enforce a compliance upon the part of the railroad by taking such tax receipts and issuing a passenger ticket therefor. *Mobile and Ohio R. R. Co. v. Wisdom*, 5 Heiskell (Tenn.), 125, 1371; 1 Amer. R'y Rep., 107.

148. — The legislature, in saying that tax receipts or certificates, issued to the taxpayer under the act authorizing county subscriptions, "may be traded, assigned or transferred, and shall be receivable in payment of either freight or passage on any road on which such subscription may have been expended," intended to make these receipts a kind of local currency, and this object was accomplished by making them transferable or assignable, either by written indorsement or by mere delivery. *Ib.*

149. — The receipts, though dated 1854, and not demanded to be received until 1869, not being by law demandable until one year after completion of the railroad, and the date of the completion not appearing, the court cannot assume that the petitioner has delayed unreasonably long the assertion of his rights. *Ib.*

IX. MISCELLANEOUS.

150. Action to annul proceedings. In a suit to annul the proceedings authorizing the issuance of county bonds the bondholders are necessary parties. *Board v. Texas and Pacific R'y Co.*, 46 Tex., 316, 1876; 13 Amer. R'y Rep., 259. As to proceedings in case of fraud, see *Leavenworth, Lawrence and Galveston R. R. Co. v. Comm'rs of Douglas Co.*, 18 Kans., 169, 1877; 15 Amer. R'y Rep., 256.

151. Bond to refund tax. A bond was executed by the officers of a railway company, as obligors, to certain tax-payers, as obligees, reciting that the board of commissioners of the county wherein such tax-payers resided had ordered a special tax to be levied on the property of the obligees and immediately collected, to aid in the construction of the company's line, and that one of said tax-payers, for himself and the

others, had appealed from such order, which would occasion delay and injury to the interests of the obligors, and stipulating that, if such tax-payer would "dismiss his said appeal, and thereby permit" the collection of such tax, and if such obligees, naming them, would "pay the special tax so ordered to be collected by said board, for the purpose aforesaid," the obligors would refund to such tax-payers, on or before a day named, "severally the taxes they may severally pay for said purpose into the county treasury," if such railway was not completed to a certain point in such county by said day. The complaint, in an action on such bond by one of such tax-payers, failed to allege that the entire special tax had been paid by the obligees. *Held*, that the complaint was defective for this reason, as the bond contemplated the payment of the whole of such tax. *Hicks v. Zion*, 58 Ind., 548. 1877.

152. Change of organization. Although a subscriber for stock in a company is released from his subscription by a subsequent alteration of the organization or purposes of the company, this is only when such alteration is a fundamental one, and when, in addition, it is not provided for or contemplated by either the charter itself or the general laws of the state. *Nugent v. The Supervisors*, 19 Wallace, 241, 1873; *Thomas v. Scotland County*, 3 Dillon (U. S. C. C.), 7, 1874; *Washburn v. Cass County*, 3 Dillon (U. S. C. C.), 251, 1875.

153. Division of counties. It is competent for the legislature in dividing a county to provide for a *pro rata* division of the liability of the old county upon railway aid bonds. *Canova v. Baker County*, 18 Fla., 512. 1882.

154. Issue of stock. By the act approved December 17, 1872, railway companies which had received aid from counties or townships by taxation were required to issue stock to the parties who had paid the taxes, to the amount by them respectively paid; and the act provided that the issue of stock to a taxpayer should operate to cancel *pro tanto* the stock held by any county or township under the provisions of the statute of May 12, 1869. Where, pursuant to the latter act, the board of commissioners of a certain county had

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levied a tax in aid of a certain railway, and had subscribed, and, with the proceeds of the tax, had paid for a certain number of shares of the capital stock of the company, and certificates of stock therefor had been issued to the county, *held*, that the act of December 17, 1872, so far as it provides for divesting counties of stock already subscribed and paid for at the time of the passage of the act, is not unconstitutional. *Lucas v. Commissioners of Tippecanoe County*, 44 Ind., 524. 1873.

155. — A county, in accordance with a vote of a duly authorized election, subscribed for \$100,000 of the stock of a railway company, payment of which was to be made in bonds of the county; the articles of incorporation of the company provided that, if the instalments of subscriptions were not paid when called for, the amount due should be collected by suit, or the stock with all payments made forfeited, or the stock sold at auction; the by-laws provided that certificates of stock should be issued if desired, upon payment of the first instalment, and that the amount of the instalment should be credited thereon; it was the practice of the company to give, in addition to these, receipts for subsequent payments, and paid up certificates only when all the payments had been made; the county having issued its bonds for \$30,000, and refused to issue more, and brought its action to compel the company to issue stock certificates for that amount, it was held that the contract was an entire and indivisible one. *Wapello County v. Burlington and Mo. River R. R. Co.*, 44 Ia., 585. 1876.

156. Offers by municipal authorities. Counties having no power to contract with a railway company to subscribe to its capital stock, except when authorized by a vote of the people, it follows that the county authorities cannot hold out any offer to such a company, prior to any vote upon which the company has a right to rely. *People v. Cass County*, 77 Ill., 438. 1875.

157. Preferred stock. An act of the legislature authorized the issue of bonds by a county "in subscription for preferred stock" of a railway company, and the act provided that the county "shall receive from the company preferred stock to the amount of the said bonds, which preferred stock shall bear

interest at the rate of seven per cent. per annum." *Held*, that this preferred stock meant capital stock, different from other capital stock only in the preference given to it in the matter of dividends. *State ex rel. v. Cheraw and Chester R. R. Co.*, 16 So. Car., 524, 1881; 9 Amer. & Eng. R. R. Cases, 631.

158. Rights of creditors of corporation. The creditors of an insolvent corporation may enforce a subscription made to the capital stock of the company for a county. *County of Morgan v. Allen*, 103 U. S., 498, 1880; 3 Amer. & Eng. R. R. Cases, 92. See, also, *Morgan County v. Thomas*, 76 Ill., 120. 1875.

159. — A., an alleged creditor of a railway company, whose claim had not been established at law, filed his bill against the latter, averring it to be insolvent, and against a county, a debtor of the company, praying that the debt due from the county be applied to the payment of that claim. There being no assignment to A. by the company of his debt against the county, and no lien upon the fund in the hands of the latter, *held*, that the bill could not be sustained. *Smith v. Railroad Co.*, 99 U. S., 398. 1878.

160. Statutes. The statutes in relation to subscriptions in aid of railways construed. *Indianapolis, Peru and Chicago R'y Co. v. Commissioners of Tipton County*, 70 Ind., 385. 1880. See, also, *City of Kokomo v. The State*, 57 Ind., 152. 1877.

161. Transfer. Tax-payers are concluded by the act of the county court, and by their own failure to assert, by appropriate proceedings, their legal rights, if any they ever had, to prevent the transfer of an original subscription from one company to the other. *County of Ray v. Vansycle*, 96 U. S., 675. 1877. As to transfer of stock see *Spurlock v. Pacific R. R. Co.*, 61 Mo., 319. 1875.

SUBSCRIPTIONS BY INDIVIDUALS.

See APPEALS; ASSIGNMENT FOR THE BENEFIT OF CREDITORS; CHARTER; CONSOLIDATION; CONVEYANCE; CREDITOR'S BILL; DAMAGES; DOMICILE; ESTOPPEL; EVIDENCE; GIFT; LIMITATIONS; SET-OFF; STAMPS; STOCK AND STOCKHOLDERS.

I. CONTRACT OF SUBSCRIPTION.

II. CONDITIONAL SUBSCRIPTIONS.

Contract of Subscription.

III. CONSOLIDATION.

IV. EVIDENCE.

V. ASSESSMENTS.

VI. FRAUD.

VII. MISCELLANEOUS.

I. CONTRACT OF SUBSCRIPTION.

1. **Acceptance by corporation.** Demand of payment and action for its recovery are not evidence of acceptance where a subscription is otherwise invalid. *Northern Central Michigan R. R. Co. v. Eslow*, 40 Mich., 222. 1879.

2. — It must appear that the subscription has been accepted. *Ib.*

3. **Agency.** In a suit against A. upon a stock subscription, evidence was held competent to show that A. assumed to act in taking subscriptions from other persons, and that he took his own and other subscriptions; such evidence was admissible to show that he was bound, although he afterwards erased his name before turning the subscription paper over to the company. *Railroad Co. v. White*, 10 So. Car., 155. 1878.

4. **Agreement by corporation with a contractor.** A subscriber to the stock of a railway company, which is authorized to assess its stock when a given number of shares has been taken, cannot object that, after his own liability to assessment has become fixed by the required number of shares being subscribed, the corporation has made a contract by which the builder of the road is to receive a portion of his pay in stock, the contractor having subscribed for that amount of stock, and the contract having been made in good faith by the parties and honestly performed by the contractor. *Boston, Barre and Gardner R. R. Co. v. Wellington*, 113 Mass., 79. 1873.

5. **Agreement not to pay subscription.** Where G. gave his check for ten per cent. of his subscription to stock in a railway company, under an agreement with A., who solicited the subscription, that the check need not be paid, held, that, in the absence of authority for A. to make such an agreement, the check was valid, and could be enforced. *Syracuse, Phoenix and Oswego R. R. Co. v. Gere*, 6 Thompson & Cook (N. Y. Supreme Ct.), 636; 4 Hun (N. Y.), 392. 1875.

6. **Alterations.** Where one having possession of an agreement to take shares in the stock of a corporation, after subscribing in good faith for shares of such stock, induces others to subscribe on the faith of his subscription, and subsequently, without the knowledge of the other subscribers, alters the paper by reducing the number of his shares, and delivers the instrument in that condition to the secretary, who is also a director of the company, this will not affect the liability of one thus induced to subscribe, although, at the time of such delivery, the person making the alteration explains the same to the secretary, who makes no objection thereto. *Jewett v. Valley R'y Co.*, 34 Ohio St., 601, 1878; 21 Amer. R'y Rep., 21.

7. — In an action upon a subscription, which after its execution had been materially altered without the knowledge or consent of the maker, and the execution of the contract is denied, the plaintiff cannot recover the amount due on the original subscription, without showing that the alteration was not fraudulently made. *Berry v. Marietta, Pittsburgh and Cleveland R'y Co.*, 26 Ohio St., 673, 1875; 11 Amer. R'y Rep., 259.

8. — In a suit on a contract of subscription, where the defense was an alteration without defendant's consent, of the amount subscribed, the *onus* would rest on plaintiff to prove that defendant placed opposite his name, or consented to have placed, the sum sued for. *Workman v. Campbell*, 57 Mo., 53. 1874.

9. — Where the amount of an original subscription was altered by a third party, a subsequent ratification would be equivalent to a previous authorization of the change. *Ib.*

10. — The defendant signed a printed paper whereby he agreed to take one share of the capital stock of a railroad company thereafter to be organized, the route of which was described in the paper. Other printed papers, *fac similes* of the one signed by the defendant, were signed by other persons, all of which papers afterwards were delivered to the persons proposed in them as directors with the intention that they should be used in organizing the company. There-

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after the persons having the papers in charge cut from all of them except one the signatures attached thereto, pasted such signatures upon the remaining paper and filed it, with the requisite affidavit annexed thereto, in the office of the secretary of state for the purpose of organizing the corporation. In an action brought by the corporation to recover the unpaid balance of the defendant's subscription, *held*, that as the defendant's liability was in no way changed or affected by the mutilation of the paper signed by him, and as the paper was not mutilated by the corporation or by any person for whose acts it was responsible (the directors in what they did having acted as agents of the subscribers), the defendant was not released from his liability upon the agreement. *Sedus Bay and Corning R. R. Co. v. Hamlin*, 24 Hun (N. Y.), 390. 1881.

11. **Amendment to charter.** The amendment of the charter of a corporation, without materially changing its purposes, does not have the effect of releasing subscribers to its capital stock. *Peoria and Rock Island R. R. Co. v. Preston*, 35 Ia., 115; 5 Amer. R'y Rep., 7, 1872; *Bucksport and Bangor R. R. Co. v. Buck*, 68 Me., 81, 1878; 19 Amer. R'y Rep., 10; *Cross v. Peach Bottom R'y Co.*, 90 Pa. St., 392, 1879; 1 Amer. & Eng. R. R. Cases, 366.

12. — The original contract between the stockholders of a railroad company, as contained in the charter, cannot be materially or essentially altered by an amended charter so as to bind the subscribers thereto without their consent. *May v. Memphis Branch R. R. Co.*, 48 Ga., 109, 1873; 11 Amer. R'y Rep., 395.

13. — By the supplement to an act incorporating an iron and railway company, the name of the company was changed, authority was given to purchase and cancel the original stock, and the main purpose of the new corporation was to be that of a general transportation company. *Held*, that it was a fair question for the jury whether a combination to change the fundamental purpose of the original act by the supplement and divert the stock of an original subscriber to this new end was not a fraud upon him, and if they so found, an action for the amount of this original subscription could not be sus-

tained. *Southern Pennsylvania Iron and R. R. Co. v. Stevens*, 87 Pa. St., 190. 1878.

14. — In a suit by the C. R'y Co. to recover subscriptions to its stock, the affidavit of defense averred that a railroad company had been chartered to make a road, one terminus to be Pittsburgh, the other Washington; that the railroad was sold under a mortgage, and the purchasers were chartered under the act of April 8, 1861, as the C. R'y Co., and defendant subscribed to the stock of that company; the plaintiff had completed its line, but to neither of the terminal points designated in the charter of the railroad company, and had abandoned the construction of the road towards Pittsburgh, stopping eight miles short of it, and also two thousand feet distant from Washington. *Held*, *prima facie* a good defense. *Chartiers R'y Co. v. Hodgins*, 77 Pa. St., 187. 1874.

15. **Amount necessary to be subscribed.** Where the charter of a railway company provided that the minimum capital should be five thousand shares of \$50 each, with the privilege of increasing, and that it might be subscribed for or disposed of "in whole or in part, from time to time, as the board of directors may think proper," and empowered the company to act as a corporation upon a subscription of ten per centum of its capital stock and payment of \$1 per share, it is not necessary that the whole amount of the minimum capital should be subscribed to enable the company to recover from subscribers. *Hanover Junction, etc., R. R. Co. v. Haldeman*, 82 Pa. St., 36, 1876; 15 Amer. R'y Rep., 442. See, also, *Warwick R. R. Co. v. Cady*, 11 R. I., 131. 1875.

16. — Where a railway corporation was attempted to be formed under the act of March 1, 1872, and its capital stock fixed in its articles at \$1,000,000, and the shares of capital stock fixed at ten thousand, of \$100 each, it was held that, until the whole amount had been subscribed, the corporation could have no legal existence, and that, until the whole stock was subscribed, the directors could not make any call or assessment on the shares of those who had subscribed. *Allman v. Havana, Rantoul and Eastern R. R. Co.*, 83 Ill., 521, 1878; 21 Amer. R'y Rep., 347.

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17. Assignment. Where the subscription is to an existing corporation, its successors or assigns, the completion of the road by its successor, to whom it had assigned all its franchises and property, including such subscription, will enable the latter to enforce the promise in its own name; the building and opening of the road is the essence of the agreement. *Michigan, Midland and Canada R. R. Co. v. Bacon*, 33 Mich., 466. 1876.

18. — A railroad corporation cannot, under the statute, purchase the subscription notes or obligations given by stockholders to another railroad corporation, and enforce them against the subscribers; and the fact that one railroad company has bought the road-bed of another, intending to complete the road, gives the purchaser no right to purchase the vendor's stock subscriptions and enforce them against the subscribers. *West End R. R. Co. v. Dameron*, 4 Mo. App., 414. 1877.

19. — Defendant executed a note, payable *on demand*, for money loaned by the payee, with the understanding that such note should stand against assessments on payee's subscription to the capital stock of defendant, and be delivered up when the stock was issued. Assessments large enough to cover the note were made. Afterwards, and three or four months after its date, the note was transferred to the plaintiff as security for a loan. The difference between the amount of the note and the assessments was paid in cash; and the stock was delivered after the plaintiff took the note. *Held*, that in a suit brought by the holder of such a note against defendant it was subject to all defenses that it would have been subject to in the hands of the original parties, as it must be considered as having been taken by the plaintiff after maturity, being payable on demand, under circumstances that should have put him upon inquiry, and that parol testimony was admissible to show the understanding between the original parties at the time the note was given. *Paine v. Central Vermont R. R. Co.*, 14 Federal Reporter, 269. 1882.

20. Before organization. An agreement to take stock in a company not yet organized is valid and may be enforced by the company upon its organization. *European and*

North American Ry Co. v. McLeod, 3 Pugsley (New Brunswick), 3, 1875; *Stuart v. Valley R. R. Co.*, 32 Grattan (Va.), 146, 1879; *Peninsular Ry Co. v. Duncan*, 28 Mich., 130, 1873; 12 Amer. Ry Rep., 243.

21. — The signing of an agreement to take stock in a railroad corporation before the incorporation thereof does not constitute the subscriber a stockholder in the sense to make him liable for assessments subsequently levied. *Monterey, etc., R. R. Co. v. Hildreth*, 53 Cal., 123. 1878.

22. — The prospectus of an intended company contained a list of "provisional directors," and announced that applications for shares were to be made to "the provisional committee of management." A committee of management, with a chairman, was subsequently appointed by a resolution of the provisional committee, and thenceforward managed the affairs of the company. Defendant made an application for shares in the form prescribed, which contained a promise to pay deposits, and received a letter of allotment from the secretary of the company, stating that scrip certificates would be delivered in exchange for such letter. At the foot of the letter was a receipt for deposits signed by one of the company's bankers. The form of the receipt purported that the amount payable on deposits had been received "on account of the provisional committee." *Held*, that the defendant's contract was made with the provisional committee at large, and that the committee of management could not maintain an action for the non-payment. *Woolmer v. Toby*, 10 Adolphus & Ellis (N. S.), 691; 59 E. C. L., 690. 1847.

23. By-laws. Under the railway law of 1871 (Comp. L. 1871, § 2405) subscriptions to the capital stock of a railway company could only be made "in the manner to be provided by its by-laws." A subscription made before any by-laws were adopted gave no rights to either party; and where there had been nothing done to create an estoppel, the subscriber was held not bound by a by-law made afterwards and adopting his subscription. *Carlisle v. Saginaw Valley and St. Louis R. R. Co.*, 27 Mich., 315, 1873; 10 Amer. Ry Rep., 283.

24. Charter. The subscriber to stock is bound by the articles of association, and can-

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not allege ignorance of their contents. *Kisch v. Central Venezuela R'y Co.*, 3 De Gex, Jones & Smith, 122; 68 Eng. Ch., 122. 1865.

25. Construction. Certain special contracts of subscription construed. *Bucksport and Bangor R. R. Co. v. Buck*, 65 Me., 536, 1876; 9 Amer. R'y Rep., 293; *St. Paul, Stillwater and Taylor's Falls R. R. Co. v. Robins*, 23 Minn., 439, 1877; *Minneapolis and St. Louis R'y Co. v. Morrison*, 23 ib., 308, 1877; *Waukon and Mississippi R. R. Co. v. Dwyer*, 49 Ia., 121, 1878; *Bucher v. Dillsburg and Mechanicsburg R. R. Co.*, 76 Pa. St., 306, 1874; *Van Allen v. Ill. Central R. R. Co.*, 4 Abbott's Court of Appeal Decisions (N. Y.), 443, 1886; *Buffalo and Jamestown R. R. Co. v. Gifford*, 87 N. Y., 294, 1882; 4 Amer. & Eng. R. R. Cases, 337; *Buffalo and Jamestown R. R. Co. v. Clark*, 22 Hun (N. Y.), 359, 1880; affirmed, *Same v. Same*, 87 N. Y., 632, 1882; *Stuart v. Valley R. R. Co.*, 32 Grattan (Va.), 146, 1879.

26. Convertible notes. A contract for the subscription of loan notes convertible into stock of a railway corporation construed. *Campbell v. London and Brighton R. R. Co.*, 5 Hare (Eng. Ch.), 519. 1846.

27. Correspondence. The defendant applied by letter to a projected railway company for one hundred shares, undertaking to accept the same, or any less number, and to pay the deposits. He received a letter of allotment for sixty shares. This letter was headed "Not transferable." In an action by the company against the defendant to recover the amount of the deposits, *held*, that there was no binding contract, the proposal being absolute, and the acceptance conditional, it containing a qualification that the contract was not to be transferable. *Duke v. Andrews*, 5 Eng. R. R. & Canal Cases, 496. 1848.

28. Delivery. In a suit in the name of a corporation for the use and benefit of a third person, upon a subscription, where it appeared that the paper was originally got up by a voluntary movement among citizens, and its actual delivery to, or acceptance by, the company was not shown, it is error to rule that the production of the instrument at the trial is evidence of its delivery to the plaintiff. *Parker v. Northern Central Michigan R. R. Co.*, 33 Mich., 23. 1875.

29. — G. was active in soliciting subscriptions for the building of a railway. He took a book from the agent of the company, subscribed therein himself and persuaded others to subscribe, and kept the book about six months. Because of some difference with the agent of the company about the payment for his services, he cut his name out of the book and returned it to the company. In a suit by the latter for the amount of his subscription, *held*, that he had perfected a contract with the company, and he was just as much bound as if he had left his name in the book. *Greer v. Chartiers R'y Co.*, 96 Pa. St., 391. 1880.

30. Dissolution; successor. Defendant and others signed the following instrument: "We, the undersigned citizens of Unionville and vicinity, pledge ourselves to subscribe for and take stock in and for the construction of the Lake Ontario Shore Railroad to the amount set opposite our names respectively, on condition said road be located and built through or north of the village of Unionville, in Parma." *Held*, that it was not a subscription to plaintiff's capital; that it was in no sense a party to the agreement, and could not maintain an action thereon, the plaintiff being a new and different company, though owning the same railway as that named in the agreement. *Lake Ontario Shore R. R. Co. v. Curtiss*, 80 N. Y., 219, 1880; 1 Amer. & Eng. R. R. Cases, 362.

31. — It appeared that plaintiff's road and property, with its rights and franchises, were sold under a mortgage, that a new company was organized which became the owner thereof, and that the road was afterwards built by the new company; plaintiff did not offer to furnish defendant with stock in the new road. *Held*, that these facts did not aid the plaintiff; that plaintiff, although not formally dissolved, had in fact ceased to exist for any practical purpose; that its certificate of stock, if now issued, would not represent the road, or anything else of value, and so that defendant would receive no consideration for his subscription, if made, or for his money, if paid. *Ib.*

32. Escrow. Appellee subscribed to the capital stock of appellant, and delivered such subscription to a director of the company, in escrow, not to be delivered to the company

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except on condition that the county of Kendall failed to vote a subscription to the company. *Held*, in the absence of proof that Kendall county had failed to vote a subscription to the company, there was no delivery to the company, and no recovery could be had against appellee. *Ottawa, Oswego and Fox River Valley R. R. Co. v. Hall*, 1 Bradwell (Ill.), 612. 1878.

33. — That the committee, to whom the subscription list had been intrusted, with directions to turn it over to the company whenever they became satisfied that the latter had complied with its conditions, did in fact deliver it in the exercise of their discretion, does not render the contract binding upon the subscribers. *Davenport and St. Paul R. R. Co. v. O'Connor*, 40 Ia., 477. 1875.

34. *Estoppel*. An act of parliament (6 Geo. 4, c. xxx), to enable a company to form a railway, prescribed the form of action against the proprietors for calls, and enacted that it should only be necessary to prove that the defendant was a proprietor, and that the calls had been made in pursuance of the act; it also recited that a sum of money had been subscribed by the proprietors, under a contract binding their heirs; whereas, in fact, that sum had not been subscribed, and no contract under seal had been executed by the proprietors. *Held*, that a defendant who, with a knowledge of the misrecital, had paid previous calls, and acted as a proprietor, was estopped from questioning the validity of the act, upon the ground of the misrecital; and that it was not incumbent upon the plaintiff to show that the defendant had executed a contract under seal, in order to prove that he was a proprietor within the meaning of the act. *Cromford and High Peak R'y Co. v. Lacey*, 3 Younge & Jervis (Exchequer), 80. 1829.

35. — The defendant signed, with others, a subscription which contained a condition that no assessment of over two per cent. should be laid upon the stock subscribed until the whole sum which should be estimated as necessary to complete the railway should have been subscribed. The defendant was active in soliciting subscriptions; was present and acted at stockholders' meeting for the election of directors, and was

himself elected a director, and accepted the office; and was present and acted at different meetings of the directors, at which a surveyor was appointed to locate the line, by-laws were adopted, and resolutions passed for advertising for proposals for constructing the road. He was also present, but it did not appear that he acted, at a meeting at which an assessment of forty per cent. was laid upon the subscribed stock, and a report made by the president and accepted, that he and the secretary had signed a contract for the construction of the road, and that the contractors had commenced work. At one meeting of the directors, at which the defendant was not present, the president and secretary had been authorized to sign the contract referred to, and an assessment of fifteen per cent. had been levied upon the stock, but the defendant was present at the next meeting at which the record of that meeting was read and approved. *Held*, that the defendant was not estopped by any of these facts from showing that the condition of the subscription had not been complied with, and that it was not binding upon him. *Ridgefield and New York R. R. Co. v. Reynolds*, 46 Conn., 375. 1878. But see *York Tramways Co. v. Willows*, 6 Amer. & Eng. R. R. Cases (Eng., Q. B. D.), 492. 1881.

36. — If a subscriber acquiesce in the progress of the work by payment of his subscription, assessed or otherwise, he cannot afterwards object, either to the failure originally to get subscribers to the whole stock or to a material amendment of the charter; but the fact that he merely pays his assessments to have the route surveyed is not sufficient to show such acquiescence. *Memphis Branch R. R. Co. v. Sullivan*, 57 Ga., 240. 1876.

37. *Extension of line*. If a statute in force at the time of a subscription authorizes an extension of the line of the railroad, the subsequent exercise of such power by the company will not affect the subscription. *Jewett v. Valley R'y Co.*, 34 Ohio St., 601, 1878; 21 Amer. R'y Rep., 21.

38. *Extension of time*. The consideration of a written contract for the payment of money was the construction of a railway to Leon by July 1, 1872. On the back of the

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instrument was the following written agreement: "I hereby agree to extend the time of completing the within road to Leon to September 1, 1872, and this note shall have the same value as if the said road is completed by July 1, 1872." *Held*, that the effect of this written agreement was the creation of a new contract, differing from the first only in date of performance, and that it was sustained by a good and valid consideration. *Burlington and Mo. River R. R. Co. v. Penney*, 38 Ia., 255. 1874.

39. Illegal increase of stock. It being stipulated in the note that the consideration therefor was to be capital stock of the railway company, which was to be limited to a certain specified amount, an illegal increase thereof would constitute a valid defense to the note, if such illegal stock was not distinguishable from the legal. *Merrill v. Gamble*, 46 Ia., 615, 1877; *Merrill v. Beaver*, ib., 646, 1877.

40. — But where the illegal stock can be distinguished from the legal stock, the issue of such illegal stock constitutes no defense to the subscription. *Merrill v. Beaver*, 50 Ia., 404. 1879.

41. Infancy. To a declaration in debt for calls, charging the defendant as the holder of shares under a railway act incorporated with Stat. 8 and 9 Vict., c. 16, it is no answer to plead that defendant, when he became indebted, was an infant; or that defendant is sued as the registered holder of shares, that when he became so registered he was an infant, and that he has not, since he attained his age, been registered anew, or ratified the original registration, or held the shares except as such registered holder as before mentioned. For (per Lord Denman, C. J., and Patterson, J.), by the express wording of Stat. 8 and 9 Vict., c. 16, an infant is liable for calls. At all events (per Coleridge and Erle, JJ.), if he is sued after obtaining his age, and still holds the shares; for such holding is a ratification. *Cork and Bandon R'y Co., v. Cazenove*, 10 Adolphus & Ellis (N. S.), 935; 59 E. C. L., 934. 1847.

42. Interest. A subscriber to the capital stock of a corporation, who has failed to pay for the shares as required by the terms of his subscription, is chargeable with interest from the time of the default, and cannot

compel the company to issue the stock until both the principal and the interest are paid. *Gould v. Town of Oneonta*, 71 N. Y., 298. 1877.

43. Married women. When a married woman subscribes to capital stock of a railway company, by which she agrees to take and pay for a certain number of shares of said stock, but makes default in payment, and action is brought to charge her separate property with the amount of such subscription, *held*, that in the absence of any proof that either party dealt on the credit of such property, equity will not imply or enforce a charge against the same. *Rice v. Railroad Co.*, 32 Ohio St., 380. 1877. But see, *contra*, *Williams v. Urmston*, 35 ib., 296, 1880, overruling same.

44. Mortgage. Where a party subscribing to the capital stock of a railroad company executed his note for his subscription, secured by mortgage on real estate, and the company at the same time guarantied to him that his annual dividends should pay the interest on the note, and that, in consideration of the transfer of those dividends, the company would pay the interest on the same, and indemnify the maker against the payment of any interest, and against the payment of the principal also; and it happened that there were no dividends, and the stock was worthless at the maturity of the note, *held*, that, as against the company, on bill to foreclose, the facts could be set up as a defense, on the ground of recoupment or equitable set-off, and that the same rule applied to a purchaser of the note and mortgage before maturity on bill by him to foreclose. *Hasckell v. Brown*, 65 Ill., 29. 1872.

45. Option. A railroad company having resolved, on the 25th of July, to create a certain number of new shares, gave, at the same time, an option to every registered proprietor to take a certain number of those shares, provided he declared such option on or before the 10th of August following. One of the registered proprietors, residing at Naples, was not apprised of the resolutions until the 12th of August. But on that day he wrote to the secretary of the company declaring his option to take his proportion of the new shares. *Held*, that the time fixed by the resolutions was final, and that the

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plaintiff's declaration was too late. *Pearson v. London and Croydon R. R. Co.*, 14 Simons (Eng. Ch.), 541. 1845.

46. Organization of company. By § 1 of an act of incorporation, a railway company was declared to "be a body politic and corporate;" and in a subsequent section it was enacted "that when \$100,000 shall have been subscribed, and \$1 on each share shall have been paid in, the said company may organize and proceed to work." *Held*, that this requirement was sufficiently complied with when \$100,000 was subscribed, and a sum in gross paid in equal to \$1 upon every share subscribed. *Held*, further, that a failure to comply strictly with these requirements would not affect the corporate existence, but would be an irregularity only, which could not defeat the right of the corporation to recover a stock subscription. *S. and A. R. R. Co. v. Ezell*, 14 So. Car., 281. 1880.

47. — A subscriber to the stock of a railway company cannot set up in defense to an action upon his subscription any mere irregularity in the organization of the company, provided it be a corporation *de facto*, proceeding without interference of the state authorities in the construction and completion and maintenance of its road. *Monroe v. Fort Wayne, Jackson and Saginaw R. R. Co.*, 28 Mich., 272, 1873; 12 Amer. R'y Rep., 273. See, also, *Montpelier and Wells River R. R. Co. v. Langdon*, 46 Vt., 284, 1873; *Cayuga Lake R. R. Co. v. Kyle*, 64 N. Y., 185, 1876.

48. Partnership. The evidence reviewed in case of a subscription by a partnership, and the power of a partner to make a stock subscription considered. *Ottawa, Oswego and Fox River Valley R. R. Co. v. McMath*, 4 Bradwell (Ill.), 356. 1879.

49. Payable in land. A complaint alleged the subscription by defendant to the stock of plaintiff's company of fifty acres of land, and a refusal to convey, and demanded payment in money for the land so subscribed, without alleging a promise to pay money or a previous demand for money. *Held*, on demurrer, to state facts sufficient to constitute a cause of action. *Cheraw and Chester R. R. Co. v. Garland*, 14 So. Car., 63. 1880.

50. Payment of first instalment. Payment of five per cent. on the subscription, or something equivalent in effect, is necessary to entitle the subscriber to participate in the organization, or to make the subscription effectual; but if the requisite amount is paid in by the other subscribers, credit might be given for this first payment so as to entitle the subscriber to all the privilege of the rest. *Peninsular R'y Co. v. Duncan*, 28 Mich., 130, 1873; 12 Amer. R'y Rep., 248.

51. — A subscriber to the stock of a corporation cannot escape his liability to pay his subscription on the ground that he did not pay the sum required to be paid by the statute at the time he subscribed. *Pittsburgh, Wheeling and Kentucky R. R. Co. v. Applegate*, 21 W. Va., 172, 1882; *Minneapolis and St. Louis R'y Co. v. Bassett*, 20 Minn., 535, 1874.

52. — The act of February 19, 1849, regulating railway companies, provides that where subscriptions are made to the stock of such company previous to the issue of letters patent, no subscription shall be valid unless the party making the same shall, at the time of subscribing, pay \$5 on each and every share for the use of the company. *Held*, that giving a note for a subscription was not a payment within the meaning of the statute. *Held*, further, that such a subscriber, who had taken no other part in the affairs of the corporation, was not estopped from setting up the absence of such payment as a defense to an action of *assumpsit* for the subscription. *Boyd v. Peach Bottom R'y Co.*, 90 Pa. St., 169. 1879.

53. — A subscription to the capital stock of a corporation organized under the general railroad act (ch. 140, Laws of 1850), made after the formation of the corporation, is invalid where ten per cent. of the amount subscribed has not been paid; and in an action by the corporation against a subscriber to recover the amount subscribed, the latter is not estopped from denying such payment because of a statement in the subscription paper that ten per cent. has been paid. A statute cannot be evaded by estoppel. *New York and Oswego Midland R. R. Co. v. Van Horn*, 57 N. Y., 473. 1874.

54. Pleadings. Where the declaration upon a contract of subscription described

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the contract as containing the ordinary dollar mark prefixed to the figures 500 set opposite the defendant's name, a contract without such mark prefixed to the figures, or to any in the column, and where there is nothing in the instrument to indicate that the sum set opposite the defendant's name meant so many dollars, is variant from that described, and not admissible in evidence under the pleadings. *Jacksonville, Northwestern and South-eastern R'y Co. v. Brown*, 67 Ill., 201. 1873.

55. — An averment as to a subscription not within the statute, that defendant, being desirous that the company should proceed in the building of its road, etc., in consideration thereof did subscribe and sign such subscription, setting it out, in the absence of any allegation that the company undertook to build the road in response to the subscription or in reliance on it, or that in building it afterwards it acted on such reliance, or that the company or its agents ever prepared, proposed or sanctioned such subscription, or ever received, accepted or in any way recognized it, fails to allege any consideration for the promise declared upon. *Parker v. Northern Central Michigan R. R. Co.*, 33 Mich., 23. 1875.

56. — Pleadings examined in actions upon stock subscriptions. *Ruckman v. Ridgfield Park R. R. Co.*, 38 N. J. Law, 98, 1875; 13 Amer. R'y Rep., 31; *Lewisburg, etc., R. R. Co. v. Stees*, 77 Pa. St., 332, 1875; *Mansfield, Coldwater and Lake Michigan R. R. Co. v. Hall*, 26 Ohio St., 310, 1875; 11 Amer. R'y Rep., 56; *Cheraw and Chester R. R. Co. v. White*, 14 So. Car., 51, 1880.

57. — Upon an unconditional promise to pay a corporation a certain sum of money, either as an ordinary debt or as a subscription to its capital stock, it is unnecessary to aver that the requisite amount of capital has been subscribed, as provided by the charter, in order to present a good cause of action. *Lail v. Mt. Sterling Coal Road Co.*, 13 Bush (Ky.), 32. 1877.

58. Release. The abandonment of part of a railway is no defense to a claim for calls; nor is the non-subscription of the prescribed capital a defense. *Jennings, In re*, 1 Irish Ch., 236. 1851.

59. Right to withdraw. Until the association is ready to file the articles of associa-

tion, a subscriber may withdraw. *Garrett v. Dillsburg and Mechanicsburg R. R. Co.*, 78 Pa. St., 465. 1875.

60. — If a subscriber permits his name to remain and the articles to be filed, his obligation is final and he cannot set up his omission against his associates. *Ib.*

61. Sale of stock below par. A corporation may dispose of its stock for less than its face value, and the transaction, as between the corporation and the purchaser, will be valid, unless prohibited by statute, and there is no such prohibition in Colorado. *Harrison v. Arkansas Valley R'y Co.*, 4 McCrary (U. S. C. C.), 264. 1882.

62. Signature. Where the signature of a subscription is denied it is competent to show a subsequent ratification, although the signature was originally made without authority. *Houston and Texas Central R. R. Co. v. Chandler*, 51 Tex., 416. 1879.

63. Street railways. Several persons signed a contract to pay to a street railway company a certain sum each, provided that the company would purchase a particular lot of land and put its depot and other buildings thereon, the subscriptions to be payable on demand "when the sum required is subscribed hereto." At the trial of an action on this contract, it was shown that the amount required to purchase the lot was \$2,000, and that this was known before the paper was written, and was stated to the defendant when he signed it, and that a person had agreed to make up whatever was wanting to complete the sum of \$2,000; that \$600 was subscribed on the paper, and the balance to make up the \$2,000 was paid. *Held*, that the action could be maintained. *Springfield Street R'y Co. v. Sleeper*, 121 Mass., 29. 1876.

64. — There can be no recovery upon a subscription to the stock of a street railway company, made before its organization, where it is not shown that the defendant, after the subscription of the requisite amount of stock, subscribed articles of association in which were set forth the number of directors to manage the company and their names, as required by § 1, 3 Ind. Stat., 422, and it does not appear that he ever assented to the number or names of the directors. *Reed v. Richmond Street R. R. Co.*, 50 Ind., 342. 1875.

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65. Tender of stock. A subscriber cannot defeat a recovery of his subscription on the ground that no certificate of stock has been tendered to him. *Slipher v. Earhart*, 83 Ind., 173, 1882; *South Ga. and Fla. R. R. Co. v. Ayres*, 56 Ga., 230, 1876.

66. — A tender of stock held necessary to enable the plaintiff to sue upon a subscription. *Lawrence v. Smith*, 50 Ia., 703; *Cooper v. McKee*, 49 Ia., 286, 1878; *Courtright v. Deeds*, 37 Ia., 503, 1873; *St. Paul, Stillwater and Taylor's Falls R. R. Co. v. Robbins*, 23 Minn., 439, 1877.

67. Unlawful act of agent. If one subscribes to the stock of a corporation for and in the name of another without authority, he thereby binds himself, and becomes the equitable owner of the stock. A transfer thereof from the person in whose name the subscription is made is not necessary — it is sufficient if the stock be carried to the account of the subscriber on the stock ledger of the company. *State ex rel. v. Smith*, 48 Vt., 266; 16 Amer. R'y Rep., 394. 1876.

68. Validity. Subscriptions are only binding upon the subscribers when they are so made as to bind the corporation; and as the statute creates no obligation on the corporation, except upon subscriptions regularly made, no others can be enforced unless they were made upon some actual consideration or agreement binding the company. *Parker v. Northern Central Michigan R. R. Co.*, 33 Mich., 23. 1875.

69. — A subscriber may show in defense the failure of the corporation to obtain the requisite amount of stock; because his subscription is upon the implied condition that the aggregate amount required by the statute shall be subscribed. *Monroe v. Fort Wayne, Jackson and Saginaw R. R. Co.*, 28 Mich., 272, 1873; 12 Amer. R'y Rep., 273.

70. What constitutes a subscription. An agreement to subscribe for stock in a corporation is not a subscription. *Mt. Sterling Coalroad Co. v. Little*, 14 Bush (Ky.), 429. 1879.

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71. Amount subscribed. A subscription with a supplemental agreement to be pay-

able in work and materials, made in good faith, is valid, and such subscription is properly counted in making up the amount necessary to enable the corporation to collect its subscriptions, where the other subscriptions are conditioned upon a certain sum being subscribed. *Richfield and New York R. R. Co. v. Brush*, 43 Conn., 86, 1875; 11 Amer. R'y Rep., 18.

72. — An agreement to subscribe for shares of a corporation upon a stipulated condition is not binding unless the condition be complied with. So held as to a condition specifying the amount of other subscriptions required. *Santa Cruz R. R. Co. v. Schwartz*, 53 Cal., 106. 1878.

73. — A conditional subscription held valid and to constitute a part of the amount of the subscription required as a condition precedent to bind other subscribers. *Bucksport and Bangor R. R. Co. v. Buck*, 68 Me., 81, 1878; 19 Amer. R'y Rep., 10.

74. — The defendant subscribed an agreement to take the amount of shares set against his name in the stock of the plaintiff, agreeably to foregoing conditions, one of which was that no assessment, except for a preliminary survey and location, should be made nor any work upon the line commenced until the full amount was secured for its completion to (or as far as to) Newport. The subscriptions were less in amount than the actual cost; and, if a deduction of invalid conditional subscriptions, were much less than the cost estimated by the engineer. Held, that the defendant's subscription was invalid. *Belfast and Moosehead Lake R. R. Co. v. Cottrell*, 66 Me., 185, 1876; 19 Amer. R'y Rep., 35.

75. Assignment. G. executed a promissory note to a railway company to aid in the construction of a road between two points named in the note. At the time of its execution it was understood that the note, with others of like purport, if they reached a certain amount, were to be turned over to another company which was to construct the road; they did not reach the amount, and the road was constructed by plaintiff, who was the assignee of the payee of the note. Held, that upon compliance with the other conditions of the note it was collectible by plaintiff. *Merrill v. Gamble*, 46 Ia., 615,

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1877; 16 Amer. R'y Rep., 65; *Merrill v. Beaver*, ib., 646, 1877.

76. Company not organized. A subscription to the stock of a corporation prior to the procurement of its charter is absolute and a condition attached is void. *Caley v. Philadelphia and Chester County R. R. Co.*, 80 Pa. St., 363. 1876.

77. Completion of railway. A ruling that the word "completed" in a subscription has a different meaning from what it has in a contract for the construction of the road is held not error; the purpose of such a condition, when embodied in a subscription, is accomplished when the road is put in a condition for regular business. *Tower v. Detroit, Lansing and Lake Michigan R. R. Co.*, 34 Mich., 328. 1876.

78. — Whether a railway company has finished its road and put it into full operation is a question for the jury. *Toledo and Ann Arbor R. R. Co. v. Johnson*, 49 Mich., 148. 1882.

79. — A subscription was conditioned to pay a certain proportion when the railway was graded and a certain further sum when it was ironed. The road was graded but not ironed, and the time for its completion had elapsed. Held, that, as the company did not bind itself to build the road, the contract was not valid for want of mutuality; that nothing short of full performance would render it binding upon the defendant. The subscribers could not be held liable on the grading alone. *Gray v. Hinton*, 7 Federal Reporter, 81. 1881.

80. — A subscription provided that if the Cincinnati Southern Railway should be permanently located and constructed through Lexington "we will pay the sums set opposite our names in equal instalments at six, twelve and eighteen months from the first of July, 1873, unto Thomas Mitchell, as trustee, . . . to be used and applied by him only toward paying the damages, cost, etc., in acquiring the right of way," etc. The completion of the road held not to be a condition precedent to the payment of the money subscribed. *Berryman v. Cincinnati Southern R'y Co.*, 14 Bush (Ky.), 755. 1879.

81. — The leasing of a part of the road between two points is not a compliance with the contract to construct a road between

said points. *Lawrence v. Smith*, 57 Ia., 701, 1882; 9 Amer. & Eng. R. R. Cases, 604.

82. — The terms of the subscription being complied with it is no defense that the railway has not been built as described in its charter. *Stowell v. Stowell*, 9 Amer. & Eng. R. R. Cases (Mich.), 598. 1882. See, also, *Chartiers R'y Co. v. Hodgins*, 85 Pa. St., 501, 1877; 18 Amer. R'y Rep., 526.

83. Compliance. Substantial compliance with the conditions of a subscription as to the time of completion of a railway is sufficient. *C. D. and M. R. R. Co. v. Schewe*, 45 Ia., 79. 1876.

84. — A subscription bound the maker to pay \$300 upon the completion of the G. and M. Railroad within a certain time. The articles of incorporation described the initial point of the road as G. Held, that the building of the road to a point three and a half miles from G., and there connecting with another railway over which its trains were run to G., was not a compliance with the condition. *Cooper v. McKee*, 53 Ia., 239. 1880. But see *Detroit, Lansing and Lake Michigan R. R. Co. v. Starnes*, 38 Mich., 698. 1878.

85. — Where a written promise was made to pay a railway company \$100 if its road was built and equipped and trains running to a given point by a day named, but if not completed on such line within such time the obligation to be void, and the proof showed that the company ran an engine, tender, one passenger coach, and one or two flat cars over the line two days before the time limited, but places on the road were only half tied, and regular trains were not run over the same until several months after the time, it was held that no recovery could be had on the obligation. *Paris and Danville R. R. Co. v. Henderson*, 89 Ill., 86. 1878.

86. — A right of action on a contract of subscription promising to pay a certain sum "as soon as the cars shall run to B. upon a completed railroad from W.," will not be defeated by the fact that the company building the road does not own the rolling stock by which it is operated. *Courtright v. Deeds*, 37 Ia., 503. 1873.

87. — The terms of subscription to aid in the construction of a railway contained the

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stipulation that the money should be paid "in instalments of five per cent. so long as the work should be in actual progress," and that if the railway company named should fail to construct the road, then the amount subscribed should be paid on the same terms and conditions to any other company which would grade and tie a road between the points designated. *Held*, that the grading and tying were not conditions precedent to the payment of the subscription. *Iowa Northern Central R'y Co. v. Bliobenes*, 41 Ia., 267. 1875.

88. — Voluntary subscriptions in aid of a proposed railway, when accepted, and the road constructed in accordance with the conditions of the promise, become valid and binding contracts. *Michigan Midland and Canada R. R. Co. v. Bacon*, 33 Mich., 466. 1876.

89. — By the terms of a contract between W. and a railway company, he became bound to pay the latter \$1,500 if within a specified time it should have completed its road to West Union and have done half the grading between that place and the point of intersection with the M. and St. P. Railway. *Held*, that the company had not complied with the contract by completing the road between West Union and the point of intersection named, while it failed to construct its road to West Union from the other direction, and that the road must have been completed to West Union on the one side and half the grading done on the other. *B., C. R. and M. R. R. Co. v. Whitney*, 43 Ia., 113. 1876.

90. **Construction.** Conditional subscriptions construed. *Hanover Junction, etc., R. R. Co. v. Haldeman*, 82 Pa. St., 36, 1876; 15 Amer. R'y Rep., 442; *Emmitt v. Springfield, etc., R. R. Co.*, 31 Ohio St., 23, 1876; 16 Amer. R'y Rep., 266; *Mansfield, Coldwater and Lake Michigan R. R. Co. v. Brown*, 26 Ohio St., 223, 1875; 13 Amer. R'y Rep., 341; *North and South R. R. Co. v. Winfree*, 51 Ga., 318, 1874; *Lamoille Valley R. R. Co. v. Marsh*, 49 Vt., 37, 1876.

91. **Depot.** A contract of subscription bound defendant to pay a certain sum to a railroad company upon the construction of its road to a depot, to be located within three-fourths of a mile of the corporate

limits of the town of C., for which defendant was to receive certificates of stock. By a subsequent contract he surrendered his certificates of stock on condition that the company should construct its road by D. to said town of C. *Held*, that, under proper construction of these contracts, defendant was liable on completion of the road to a depot located within the distance of the corporate limits stipulated in the original contract. In determining the distance mentioned, the measurement should be by a straight line from the corporate limits to the depot; and if the depot is in the prescribed limit, it is sufficient, though all the side-tracks and switches are not. *Courtwright v. Strickler*, 37 Ia., 382. 1873.

92. — Under a contract of subscription to a railroad company of the character above mentioned, the jury were properly instructed that the point from which measurement is to be made, in order to determine whether the depot is built within the distance prescribed, must be the corporate limits of the town, without regard to buildings or improvements. *Ib.*

93. — A railway company being about to construct its line through a town, the citizens, among whom was one A., agreed to subscribe to the company \$150,000, of which A. agreed to pay \$500, and also to furnish suitable depot grounds. The company undertook to complete its road in one year. Subsequently the citizens provided depot grounds which proved unsuitable, and it was thereupon agreed that they should buy other grounds, and that the amount paid therefor by each citizen should be credited on his subscription. A. paid his whole \$500 to buy depot grounds, the title to which afterwards became vested in the company. Subsequently, the company having failed to complete its road within the time stipulated, A. brought suit against it to recover his \$500. *Held*, that there was no new contract substituted for the old one, and that the company was not released from its obligation to complete the road in the time specified. *Held*, therefore, that plaintiff was entitled to recover. *Texas and Pacific R. R. Co. v. Fitch*, 12 Amer. & Eng. R. R. Cases (Tex.), 312. 1888.

94. — A subscription list, signed to aid in

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the construction of a railroad, provided that a certain payment should be made when the road intersected with another "at Wheatland" and "has been permanently located to and within the limits of the town of Wheatland, with a station at the same." *Held*, that a construction of the road through the town and of the depot just outside of its limits was not a compliance with the terms of the contract. *Davenport and St. Paul R. R. Co. v. O'Connor*, 40 Ia., 477. 1875.

95. — A railway company obligated itself to locate its depot at the nearest practicable point, within one mile of the court-house. The word *practicable* was held not to be used in the contract as synonymous with *possible*. The road was only bound to locate its depot at the nearest point, within one mile of the court-house, at which it could be done at a reasonable and ordinary cost, with reference to all the circumstances under which it was done and in view of the objects and purposes inducing the contract. *Wooters v. International and Great Northern R. R. Co.*, 54 Tex., 294, 1881; 4 Amer. & Eng. R. R. Cases, 100.

96. *Escrow*. An agreement between the plaintiff and the citizens of V. stipulated that certain subscription notes should remain in the hands of W. until a certain designated right of way had been secured, when the notes should be "turned over" to plaintiff, who thereupon should enter into an absolute contract for the construction of an extension of its line upon certain specified conditions, and that it would not locate a depot on such extension within seven miles of V. *Held*, 1. That W. was authorized, without further direction from the parties, to deliver the notes to plaintiff. 2. That a failure to incorporate in the last contract the condition respecting the location of the depot would not constitute a defense to an action upon one of the subscription notes, when, in fact, the condition had been complied with by plaintiff. *B., C. R. and M. R. R. Co. v. Palmer*, 42 Ia., 222. 1875.

97. *Illegal conditions*. Persons subscribing to the stock of a corporation must take notice of the law creating it and defining its powers, and if the directors, in order to secure stock subscriptions, propose to do

that which they are prohibited from doing by the statute, no subscriber can be heard to say, as against the corporation, that he has been misled and deceived thereby. *Peters v. Lincoln and Northwestern R. R. Co.*, 14 Federal Reporter, 319, 1883; 4 McCrary, 269.

98. *Parol conditions*. In an action for the amount of a subscription the defendant alleged that it was expressly stipulated by the agent of the company, in the presence of S., that the defendant's subscription was not to be paid until a certain amount had been subscribed. The agent, on cross-examination, denied having made such representations. Defendant then called a witness to prove that the agent had made such representations, although they were made at a time previous to the subscription. The court excluded the offer. *Held*, that the testimony should have been admitted as tending to corroborate the defendant, and as part of the *res gestæ*. *Rinesmith v. Peoples' Freight R'y Co.*, 90 Pa. St., 262, 1879; 1 Amer. & Eng. R. R. Cases, 374.

99. — Where a note was given for a subscription "to become due and payable when the track of said railroad shall be built" through a named county, and the "cars shall have run thereon," a plea which set up a further condition that the road should be completed through the county within two years was held bad, as attempting to change by parol the written agreement. *Cairo and Vincennes R. R. Co. v. Parker*, 84 Ill., 613. 1877.

100. — Where, previous to signing a subscription, the defendant objected to signing, for the reason that certain conditions on which the subscription was to be made did not appear therein, and was assured by the president of the company that these conditions should be considered a part of the contract, parol evidence of these conditions is admissible in a suit on the subscription, and the non-performance of them is a defense. *McCarty v. Selinsgrove and North Branch R. R. Co.*, 87 Pa. St., 332. 1878.

101. — In a subscription the covenant was to pay money on call. In a suit therefor the defendant offered to prove a parol agreement that he might pay in labor and materials, without offering to show that he attempted

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to ascertain when and where he could do so, or making a tender thereof. *Held*, that the offer was not admissible. *McClure v. People's Freight R'y Co.*, 90 Pa. St., 269, 1879; 1 Amer. & Eng. R. R. Cases, 371.

102. Resolution of directors. A subscription was "on condition that in the judgment of the directors . . . a sufficient amount is subscribed . . . to grade and bridge the road, including right of way; . . . otherwise these subscriptions shall be void." The directors passed a resolution that in their "judgment . . . sufficient stock had been subscribed," etc. *Held*, if the board acted in good faith in passing the resolution, the condition was complied with. *Cass v. Pittsburgh, Virginia and Charleston R'y Co.*, 80 Pa. St., 31. 1875.

103. Route. A subscription to the capital stock of a railway company on the condition that the railroad shall pass through a certain place becomes absolute on the location of the road through the place named. *Mansfield, Coldwater and Lake Michigan R. R. Co. v. Stout*, 26 Ohio St., 241, 1875; 13 Amer. R'y Rep., 361.

104. — A subscription paper set out the *termini* of a railway and the route over which it would be constructed. *Held*, that this was a contract that the *termini* and the route should be as stated; and, if the company materially changed them, a subscriber would be released. A railway company took subscriptions for its road with specified route and *termini*; it passed a resolution changing them in material points. *Held*, that this was evidence of abandonment of the route, etc., in the subscription. *Caley v. Philadelphia and Chester County R. R. Co.*, 80 Pa. St., 363. 1876.

105. — In an action by the railroad company against defendant for the balance unpaid upon his subscription for stock, *held*, that the fact of a failure to comply literally with the provisions of the statute relating to the description of the location of the proposed railroad would not defeat a recovery. *Cayuga Lake R. R. Co. v. Kyle*, 5 Thompson & Cook (N. Y. Supreme Ct.), 659. 1875.

106. — Conditions as to the location of the line of a railway held invalid, and the subscriptions enforced without the condi-

tions. *Pittsburgh and Steubenville R. R. Co. v. Woodrow*, 1 Pittsburgh, 450. 1858.

107. — In an action upon a contract which stipulated that the obligor would pay a certain sum to a railway company, on condition that the company would build, equip and run a train of cars over a railroad between given points, by a certain time, running on the east line of the obligor's land, the complaint alleged the building of the road between the points within the time named, and the running of the train, and that the track was constructed "upon, or as near as practicable upon, the east line of the lands owned by said defendant, and at all points within fifty feet of said east line," alleging no reason for not building the track on the east line, and no waiver of that condition. *Held*, that the complaint was bad in not showing performance of the condition precedent. *Crane v. Indiana North and South R'y Co.*, 59 Ind., 165. 1877.

108. — A railway company having filed a location in which the line was divided into three divisions, and in which a portion, extending to a point in the town of P., was designated as the first division, was subsequently empowered by statute to build its road in sections, and the road was so built; afterwards a new location was filed, in which the line was not divided into sections and no point in the town of P. was indicated as the end of the first section. In an action by the company to recover assessments against one who, before the relocation, had subscribed for stock in the first section, *held*, that the failure to fix the end of the first section in the relocation did not release the stockholder. *Boston, Barre and Gardner R. R. Co. v. Wellington*, 113 Mass., 79. 1873.

109. — A contract of subscription to stock provided for the building of the H. J. and S. R. R., according to the survey made by the P. and R. R. R. Co. The original route ran within five hundred feet of M.'s mill. M. contended that this change was material; that it was the location of the original survey which induced his subscription, and that his interests were seriously compromised by the alteration, and in the court rejected. *Held*, that the court erred, and that he should have been permitted to

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show that the alteration in the route was, as to him and his interest, a material variation. *Moore v. Hanover Junction and Susquehanna R. R. Co.*, 94 Pa. St., 324, 1880; 4 Amer. & Eng. R. R. Cases, 256.

110. — An agreement to pay a railway company a certain sum of money, in consideration that the company will adopt a line along and near a public highway, instead of one already surveyed, is not contrary to public policy and will be enforced. *Cedar Rapids and St. Paul R'y Co. v. Spafford*, 41 Ia., 292. 1875.

111. — Public policy does not prohibit voluntary contributions to railway companies for purposes of construction, etc., or render void a contract based upon the consideration that the road shall be located in or through a certain locality, unless the public interest is to be sacrificed by it. *Berryman v. Cincinnati Southern R'y Co.*, 14 Bush (Ky.), 755. 1879.

112. — But where officers of such corporations undertake to receive donations for their own private use, or make contracts by which they are to be paid for using an influence to locate a line of railway in a particular locality, such contracts will be held void as against public policy. *Ib.*

113. Stock. A promise to pay a certain sum to a railroad company when a certain amount of the work of construction is done, with an agreement on the part of the company to deliver to the party, upon the payment of the money, a certificate for a like amount of its capital stock, on demand, is a subscription to the stock of the road to assist in its construction, and not a purchase of stock. *Ottawa, Oswego and Fox River Valley R. R. Co. v. Black*, 79 Ill., 262. 1875.

114. — The lease of the railway will not discharge such a subscriber. *Ib.*

115. Terminus. Where a railway company changes a terminus of its road from one county into an adjoining county, under the act of 1872 (69 Ohio L., 163), the mere fact that the route to the new terminus, selected by the company, passes through a portion of a third county, will not invalidate existing subscriptions to the capital stock. *Jewett v. Valley R'y Co.*, 34 Ohio St., 601, 1878; 21 Amer. R'y Rep., 21.

116. — A change in the terminus of a

railway, though made to injure a subscriber to its capital stock, will not release the subscriber. *White Hall and Plattsburg R. R. Co. v. Myers*, 16 Abbott's Practice (N. S.), 34, 1872; *Greeneville, etc., R. R. Co. v. Johnson*, 8 Baxter (Tenn.), 333, 1874.

117. Time. Where by the terms of a promissory note the maker undertook to pay a certain sum to a railway company two years after its trains should be running to a point specified, in consideration of the construction of the line and the opening of a certain street within sixty days, held, that the failure to construct the road and open the street within sixty days did not relieve the payer from the obligation of payment. *Traer v. Stuart*, 46 Iowa, 15. 1877.

118. — In a written instrument, by the terms of which the obligor became bound to pay a certain sum of money to a railway company when the line was completed and the cars running between designated points, the words, "The road to be finished by September 1, 1872," were held not to imply a condition precedent. The obligor was not released from payment by the fact that the road was not completed at the time fixed in the instrument. *Davis v. Cobban*, 39 Ia., 392, 1874; 20 Amer. R'y Rep., 88.

119. — In an action upon a note given to a railroad company, to be paid "when the track of said railroad shall be laid through White county and cars shall run thereon," the defendant pleaded that the sole consideration was that such road should be built within three years from the date of the note, and averred that such road was not built within three years, etc. Held, that the circuit court erred in overruling a demurrer to defendant's plea. The plea was bad on general demurrer. *Cairo and Vincennes R. R. Co. v. Delap*, 7 Bradwell (Ill.), 60. 1880.

120. Voluntary payments; recovery back. An express condition upon which a note was made payable, "that a depot be established within eighty rods of the present town of Wheatland," was not fulfilled by the building of a depot within eighty rods of the limits of the town as extended after the note was given. The recorded plat of the town at the date of the execution of the note will govern in the construction of the contract. Where a note for railway shares was given

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upon the condition that "a depot be established within eighty rods of the present town of Wheatland," and, before the depot was established, the maker made certain voluntary payments, *held*, that he could not recover the sums paid if no promise, fraud or mistake were shown. *Davenport and St. Paul R. R. Co. v. Rogers*, 39 Ia., 298, 1874; 9 Amer. R'y Rep., 92; 20 Amer. R'y Rep., 85.

121. Waiver. The defendant subscribed for shares of the stock of a railway company payable on certain conditions, one of which was that the road should be built to F. prior to a certain date. Subsequently he gave notes for the amount, payable on the happening of the conditions, except the one above specified. *Held*, that the omitted condition was thereby waived. *Slipher v. Earhart*, 88 Ind., 173. 1882.

122. — The officiating as a judge of an election of an incorporated company is a waiver of any alleged condition attached to the subscription for its stock, and renders such subscription absolute. *Pittsburgh and Steubenville R. R. Co. v. Proudfit*, 2 Pittsburgh, 85. 1860.

III. CONSOLIDATION.

123. Effect upon subscriptions. Three existing corporations were consolidated. A subscription was made after the agreement for consolidation, but before it was filed in the office of the secretary of the commonwealth. *Held*, that the filing of the contract in the office of the secretary was not necessary to validate the subscription. *McClure v. People's Freight R'y Co.*, 90 Pa. St., 269, 1879; 1 Amer. & Eng. R. R. Cases, 371.

124. — A company formed by the consolidation of two or more corporations cannot, under the statute (Comp. L., § 2347), make valid assessments upon subscriptions to the capital of one of the original corporations, before the consolidation papers are filed in the office of the secretary of state; the statute is the only source of the corporate existence of the consolidated company, and its conditions are imperative. *Peninsular R'y Co. v. Tharp*, 28 Mich., 506. 1874.

125. — Under the railway consolidation act of April 10, 1856 (53 Ohio L., 143), corporations, parties to an agreement to con-

solidate, continue in the full enjoyment of their powers and franchises respectively, and may accept subscriptions to their capital stock at any time before consolidation is consummated by filing the agreement of consolidation with the secretary of state. *Mansfield, Coldwater and Lake Michigan R. R. Co. v. Brown*, 26 Ohio St., 223, 1875; 13 Amer. R'y Rep., 341.

126. — Where such companies consolidate under the act of 1856, the new corporation thereby created may perform the conditions named in subscriptions to the capital stock of the original companies, and it may also, by performance of the conditions, accept a continuing conditional offer to subscribe such stock. *Mansfield, Coldwater and Lake Michigan R. R. Co. v. Stout*, 26 Ohio St., 241, 1875; 13 Amer. R'y Rep., 341.

127. — In a suit by a consolidated company to recover assessments upon a subscription to the stock of one of the original corporations, on the ground of a right by succession under the statute, it is essential to a recovery that a consolidation conforming to the statute be proved. *Mansfield, Coldwater and Lake Michigan R. R. Co. v. Drinker*, 30 Mich., 124. 1874. See, also, *Detroit, Lansing and Lake Michigan R. R. Co. v. Starnes*, 38 Mich., 698. 1878.

128. — A subscriber to stock, in an action against him to enforce the collection of assessments by a new corporation formed by consolidation with another company, may question the validity of the consolidation proceedings wherein he took no part, and is not precluded by the fact that such proceedings were sufficient to make the new company a corporation *de facto*; and no change in the corporation, violating any of the substantial statutory conditions, can bind a dissenting stockholder. *Tuttle v. Michigan Air Line R. R. Co.*, 35 Mich., 247, 1877; 15 Amer. R'y Rep., 406; *Mansfield, Coldwater and Lake Michigan R. R. Co. v. Drinker*, 30 Mich., 124, 1874.

129. — In case of the consolidation of a Michigan with an Indiana corporation, the objection is not open to a subscriber to the former company, when sued upon his subscription by the consolidated company, that it is not alleged or proved that the statutory amount per mile had been subscribed for the

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entire road, as well in Indiana as in Michigan, where it clearly appears that the requisite amount per mile of the road in Michigan had been subscribed; this requirement of the Michigan statute has exclusive reference to corporations created there for the construction of roads within that state, and was not intended to have any extraterritorial effect. *Monroe v. Fort Wayne, Jackson and Saginaw R. R. Co.*, 28 Mich., 272, 1873; 12 Amer. R'y Rep., 273.

130. — Under § 1 of the act of 1856, as amended May 6, 1869, it is a condition precedent to the right to enter into a joint agreement for consolidation that the lines of road of the contracting corporations be first made, or be in process of construction; and a conditional subscriber, who had no knowledge of the progress of consolidation and in no way contributed thereto, may, in an action by the new company as successor to the old, to recover the amount of his subscription, dispute the corporate existence of the plaintiff, on the ground that, at the date of the agreement to consolidate, the road of the company, to whose stock he so subscribed, was neither made nor in process of construction. *Mansfield, Coldwater and Lake Michigan R. R. Co. v. Stout*, 26 Ohio St., 241, 1875; 13 Amer. R'y Rep., 361.

131. — Two railway enterprises, having been consolidated, differed so widely in their starting points, and the region of country to be traversed, that an original subscriber to the Houston and Great Northern Company might well object that he had not agreed to or authorized such a union; nor did he, by failing to object to a subsequent enlargement of the charter, which, whether it actually gave such power or not, did not, on its face, purport to give any power to consolidate, preclude himself from objecting to a consolidation making so fundamental a change in the objects of the corporation. *International and Great Northern R. R. Co. v. Bremond*, 53 Tex., 96, 1880; 4 Amer. & Eng. R. R. Cases, 308.

IV. EVIDENCE.

132. Corporate existence. In a suit upon a subscription to a railway company which recognizes the corporation, the existence of

the company cannot be disputed, and questions of the regularity of its organization are immaterial. *Parker v. Northern Central Michigan R. R. Co.*, 33 Mich., 23, 1875; *Montpelier and Wells River R. R. Co. v. Langdon*, 46 Vt., 284, 1873; *Lail v. Mt. Sterling Coal Road Co.*, 13 Bush (Ky.), 32, 1877.

133. Meetings of corporation. The 8 and 9 Vict., c. 17, s. 161, which makes the entries of minutes of meetings signed by the chairman thereof evidence, does not exclude other evidence of the fact. It is competent, therefore, for the company to prove what was done at those meetings by independent evidence. *Inglis v. Great Northern R'y Co.*, 1 Stuart, Milne & Peddie (House of Lords, Scotch App.), 749. 1852.

134. Minute books. A subscriber, sued upon a stock subscription, is not entitled to a rule to inspect the minute books of the directors' meetings, such inspection being desired for the purpose of framing his plea. *Birmingham R'y Co. v. White*, 1 Adolphus & Ellis (N. S.), 282; 41 E. C. L., 541. 1841.

135. — A statute made the record of proceedings of the company competent evidence, when recorded, and the "records signed by the chairman of the meeting." *Held*, that the chairman might sign the records of the meeting at the next meeting. *West London R'y Co. v. Bernard*, 3 Adolphus & Ellis (N. S.), 873; 43 E. C. L., 1015. 1843.

136. Notes. In case of a subscription to the stock of a corporation, the notes given in payment therefor and the receipt issued by the company for payment for the stock, being connected together and part of the same transaction, are admissible in evidence as part of the same contract. *Hedge v. Gibson*, 7 Amer. & Eng. R. R. Cases (Ia.), 69. 1882.

137. Parol evidence. In an action upon a subscription to pay a certain sum upon the completion of a certain railway, where the declaration avers the contract to have been made for a valuable consideration, and the antecedent negotiations out of which the contract grew are relied upon as constituting such consideration, it is proper to allow such preliminary negotiations to be very fully disclosed, and a wide discretion in that regard must be left with the trial judge.

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Tower v. Detroit, Lansing and Lake Michigan R. R. Co., 34 Mich., 328. 1876.

138. — Where the original agreement was entire, and a part only reduced to writing, parol evidence of the agreement is admissible. *Bross v. Cairo and Vincennes R. R. Co.*, 9 Bradwell (Ill.), 363. 1881.

139. **Stock book.** Where the name of an individual appears upon the stock book of a corporation as a stockholder, the presumption is that he is owner of the stock appearing in his name, and such book is proper evidence to go to the jury to show that he was a subscriber to such stock. *Pittsburgh, Wheeling and Kentucky R. R. Co. v. Applegate*, 21 W. Va., 172. 1882.

140. — Where the register of shareholders consists of several volumes, the company's seal fixed to the last volume of the series is a sufficient authentication within 8 and 9 Vict., c. 17, s. 9, to make the register evidence, though the name of the defendant as shareholder appears only in the volume to which the seal is not attached. *Inglis v. Great Northern R'y Co.*, 1 Stuart, Milne & Peddie (House of Lords, Scotch App.), 749, 1852; 15 Scotch Session Cases (2d series), House of Lords Cases, 13, 1852.

141. **Subscription books.** The subscription books opened and kept by the commissioners are in the nature of official registers, and are competent evidence to prove how much per mile had been subscribed to the capital stock. *Monroe v. Fort Wayne, Jackson and Saginaw R. R. Co.*, 28 Mich., 272, 1873; 12 Amer. R'y Rep., 273.

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142. **Forfeiture.** A stock company, not having express power granted to declare a forfeiture of stock for non-payment, may sue for the amount of subscription to stock, and on failure to collect the full amount subscribed may collect the residue by sale of stock subscribed for. *Chase v. East Tenn., Va. and Ga. R. R. Co.*, 5 Lea (Tenn.), 415, 1880; 4 Amer. & Eng. R. R. Cases, 349.

143. — A corporation may maintain a suit upon an express agreement to pay assessments on stock, although by a subsequent provision of the subscription paper it is au-

thorized to sell the stock in case of non-payment. *Boston, Barre and Gardner R. R. Co. v. Wellington*, 113 Mass., 79. 1873.

144. — A railway act authorized the declaration of forfeiture for non-payment of calls, provided that no advantage should be taken of any forfeiture of shares until notice in writing given nor until the declaration of forfeiture should be confirmed at a general or special meeting of the company. A declaration of forfeiture without such confirmation is no defense to an action for calls. *London and Brighton R'y Co. v. Fairclough*, 2 Manning & Granger, 674; 40 E. C. L., 800, 1841; *Birmingham R'y Co. v. Locke*, 1 Adolphus & Ellis (N. S.), 256; 41 E. C. L., 527, 1841.

145. **Limitations.** Where, in 1860, subscriptions were made, subject to future calls by the directors, and the directors made calls after June 1, 1865, held, that the right of action for the amounts due under such calls did not accrue until after June 1, 1865, and therefore suits brought therefor must be controlled by the statutes of limitation as embraced in the Code, and not by the act of March, 1869. *Macon and Augusta R. R. Co. v. Vason*, 52 Ga., 326. 1874.

146. **Sale of shares for assessments.** A subscriber for shares in the stock of a railway company refused to pay the assessments on the shares; the company did not formally declare them forfeited, but procured subscriptions from other persons to the full amount of the capital stock. Held, that the corporation could not sell the shares and sue the subscriber for the difference between the assessment and the sum for which the shares were sold, under the Gen. Stats., ch. 63, § 9. *Athol and Enfield R. R. Co. v. Inhabitants of Prescott*, 110 Mass., 213. 1872.

147. **Transfer.** Where a railway act required that a transfer of shares should be only made by written conveyance recorded by the company, and until such transfer the subscriber should be liable for all calls, it was held that a transfer without compliance with this provision would not release a subscriber from liability. *Cheltenham R'y Co. v. Daniel*, 2 Adolphus & Ellis (N. S.), 675; 42 E. C. L., 675. 1841.

148. — Section 16 of 8 Vict., ch. 16, enacts

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that no shareholder shall be entitled to transfer any share, after any call has been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him; *held*, that the section only applies to the transfer of shares on which a call can be and has been made, and has no application to the transfer of shares on which all the calls have been paid; and a company, therefore, is bound to register a transfer of stock, although the transferee be the holder of shares on which there are shares unpaid. *Hubbersty v. Manchester, Sheffield and Lincolnshire R'y Co.*, Law Reports, 2 Queen's Bench Cases, 59. 1866.

149. — The transfer of shares after a call was held to be no defense to an action on the call. *Aylesbury R'y Co. v. Mount*, 7 Manning & Granger, 898; 49 E. C. L., 898, 1844; 3 Eng. R. R. & Canal Cases, 469. *Contra*, *Aylesbury R'y Co. v. Mount*, 4 Manning & Granger, 651; 43 E. C. L., 386. 1842.

150. When calls may be made. There is nothing in the charter of the Cheraw and Chester R. R. Co. which requires its whole capital stock to be subscribed before calls are made for the payment of subscriptions; and therefore stock subscriptions may be made payable upon such terms as are agreed upon between the corporation and the stockholders. *Cheraw and Chester R. R. Co. v. Garland*, 14 So. Car., 63. 1880.

151. — A subscription to the stock of a railway company, made and accepted on the express condition "that not more than ten per cent. shall be required to be paid at any one call, nor shall calls be made more frequently than once in sixty days," is not embraced in a previous resolution of the directors requiring the instalment of \$5 due on each share of stock at the time of making the subscription to be paid at once, and ten per cent. or \$5 on each share subscribed to be paid on the 15th of each month following until the whole amount shall be paid. *Mansfield, Coldwater and Lake Michigan R. R. Co. v. Pettis*, 26 Ohio St., 259, 1875; 13 Amer. R'y Rep., 880.

152. — A railway company authorized by its charter to commence the construction of its line whenever a given number of shares has been subscribed for, can assess the shares

when the subscriptions have reached that number, although the whole number of shares has not been determined. *Boston, Barre and Gardner R. R. Co. v. Wellington*, 113 Mass., 79, 1873; *Jewett v. Valley R'y Co.*, 34 Ohio St., 601, 1878; 21 Amer. R'y Rep., 21.

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153. Fictitious subscriptions. A subscription contract by W. provided "that not exceeding 700,000l. should be raised." Afterwards fictitious subscriptions were taken to make up the amount to 700,000l. *Held*, that such subscriptions not being *bona fide* was no ground for the recovery of the deposit paid upon the subscription of W. *Watts v. Salter*, 10 Common Bench, 477; 70 E. C. L., 477, 1853; 12 Eng. Law & Equity, 482.

154. Misstatements. A statement on the part of the agent of a corporation as to the pecuniary condition and prospect of his corporation will not avoid a subscription, unless the falsity and fraud of such representations are clearly shown, and unless it is manifest that the condition of the enterprise constituted a material inducement to the subscription. *Selma, Marion and Memphis R. R. Co. v. Anderson*, 51 Miss., 829. 1876.

155. — To avoid a subscription on the ground of false representation of an agent, it must be shown that the statement was not uttered as an opinion, but as an ascertained and existing fact. It must not only be false in fact, but must also be either known to be so by the party uttering it, or his position must be one that made it his duty to know the truth. *Id.*

156. — Subscriptions to a railroad company obtained by fraudulent representations of the plaintiffs, or to which they were privy, will not be enforced. *Davis v. Dumont*, 37 Ia., 47, 1873; *Melendy v. Keen*, 89 Ill., 395, 1878.

157. — A farmer and his wife, on the line of a proposed railroad, subscribed to stock in the road and mortgaged their farm upon representations made to them by agents of the road and others, in a time of excitement got up at public meetings, that the road would prove the most lucrative investment of money, a very profitable thing to the

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neighborhood, etc. The making of the road was begun, and, after a good deal of money had been laid out, it was stopped for want of funds. The mortgage thus got was assigned to a director of the road who was a large creditor of the road. *Held*, on a bill by him to foreclose, that he was to be taken as an innocent holder for value; and that he was entitled to a decree. *Sawyer v. Prickett*, 19 Wallace, 146. 1873.

158. — Where a railroad company was seeking to procure local aid for the construction of its road, and in pursuance of this plan its board of directors at a regular meeting adopted a blank form for notes for the purpose of obtaining private subscriptions; and by the order of the board a number of these blanks were delivered to one of the members of the board who was a Swede, and having great influence among the population of that nationality in his neighborhood, employed one C., another Swede of influence, who could not read or write English well, to take the blanks and obtain from the Swedish population in his town subscriptions to the railroad; and C., under the direction and with the consent of said director, made positive assertions of fact to a Swede farmer, who could not read or understand English thoroughly, as to the purport and meaning of the language of the notes, which assertions of fact were false, though believed by the director and C. at the time to be true, and such Swede was induced thereby to sign the note,— such notes being obtained by false assertions of fact, are fraudulent and cannot be collected. *Wickham v. Grant*, 28 Kans., 517. 1882.

159. — Where the plea averred that the inducement to subscribe for stock was to procure a competing line to another named road, and the agent at the time represented that the road should remain a competing line, but when completed it was leased to the competing road, *held*, this plea was bad on demurrer, as it fails to aver that the agent falsely and fraudulently made the representations. Fraud must be pleaded and proved. *Hays v. Ottawa, Oswego and Fox River Valley R. R. Co.*, 61 Ill., 422, 1871; 12 Amer. R'y Rep., 454.

160. Prospectus. A fraudulent prospectus, when relied upon by the subscriber

for shares, is good ground for relief from liability for the subscription. *Kisch v. Central Railway of Venezuela*, 3 De Gex, Jones & Smith, 122; 68 Eng. Ch., 122. 1865.

161. — Prospectus held not fraudulent. *Heymann v. European Central R'y Co.*, Law Reports, 7 Equity Cases, 154. 1868.

162. Release. A stock subscription is not only an undertaking with the company but with all other subscribers, and a subscriber cannot be permitted to set up a secret parol arrangement with the agents of the company by which he may be released from his subscription whilst his fellow subscribers continue to be bound. *Miller v. Hanover Junction and Susquehanna R. R. Co.*, 87 Pa. St., 95. 1878.

163. — If the sum fixed by the charter had been subscribed, and yet subscriptions had been released so as to reduce the capital largely and materially, without the consent of the subscriber, the effect would be the same as if the stock released had never been subscribed. A mere nominal subscription, to fulfil the letter and break the spirit of the contract, is no substantial compliance with the charter, and when released because it was nominal, it becomes equivalent to no subscription *ab initio*. *Memphis Branch R. R. Co. v. Sullivan*, 57 Ga., 240. 1876.

164. Setting aside contract. A railroad company, having failed in prosecuting its undertaking, resolved to return the unapplied portion of the deposits to the shareholders ratably; and, on the first instalment being repaid, the original scrip certificates were called in and new certificates issued, to the effect that the holders were entitled to a further *pro rata* division of the balance of the company's funds; and, on payment of the final instalment of the unapplied fund, the new certificates were called in, and the shareholders were required to sign a memorandum, undertaking to release the directors when called upon to do so. *Held*, that the terms on which the old and new certificates respectively were delivered up constituted new contracts between the shareholders and the directors; that the persons entering into such contracts in ignorance of the frauds which were alleged to have been committed by the directors, would, on proof of such frauds, be entitled to wholly undo such con-

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tracts, but not to set them aside partially by retaining the instalments and getting rid of the agreement to release the directors; that one shareholder, having no right to make an election for the others, between abiding by the new contracts or setting them aside, could not sue on behalf of himself and all other shareholders to recover from the directors more than the amount which was refunded under the contracts. *Grand Trunk R. R. Co. v. Brodie*, 9 Hare (Eng. Ch.), 823. 1852.

VII. MISCELLANEOUS.

165. Bill to require issue of stock. A subscriber for stock in a corporation cannot maintain an action for the issue of the stock without showing payment or offer of payment of his subscription. *Dakin v. Union Pacific R'y Co.*, 5 Federal Reporter, 665. 1880.

166. Sale of railway. If a corporation, chartered to construct and carry on the business of a railroad, sells the road without authority of law to another company, it cannot collect unpaid subscriptions of stock from subscribers who did not consent to the sale. *South Ga. and Fla. R. R. Co. v. Ayres*, 56 Ga., 230. 1876.

167. Seizure of the road by the governor. It is no defense to a suit by a railroad company to recover subscription to stock to plead that the road has been seized by the governor. The charter is not forfeited, and the company may still collect its subscription, especially where suit is brought before the seizure; nor can the subscriber object to pay to the company, when probably his default contributed to the misfortune which he would now plead against the company. *Mullins v. North and South R. R. Co.*, 54 Ga., 580. 1875.

and sealed with her seal, were sold by the active efforts of the governor, and came into the hands of subjects of Holland. Most of the sales were in that country. *Held*, that, inasmuch as the bonds, though fraudulent in their inception, were put upon the market and sold in a foreign country to a people largely unacquainted with the English language, a case is presented which justifies the court in treating the owners of them as purchasers for value and in good faith, and entitled to relief accordingly. *Railroad Companies v. Schutte*, 103 U. S., 118, 1880; 3 Amer. & Eng. R. R. Cases, 1.

2. — The object and purpose of the indorsement of railroad bonds by the state, under the statutes, was to improve their credit and to facilitate their currency. On their face they are negotiable instruments by the general commercial law, which must be presumed to be of force in Boston, where they are made payable, and are capable of transfer by delivery; and the state is liable as the indorser of such paper. *State ex rel. v. Cobb*, 64 Ala., 127, 1879; 7 Amer. & Eng. R. R. Cases, 147.

3. — Except so far as restrained by constitutional limitations, the state has the same power to enter into contracts that any private person has, and is equally bound by the contracts into which it has entered; and when it has become a party to negotiable paper its liability is governed by the same principles of law that apply to other persons in that relation. *Ib.*

4. — **coupons.** The holders of overdue coupons have no priority over the holders of the bonds. *State v. Spartanburg and Union R. R. Co.*, 8 So. Car., 129. 1874.

5. Consolidation. "An act to promote the consolidation of the Greenville and Columbia R. R. Co." provided, in § 4, for a waiver of the lien of the state on the Blue Ridge Railroad property, and, in § 5, for a like waiver of lien upon the property of the Greenville and Columbia Railroad property, and, in § 7, for the indorsement by the consolidated companies of the bonds of the two companies consolidating. The two companies not having consolidated, *held*, that the act never took effect. *Gibbes v. G. and C. R. R. Co.*, 13 So. Car., 228, 1879; 4 Amer. & Eng. R. R. Cases, 459.

SUBSCRIPTIONS BY STATES.

See ELECTION OF CORPORATE OFFICERS; GRANTS.

1. Bonds. The circumstances stated under which bonds of Florida, payable to bearer, issued in aid of certain railroad companies, signed by her governor and her treasurer,

Constitutional Law — Lien.

6. Constitutional law. A limitation upon the power of the legislature in the matter of pledging the credit of the state to aid *quasi* public works, such as railways, should be strictly construed; and an act of the legislature authorizing an issue of state bonds in aid of a line of railway, differing essentially and fundamentally from the line to which the power thus to aid was limited by the constitution, is, in this respect, unconstitutional and void. *Holland v. State of Florida*, 15 Fla., 455. 1876.

7. — Where an act was entitled "An act for the sale of the Pacific Railroad, and to foreclose the state's lien thereon, and to amend its charter," *held*, that after certain sections providing for the sale, a section providing that, in certain contingencies, no sale should be made, was not a violation of the constitutional provision forbidding the release of any state liens upon railways. *Woodson v. Murdock*, 22 Wallace, 351. 1874.

8. — The state is prohibited by the constitution from becoming a "joint owner or stockholder in any company, association or corporation." The state may grant such franchises to others, but she cannot purchase, own or operate a railway. *Holland v. State of Florida*, 15 Fla., 455. 1876.

9. — The revenue bond scrip, issued by the state treasurer, under the act of March 2, 1872, "to relieve the state of South Carolina of all liability for its guaranty of the bonds of the Blue Ridge R. R. Co.," being certificates of indebtedness, payable to bearer, issued by the state in its sovereign capacity, with the faith of the state pledged for their ultimate redemption, and intended to circulate as money, are bills of credit, which, by the constitution of the United States, a state is inhibited from issuing, and are therefore null and void. *State ex rel. v. Comptroller-General*, 4 So. Car., 185. 1872.

10. — The statute and constitution of Wisconsin construed. *Sloan v. The State*, 51 Wis., 623. 1881.

11. — The amendment to § 2, art. 9, of the Minnesota constitution, adopted November 6, 1860, providing that "no law levying a tax or making other provisions for the payment of interest or principal of the bonds denominated 'Minnesota State Railroad Bonds' shall take effect or be in force until

such law shall have been submitted to a vote of the people of the state and adopted by a majority of the electors of the state voting upon the same," impairs the obligation of the contracts therein referred to, and is, consequently, repugnant to the clause in the constitution of the United States that no state shall pass any law impairing the obligation of contracts, and it is therefore void. *State ex rel. v. Young*, 2 Amer. & Eng. R. R. Cases (Minn.), 348. 1881.

12. Funding act. After a funding act has been passed, the same may be repealed before acceptance by the bondholders. *Durkee v. Board of Liquidation*, 103 U. S., 646; 3 Amer. & Eng. R. R. Cases, 135. 1880.

13. Guaranty of bonds. A state indorsed the bonds of a railroad company, and was indemnified against loss on account of the indorsement by a statutory mortgage on the railroad property. *Held*, that the fact that the state could not be sued was no reason why the holders of the bonds so indorsed should not be subrogated to the rights of the state, and have the benefit of the security. *Young v. Montgomery and Eufaula R. Co.*, 2 Woods (U. S. C. C.), 606. 1875.

14. — Where a state was an indorser of bonds secured by a statutory mortgage, it was not considered a necessary party in a suit brought by holders of bonds secured by the mortgage to foreclose the same. *Ib.*

15. — The legislation under which certain bonds were issued by the state of Florida in aid of railroads having been pronounced unconstitutional by the supreme court of that state, this court passes upon the liability of the railroad company as guarantors of such bonds,—the case upon the facts being within the rule of the liability of an indorser of commercial paper. *Railroad Companies v. Schutte*, 103 U. S., 118, 1880; 3 Amer. & Eng. R. R. Cases, 1.

16. Lien. The statutes of Alabama in relation to liens, in case of state aid to railways, construed. *Colt v. Barnes*, 7 Amer. & Eng. R. R. Cases (Ala.), 129. 1879.

17. — The lien of the state on railroads for the security of bonds loaned under the internal improvement laws of 1851-2, is superior to the rights of the holders of tax certificates under the act of 1851-2, ch. 117,

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providing for county subscriptions and making said certificates receivable for freight and passage over the road. *State ex rel. v. Nashville and Chattanooga R. R. Co.*, 7 Lea (Tenn.), 15. 1881.

18. — In 1864, while the state of Missouri was in full possession of the revenue of the defendant's road upon certain express trusts, which, it was provided, were to continue until the state bonds loaned to the company were paid or exchanged, by an act of January 7, 1865, the county of St. Louis was empowered to loan said company its bonds, which was done and accepted by the company. Section 2 of said act authorized the person who had theretofore been in custody of the earnings of the road for the state (called the fund commissioner) to pay into the county treasury, out of said earnings, a sum sufficient to meet the interest on said bonds loaned by said county as it accrued. *Held*, that by said act the state waived its lien and right to all the earnings of the company to the extent of the sum required to pay the interest on said bonds, and that the county was *pro tanto* substituted as to that amount in place of the state, with a lien or charge to that extent as effectual as the state before possessed. *Ketchum v. Pacific R. R. Co.*, 4 Dillon (U. S. C. C.), 78. 1877.

19. — In pursuance of an act of the general assembly of the state of Arkansas, approved July 21, 1868, entitled "An act to aid in the construction of railroads," the state of Arkansas issued certain bonds to the defendant railway companies; the bonds were signed by the governor and countersigned by the state treasurer, and duly delivered to the companies and by them sold for value. On the failure of the state to pay the semi-annual interest, an action was brought against the railway companies to enforce the payment of the same and interest. *Held*, that there was nothing in the bonds themselves, without indorsement, to bind the companies that received and sold them, to pay either the principal or interest; that conceding the bonds to be invalid on account of the unconstitutionality of the act under which they were issued, as claimed by the defendants, the holders of them were nevertheless entitled to such remedy as the statute

gave against the companies which had accepted and sold the bonds, and had thereby ratified the remedies provided by the statute; that there was nothing contained in the statute which would constitute a statutory lien for the benefit of the plaintiffs into whose hands the bonds had come, as against the property of the railway companies. *Tompkins v. Little Rock and Fort Smith R'y Co.*, 18 Federal Reporter, 344. 1883.

20. — Where the state guarantied the bonds of a corporation issued in exchange for outstanding mortgage bonds under a statute which provided that the state should take and retain possession of the bonds so surrendered in exchange as "security to the state, and thereby give the state the lien under the first mortgage until all the bonds now secured by mortgage shall be retired," all of the mortgage bonds not having been surrendered or exchanged, *held*, that the state could assert the lien of the mortgage bonds so held by it, together with the coupons thereto attached, as of equal rank with the mortgage bonds not exchanged. *Gibbes v. G. and C. R. R. Co.*, 13 So. Car., 228, 1879; 4 Amer. & Eng. R. R. Cases, 459.

21. — Where an act of the legislature provided that all the property of a railway company should stand pledged and mortgaged to the state for the payment of certain bonds issued by such company and guarantied by the state, such provision constituted a statutory lien for the benefit of the bondholders as well as the state, which no subsequent statute could postpone. *Ib.*

22. — A statute authorizing the guaranty by the state of certain bonds of a railway company, to be secured by a statutory lien, was passed in 1861, and the bonds issued and guarantied under the authority of this act bore the caption "Confederate States of America." In 1866, another act was passed which extended the operation of the act of 1861, and authorized the issue of new bonds in exchange for the C. S. A. bonds, also certificates of indebtedness to pay interest past due on the C. S. A. bonds, and bonds for other indebtedness, all of which were to be in like manner guarantied. *Held*, that the C. S. A. bonds not surrendered were of superior rank to the bonds issued under the act of 1866, but those issued under act

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of 1866, in exchange for bonds surrendered, could claim a lien only under the latter act, and stood upon the same footing with all other bonds issued under the act of 1866. *Ib.*

23. — Whether or not the statutory lien given in favor of the state to secure bonds indorsed under the internal improvement aid law can operate in favor of a holder of such bonds and enable him to be subrogated to such lien, is a question that can be decided in no other than a chancery court, and if the chancellor commits error in a decree thereon, it is not to be revised or corrected by a writ of prohibition. *Ex parte Brown*, 58 Ala., 536, 1877; 24 Amer. R'y Rep., 101.

24. — The purchaser of negotiable state bonds sold in open market, without indorsement or guaranty, and issued to a railroad under the "Internal Improvement Act of the State of Tennessee," for the ironing and equipping of the said railroad, has no enforceable right, by contract or otherwise, in the statutory lien vested in said state by said internal improvement act, against the road and equipments of said railroad, for the purpose of enforcing the payment of the principal and interest of said bonds at maturity. *Stevens v. Louisville and Nashville R. R. Co.*, 3 Federal Reporter, 673. 1880.

25. — The state of Kentucky waived its lien on the Louisville and Frankfort R. R., if any was retained in the act of March 1, 1847, transferring its interest in the road to the L. and F. R. R. Co., as to subsequent mortgages, by authorizing the company to issue bonds and secure them by mortgages on the road, by enabling acts passed by the legislature containing no intimations that such liens were to be subject to the prior lien of the state. *Newport and Cincinnati Bridge Co. v. Douglass*, 12 Bush (Ky.), 673, 1877; 18 Amer. R'y Rep., 221.

26. — The powers and summary remedies conferred on the state by the statute for the enforcement of the statutory lien can only be exercised by the state; but the state, having failed to exercise them, and disclaimed its liability for the indorsed bonds, they afford no obstacle to a resort to a court of equity by the holders of the bonds for the enforcement of the statutory lien for their benefit; and the fact that the state cannot

be made a party to the suit, no relief being asked against it, does not affect the jurisdiction of the court or the equity of the bill. *Forrest's Executors v. Luddington*, 68 Ala., 1. 1880.

27. — The lien created and declared by the statute may be enforced by the bondholders whenever default is made in the payment of the interest on bonds, indorsed by the state, although the governor is directed by the statute to file a bill for foreclosure on default of the payment of the bonds. *Ib.*

28. — Persons holding a mortgage on the property of a railway, executed after the indorsement of the company's bonds by the state, are junior incumbrancers, and although they may be proper, they are not indispensable parties to a bill by the holders of the state-indorsed bonds. *Forrest's Executors v. Luddington*, 12 Amer. & Eng. R. R. Cases (Ala.), 330. 1883.

29. — When a loan is made by the state and a mortgage taken to secure it in pursuance of the provisions of a public statute, all persons are chargeable with notice of it, and the state will not be prejudiced by the neglect of her agents to have the mortgage recorded. *Memphis and Little Rock R. R. Co. v. The State*, 12 Amer. & Eng. R. R. Cases, 323; 37 Ark., 632. 1881.

30. — The purpose of the provisions of the act of the legislature of Georgia, passed December 3, 1866, which established a statutory mortgage on all the property of the Macon and Brunswick Railway Company, indorsed by the governor, was to protect the state from loss on account of such indorsement, and their effect was not to make the state a trustee for the bondholders. *Cunningham v. Macon and Brunswick R. R. Co.*, 3 Woods (U. S. C. C.), 418. 1878.

31. Loan to railway company. If the regulation of a subject belongs to the legislature, the choice of means is purely in its discretion, and no other department of the government can intervene, on the ground that the law is unwise. It pertains exclusively to the legislature to say what "stocks" are safe and solvent. Its decision is binding and conclusive on the judiciary, nor can they interpose on the suggestion that the stocks they have selected are unsafe. To at-

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tempt to control or restrain the law-making department in this respect would be an encroachment on the functions of another branch of the government. When the state acts as a trustee, it acts through the legislature, and assumes the same measure of responsibility that pertains to it in the exercise of its law-making power. No other mode can be suggested in which the state can manage a fund for charitable uses. *State v. Vicksburg and Nashville R. R. Co.*, 51 Miss., 361. 1875.

32. Mortgage. When a loan is made by the state and a mortgage taken to secure it in pursuance to the provisions of a public statute, all persons are chargeable with notice of it, and the state will not be prejudiced by the neglect of her agents to have the mortgage recorded. *Memphis and Little Rock R. R. Co. v. The State*, 37 Ark., 632. 1881.

33. — The Troy and Greenfield R. R. Co. mortgaged its entire railway franchises and property to the commonwealth, under the Stats. of 1854, ch. 226, and 1860, ch. 202, to secure the payment of a loan made by the commonwealth; and subsequently surrendered the same to the commonwealth, under the Stat. of 1862, ch. 156, § 2, which provided that "the right of redemption" should not be barred until a certain time after the completion of the road by the commonwealth. *Held*, that the court had no jurisdiction, either under the Gen. Stats., ch. 63, § 128, ch. 113, § 2, or ch. 140, §§ 13-35, of a bill in equity, brought by the railway company, against the commonwealth, to enforce this right of redemption. *Troy and Greenfield R. R. Co. v. Commonwealth*, 127 Mass., 43. 1879.

34. Payments in gold. An implication that a railroad company having an unfinished road in which the state was largely interested should pay gold instead of currency to the state, which has lent to the company sterling bonds of the state, of which the interest was payable abroad, and, of course, in coin, is not inferable from the fact that, unless the contract between the company and the state be so interpreted, the state has not exacted from the company all that was necessary to its own complete indemnification; this being especially true in the case of

a contract where, in other parts, a complete indemnification was specifically and carefully provided for, and in one where at the time it was made there was no difference, existing or anticipated, in the value of currency and coin, and the difference having been brought about by events supervening long afterwards. *Maryland v. Railroad Co.*, 23 Wallace, 105. 1874.

35. Receiver. A state indorsed the bonds of a railroad company, upon the express condition that such indorsement should vest in the state the title of all property purchased with the proceeds of said bonds, and should give the state a first lien upon all the property of the company; and that, upon failure of the company to pay the interest or principal of the bonds, the governor should take possession of all its property and sell the same for the purpose of paying said bonds. Default was made by the railroad company in the payment of interest, and the governor took possession of its property, which he advertised for sale. *Held*, that, at the suit of a holder of bonds of a subsequent issue, which the state had indorsed on the same terms as the first issue, but which indorsement the legislature had declared not binding on the state, the court would not restrain the sale of the road by the governor, nor take the possession thereof from the state, nor appoint a receiver therefor. *Branch v. Macon and Brunswick R. R. Co.*, 2 Woods (U. S. C. C.), 385. 1875.

36. Repeal; constitutional law. The second section of the act of February 25, 1874, repealing all provisions in charters of railroad companies granting state aid, which provided that, should any of said companies claim that they have a vested right to such aid, and apply to the governor for the same, any citizen of the state may interpose by bill to restrain such companies, and the question as to whether such vested right exists shall be for the courts to determine, is unconstitutional in this, that it is in violation of the true intent and spirit of the fifth and thirty-first paragraphs of the first article of the constitution of 1868. *Northeastern R. R. Co. v. Morris*, 59 Ga., 364. 1877.

37. Sale of railway. The sale of a delinquent railway under the lien of the state had the effect to transfer the railway, its

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appurtenances and franchises to the purchaser, and, where the purchase was not made by the company itself, to dissolve the corporation. *Rogersville and Jefferson R. R. Co. v. Kyle*, 9 Lea (Tenn.), 691. 1882.

38. Statutes; construction. By the provisions of ch. 175, Acts 1874-75, the state recognized the bonds of the Wilmington, Charlotte and Rutherford R. R. Co. as valid. *Leak v. Bear*, 80 N. C., 271. 1879.

39. — The statutes of Mississippi construed. *Hemmingway v. Vicksburg and Nashville R. R. Co.*, 52 Miss., 16. 1876.

40. — The statute of Arkansas construed. *Tompkins v. Little Rock and Ft. Smith R'y Co.*, 15 Federal Reporter, 6, 1882; *State v. Little Rock, Miss. River and Tex. R'y Co.*, 31 Ark., 701, 1877.

41. — The Hannibal and St. Joseph loan construed. *State ex rel. v. Chappell*, 74 Mo., 335, 1881; 7 Amer. & Eng. R. R. Cases, 118; *Ralston v. Crittenden*, 3 McCrary (U. S. C. C.), 332, 1882.

42. — The statutes of South Carolina granting railway aid construed. *Hand v. Savannah and Charleston R. R. Co.*, 12 So. Car., 314. 1879. See *Same v. Same*, 17 So. Car., 219. 1881.

43. — The statutes of Florida construed. *Doggett v. Railroad Co.*, 99 U. S., 72, 1878; *Holland v. State of Florida*, 15 Fla., 455, 1876; *Trustees of Internal Improvement Fund v. Jacksonville, Pensacola and Mobile R. R. Co.*, 16 Fla., 708, 1878.

44. — The statutes and constitution of Louisiana construed. *Williams v. Louisiana*, 103 U. S., 637, 1880; 3 Amer. & Eng. R. R. Cases, 128; *Durkee v. Board of Liquidation*, 103 U. S., 646, 1880; *State ex rel. v. Nicholls*, 30 La. An., 1217, 1878.

SUBSCRIPTIONS BY TOWNSHIPS.

See SUBSCRIPTIONS BY CITIES AND TOWNS; SUBSCRIPTIONS BY COUNTIES.

1. Action of township trustees; how far conclusive. After township trustees have passed upon the sufficiency of a petition presented to them calling for an election to decide the question of levying a tax in aid of the construction of a railroad, and the election has been ordered, and the tax voted and

levied, the validity of such tax cannot be assailed on the ground that the petition was not signed by one-third of the resident taxpayers. *Ryan v. Varga and B. and M. R. R. Co.*, 37 Ia., 78, 1873; *West v. Whitaker*, 37 Ia., 598, 1873.

2. — The trustees having jurisdiction to determine the question, their decision cannot be collaterally assailed, but, like any other judicial determination, remains conclusive until reversed or set aside by writ of error, *certiorari*, or other direct proceeding provided by law. *Ib.*

3. Agreement to surrender the stock. Under an act which authorizes a municipal township to subscribe stock in a railroad company, it is not competent for the township to agree to surrender to the company stock of the company for which it subscribes and issues its bonds, and a contract of subscription which contains such an agreement is void. *State ex rel. v. Brassfield*, 67 Mo., 331. 1878.

4. Amount; excessive. Where the amount of a subscription asked by the petition exceeds two per centum of the assessed value of the taxable property of the township, as shown by the tax duplicate of the preceding year, the levy and assessment of a tax pursuant thereto are illegal and void, and the collection thereof may be enjoined at the suit of a tax-payer. *Columbus, etc., R'y Co. v. Commissioners of Grant County*, 65 Ind., 427. 1879.

5. — Only two per centum of the assessed value of the taxable property of the township, as shown by the tax duplicate of the preceding year, can be levied at one time, upon one petition and in any one period of two years; but it does not follow that other appropriations cannot be made at other times and upon different petitions. *Brokaw v. Commissioners of Gibson County*, 73 Ind., 543, 1881; 3 Amer. & Eng. R. R. Cases, 573. See, also, *Bish v. Stout*, 77 Ind., 255. 1881.

6. Authority to subscribe. A tax or appropriation for a corporate purpose is one for the benefit of the inhabitants of the municipality. Taxes levied by township authorities to aid in the construction of a railroad are for a corporate purpose; and, in this respect, the distinction between a donation in aid of

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a railroad and a subscription to the capital stock of the corporation is more shadowy than real. The power is granted in consideration of the public benefits, and these are as great in one case as in the other. *Chicago, Danville and Vincennes R. R. Co. v. Smith*, 62 Ill., 268, 1871; 6 Amer. R'y Rep., 221.

7. **Bonds.** Where a township has lawful power to issue bonds or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election, the holder in good faith has the right to assume that such preliminary proceedings have taken place, if the fact is certified on the face of the bonds by the authorities, whose primary duty it is to ascertain it; and the mere circumstance that the election was presided over and the returns made, not by the supervisor, assessor and collector of the township, *ex officio* judges of elections, but by a moderator chosen by the electors present, can be of no avail as a defense to the bonds in a suit brought by a *bona fide* holder. *Town of Pana v. Bowler*, 12 Amer. & Eng. R. R. Cases (U. S. S. C.), 563; 107 U. S., 529. 1882.

8. — Under a law which authorizes the "proper corporate authorities" of a township to issue bonds of the town when so authorized by a vote of the electors at an election called for that purpose, the supervisor and town clerk must be regarded as the proper corporate authorities for the issue and delivery of the bonds, it being but a ministerial act, though they are not such for the purpose of creating the indebtedness. There is a distinction between the creation of a debt and merely executing the evidence of it. *Town of Windsor v. Hallett*, 97 Ill., 204, 1881; 3 Amer. & Eng. R. R. Cases, 76.

9. — A township bond containing a statement that "it is to be converted into a county bond" whenever a certain injunction shall be finally dissolved, and county bonds issued under the order enjoined, not being a promise to pay money absolutely, but a stipulation for bonds thereafter to be issued, is not negotiable in such a sense as to preclude the maker from defenses, although it may be held by the plaintiff for value before due, and without actual notice of the maker's defenses. *Merriwether v. Saline County*, 5 Dillon (U. S. C. C.), 265. 1878.

10. — A township in Missouri voted to subscribe for stock in a railroad company. The proper county court, March 28, 1872, made the subscription, and, June 4th, ordered that the bonds in payment therefor be issued. They were issued in October following, but bore date the day of subscription. They were sealed with the seal of the court, and signed by the clerk and by A., a presiding justice, although the latter did not become such until October. Neither the county court nor the other justice thereof consented to A.'s act. The bonds were not registered, nor was the certificate of registration required by said act of March 30th, indorsed thereon. In a suit by B., a holder for value, upon the bonds, *held*, that he was charged with notice that A. was not presiding justice at the time they bear date. That the bonds being signed by A. was equivalent to notice that they were not in fact issued before the passage of said act, and that they are consequently void. *Anthony v. County of Jasper*, 101 U. S., 693. 1879.

11. — The P. C. and F. D. M. R. R. Co. was incorporated by the legislature of Missouri in 1860; by its charter the county court of any county through which the line was located, and any city or town, were authorized to subscribe for stock, and to issue bonds to pay therefor; by § 7 a provision is made for taking a vote of the taxable inhabitants of a strip of country on either side of the road, and if a majority vote in favor of a tax to pay for stock, it is made the duty of the court to levy and collect the tax. *Held*, that the charter gave no authority to the taxable inhabitants of a strip of country along the road to vote for the issue of bonds, or for an issue of bonds upon a vote in favor of subscribing for stock, but only authorized the levy and collection of a special tax to pay for stock. *Dodge v. County of Platte*, 2 Amer. & Eng. R. R. Cases, 583; 82 N. Y., 218. 1880.

12. — The court reaffirms the ruling in *Harter v. Kernochan*, 103 U. S., 562, that the duly signed and countersigned township bonds, payable to the company or bearer, which recite that they are duly issued in compliance with the vote of the legal voters of the township, cast at an election held by virtue of the Illinois acts of February 25, 1867,

Certificate — Conditions.

and February 24, 1869, are valid in the hands of a *bona fide* holder. *Pana v. Bowler*, 107 U. S., 529. 1882.

13. — A township was authorized to subscribe to the stock of a railway company, provided the county commissioners should not be authorized by a vote of the electors of the county to make such subscription. *Held*, in view of the decisions of the supreme court of the state, that bonds issued by the township in payment of such subscription were void in the hands of a *bona fide* purchaser, where the electors of the county had previously voted to subscribe such stock, and it was the duty of the county commissioners to ascertain and declare the result of such vote. *Northern Nat. Bank of Toledo v. Trustees of Porter Tp.*, 5 Federal Reporter, 568. 1880.

14. **Certificate.** The certificate of the township trustees of the original township is sufficient evidence of the compliance with the conditions by the railway company. Where the township is subsequently divided, the certificate of the trustees of the new township is unnecessary. *Meador v. Lowry*, 45 Ia., 684, 1877; *Sioux City and Pembina R. R. Co. v. Herron*, 46 ib., 701, 1877.

15. — The discretion of the trustees is limited to the determination of the facts that the road has been built and that the order of the president of the corporation is accompanied by the necessary estimates. *Harwood v. Quinby*, 44 Ia., 385. 1876.

16. — The certificate of the township trustees that a company is entitled to receive the tax is not authority for its collection, the only object of such certificate being to authorize the treasurer to pay to the company the amount collected and in his hands. *Lamb v. Anderson*, 54 Ia., 190. 1880.

17. — The certificate of the clerk of election, required to be executed to the county auditor by ch. 123, Laws of 1876, before the levy of a tax under its provisions is authorized, must contain all the particulars enumerated in said chapter, in addition to a copy of the notice under which the election was held. *Held*, a reference to such notice for any of the conditions of the tax is not a sufficient compliance with the statute. *M. and I. S. R. R. Co. v. Hiams*, 53 Ia., 501. 1880.

18. **Compliance.** While a tax voted to aid in the construction of a railway cannot be collected in instalments, yet, if the company shall not have expended enough in the city or township to entitle it to the whole, it may be entitled to collect the part earned in lieu of the whole. *Casady v. Lowry*, 49 Ia., 523. 1878.

19. **Compromise.** Notwithstanding this court holds the act of March 23, 1868, authorizing the issue of township bonds, unconstitutional, and bonds issued thereunder void, yet since the courts of the United States hold the contrary, such bonds cannot be deemed such absolute nullities as not to be the subject of compromise. *State ex rel. v. Holladay*, 72 Mo., 499. 1880.

20. **Conditions.** Where a township voted a subscription of \$50,000 of the capital stock of a railway company, to be paid in bonds, under a law providing that no bonds should be delivered nor any payment made under such subscription until an amount of work was done on such road in the town, or on such part of the line of the road as the authorities issuing the bonds should designate, *equal in value to the amount of bonds to be issued*, and the condition of the vote was, that the bonds were to be delivered when work was done in the township to the amount of such bonds, it was held that the building of the road through the town at a cost of only \$30,000, or even \$41,000, was not a substantial compliance with the conditions, and that the court would not compel the issue of the bonds voted. *People ex rel. v. Town of Waynesville*, 88 Ill., 469, 1878; 21 Amer. R'y Rep., 339.

21. — Where a proposition of submission to take stock in a railroad corporation is adopted by the voters of a township, at an election called in pursuance of ch. 90, Laws of 1870, and thereon a subscription is duly made, and the proposition submitted contains a condition that if the county becomes a stockholder in the corporation, or issues bonds to it under any subscription, the subscription of the township is to be null and void, *held*, that such township subscription is not avoided by the action of the corporation to enforce a pretended subscription of such county and obtain the county bonds therefor, when, on final hearing of the suit,

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the so-called subscription of the county is held invalid for want of power on the part of the subscriber to make it. *Atchison, Topeka and Santa Fe R. R. Co. v. Comm'rs of Jefferson Co.*, 21 Kans., 309. 1878.

22. — A township having voted aid to a railway company, the county board ordered one-half the necessary tax to be levied and collected at once, and the other half at a time specified. The first half was duly levied, but more than a year elapsed after the time fixed for the levy of the second half without anything being done. At length, the county board passed a resolution that the remaining half be levied and collected, the line having been permanently located and put in operation in the township, and having spent more upon its road than the total amount of aid subscribed. *Held*, that the railroad was entitled to have such second half of the necessary tax levied and collected, and that a taxpayer could not, by injunction, restrain the collection of the same. *Norton v. Milner*, 12 Amer. & Eng. R. R. Cases (Ind.), 639. 1883.

23. — Where a proposition is submitted to the voters of a township, under ch. 90, Laws of 1870, to take stock in the name of the township in a railroad corporation, and three-fifths of the electors voting favor the subscription and the issue of bonds, and thereafter the subscription is made, *held*, that the subscription is valid, and the county commissioners are bound to issue bonds of such township, after a full compliance on the part of the corporation with the terms and conditions of such submission, notwithstanding the proposition of submission contains a condition to be performed on the part of the township, relating to a transfer of its stock in the corporation, which is a nullity, when such condition, by the terms of the submission, is subsequent to the subscription and the issuance of the bonds. *Atchison, Topeka and Santa Fe R. R. Co. v. Comm'rs of Jefferson Co.*, 21 Kans., 309. 1878.

24. Consolidation of railways. Although a subscription for stock of a railroad be duly authorized by the requisite number of the qualified voters of a township, if the company, before the subscription be actually made, becomes consolidated with another,

thereby forming a third, the county court is not empowered to subscribe, on behalf of the township, for stock of the new company, and issue bonds in payment therefor. *Harshman v. Bates County*, 92 U. S., 569. 1875.

25. — The records of the township show that the bonds were directed to be issued and delivered to the consolidated company; the township is therefore, as against a *bona fide* holder for value, estopped from denying their validity. *Harter v. Kernochan*, 103 U. S., 563, 1880; 3 Amer. & Eng. R. R. Cases, 82.

26. — A tax voted to a railway inures to the benefit of a corporation with which it is afterwards consolidated. *Wilson v. Salamanca*, 99 U. S., 499. 1878. See, also, *Atchison, Colo. and Pacific R. R. Co. v. Comm'rs of Phillips County*, 25 Kans., 261, 1881; 4 Amer. & Eng. R. R. Cases, 326.

27. Constitutional law. Township aid laws held to be constitutional. *Renuick v. Davenport and Northwestern R'y Co.*, 47 Ia., 511, 1877; *Petty v. Myers*, 49 Ind., 1, 1874; *Allison v. Louisville, etc., R'y Co.*, 10 Bush (Ky.), 1, 1873; *Town of Arbington v. Cabeen*, 12 Amer. & Eng. R. R. Cases (Ill.), 591, 1883; *Jordan v. Cass County*, 3 Dillon (U. S. C. C.), 185, 1874.

28. — Certain statutes authorizing township aid held to be unconstitutional. *Harter v. Kernochan*, 103 U. S., 562, 1880; 3 Amer. & Eng. R. R. Cases, 82; *Wyscaver v. Atkinson*, 37 Ohio St., 80, 1881.

29. Contract between two companies; validity. Where the railroad company named in the petition entered into a written agreement with the officers of another company, organized to build another line into and through the same township, to the effect that, if the latter company should succeed in so building its railway, it should have the one-half of the appropriation to be voted for, and, if it failed to so build its proposed railway, then the former company should receive but one-half of said aid, and where there was no concealment of such agreement, but the same was made public through the county newspapers and by the circulation of hand-bills, *held*, that the agreement was valid. *Bish v. Stout*, 77 Ind., 255. 1881.

Contract to take Township Tax in Payment for Work — Estoppel.

30. Contract to take township tax in payment for work. When the plaintiffs, under a contract for the construction of a railroad for the defendant, agreed to collect and receive in part payment a certain sum from a township tax voted by the people of the township, or from certain subscriptions to stock that had been made, it was held that, to entitle plaintiffs to recover, they must show proper effort and diligence on their part to collect either from the subscription or tax, or some excuse for not so doing. *Arnold v. River R. R. Construction Co.*, 35 Ia., 99, 1872; 5 Amer. R'y Rep., 189.

31. Election. The action of the persons or the tribunal authorized by law to determine the result of an election held for the purpose of ascertaining whether a municipal township shall issue its bonds in aid of an object authorized by law is conclusive, and a *bona fide* purchaser of the bonds is under no obligation to look beyond it. *Township of Rock Creek v. Strong*, 96 U. S., 271, 1877.

32. — The constitution of Missouri (art. 11, sec. 14) requires a two-thirds vote to authorize municipal subscriptions to the stock of a railroad corporation. A township voted stock in company A., which afterwards, under a general law of the state, *consolidated* with company B., and formed thereby a new company, C. *Held*, that a subsequent subscription by the township to company C., by virtue of the prior vote to company A., was unauthorized, and bonds which on their face recited these facts were void, even in the hands of a *bona fide* holder for value. *Harshman v. Bates County*, 3 Dillon (U. S. C. C.), 150. 1874.

33. — The words "town meeting" have a definite and well settled meaning in the township law, and are always used to describe the annual town meetings of the electors of the town for the purpose of electing town officers, and transacting such other business as the electors are authorized to transact, or special meetings of the electors for such purposes called pursuant to law. Such meetings are clearly distinguishable from "elections" when there is no other business transacted but to elect officers. *Chicago and Iowa R. R. Co. v. Mallory*, 101

Ill., 583, 1882; 5 Amer. & Eng. R. R. Cases, 139.

34. — Under a law providing for a vote whether a township shall issue bonds in aid of a railroad, which requires the town clerk, upon receiving the proper petition, to "immediately give the notice required by law for an election," etc., it was held that three notices were all that were required to be posted of the time and place of the election, the same as of an annual town meeting, and not five, as the law then required in case of a special town meeting. *Town of Windsor v. Hallett*, 97 Ill., 204, 1881; 3 Amer. & Eng. R. R. Cases, 76.

35. — Where a law authorizing municipal subscriptions by towns in counties under township organization required the elections therefor to be held and conducted in all respects, and returns thereof made, "as in case of annual elections," it was held that the term "annual elections" did not mean town meetings, but was used in the sense of general elections, and therefore that notice of the election, under the general election law, was sufficient. *Town of Prairie v. Lloyd*, 97 Ill., 179, 1881; 3 Amer. & Eng. R. R. Cases, 58.

36. — If the certificates of the clerks of election required by ch. 102, Laws of 1870, are reasonably susceptible of a construction which will show a compliance by them with the provisions of the statute, such construction will be given it, notwithstanding any imperfections in form. *Casady v. Lowry*, 49 Ia., 523. 1878.

37. Estoppel; third parties. The trustees of B. township, in pursuance of an election, subscribed \$17,000 to the stock of the S. M. and P. R. R. Co., and issued and delivered the township bonds therefor. Prior to the election B. and others made a mortgage to the trustees to indemnify the township from all loss upon the subscription. A part of the bonds were negotiated by the company to R. H. before maturity. R. H. applied for a *mandamus* to compel the township trustees to levy a tax to pay matured interest on his bonds. In that proceeding the supreme court held the bonds unauthorized and void. The mortgaged premises had been conveyed by B. to H. H. H. H. brought a suit to remove the cloud of the mortgage from the

Expenses of Proceedings — Injunction.

lands. *Held*, that the mortgagor and his grantees were not estopped from asserting the invalidity of the bonds, and that the mortgage should be canceled. *Hopple v. Hipple*, 33 Ohio St., 116. 1877.

38. Expenses of proceedings. A county is in no way interested in the voting of taxes in its various townships in aid of railways, and cannot be required to pay any part of the expense thereby incurred. *McBride v. Hardin County*, 7 Amer. & Eng. R. R. Cases (Ia.), 221. 1892.

39. Forfeiture. The money in the hands of a county treasurer, arising from a tax voted by a township in aid of a railroad, where the company has forfeited all right to the same, under § 18 of the act of May 12, 1869 (1 R. S. 1876, p. 736), and §§ 1 and 2 of the supplemental act of December 24, 1872 (Acts 1872, p. 56), it not having been diverted into the township funds, belongs to the township, unless it has been demanded by the township tax-payers within two years after the passage of the act of 1872, or within two years after the forfeiture thereof by the company; and such demand, being matter of defense, need not be negatived in the complaint in an action by a township against a county to recover a tax voted by the township. *Centre Township v. Commissioners of Marion County*, 70 Ind., 562. 1880.

40. Foreign company. That the property and franchises of a railway company are owned by a foreign corporation, that there was a prior existing levy on the township to aid the same line, or that proper notices of election concerning the levy of the tax were not given, are matters which must have been decided by the commissioners before granting the prayer of the petition, and that decision could only be reviewed upon a direct appeal. It cannot be questioned by a suit to enjoin the collection of the tax. *Reynolds v. Faris*, 80 Ind., 14. 1881.

41. Fraud. When the electors of a township were induced by fraudulent representations to vote a tax to aid in the construction of a railway, the collection of the tax could not be enforced. *Sinnett v. Moles*, 33 Ia., 25. 1873.

42. Illegal tax; refunding by treasurer of county. Where taxes to aid in the construction of a railway were voted in two or

more townships in a county, in one of which, after a part of the taxes had been collected, the tax was declared illegal, it was held that the treasurer was not authorized to refund the taxes illegally collected out of the taxes lawfully collected from the other townships; and that *mandamus* would lie to compel him to pay the latter over to the company. *D. M. and M. R. R. Co. v. Lowry*, 51 Ia., 486. 1879.

43. Incorporated towns. For the purpose of a tax in aid of a railway, an incorporated town within a township is part of the township. *Reynolds v. Faris*, 80 Ind., 14. 1881.

44. Indiana statute. The power of counties and townships to vote aid to railroad companies is conferred and regulated by the act of May 12, 1869, and the supplement and amendatory acts of January 30, 1873, and March 11, 1875. *Peed v. Millikan*, 79 Ind., 86. 1881.

45. Injunction. Any tax-payer of a precinct has the right by legal proceedings to restrain the sale of the bonds of the precinct illegally issued to aid in the construction of a railway. *Allison v. Louisville, etc., R'y Co.*, 9 Bush (Ky.), 247. 1872.

46. — A bill to enjoin the supervisor of a town from issuing the bonds of a township, charged, "on information and belief, that said company will soon demand of the supervisor of said town all or a part of said bonds, and that there is danger, unless said supervisor is enjoined from issuing said bonds, and the said company restrained from receiving the same, that said bonds will be issued and registered." *Held*, that this was a specific and positive charge that there was danger that the bonds would be issued and registered, unless the supervisor was restrained from issuing the bonds, and clearly entitled the complainant to an answer. *Campbell v. Paris and Decatur R. R. Co.*, 71 Ill., 611. 1874.

47. — The railway company is not a necessary party defendant in an action brought by a township against the board of county commissioners, to perpetually enjoin them, as agents of the township, from subscribing to the capital stock of such company, and executing bonds therefor, under the authority of a special election, where the petition alleges the conditions precedent to the power

Legalizing Act — Railways already Built.

of the county board to call the election and make any subscription were not complied with. *Township of Dixon v. Comm'rs of Sumner County*, 25 Kans., 519. 1881.

43. Legalizing act. The act of the legislature, adopted after this suit was instituted, declaring that the act of the county judge in casting the vote of the precinct in an election for directors of the company, and the act of the commissioners in requesting him to call an election in the precinct, were legal and valid, could not affect the rights of the parties to the suit, or the law as it existed at the time the petition was filed. *Allison v. Louisville, etc., R'y Co.*, 9 Bush (Ky.), 247. 1872.

49. — The judicial being a co-ordinate and independent department of the state government, neither of the other departments can constitutionally interfere with it in the exercise of its exclusive right to determine the law of existing cases. *Ib.*

50. — A legalizing act held valid. *Unity v. Burrage*, 103 U. S., 447, 1880; 2 Amer. & Eng. R. R. Cases, 560.

51. — A legalizing act held unconstitutional. *Columbus, etc., R'y Co. v. Commissioners of Grant County*, 65 Ind., 427. 1879.

52. Limitations. Under chs. 2 and 50, Laws of 1872, it was the duty of the township trustees, after a tax had been voted to aid in the construction of a railroad, and the engineer's estimates, together with an order of the president of the company, had been presented, showing that the statute had been complied with and that the company had expended more than the amount of the tax in the township, to certify the fact to the county treasurer. *Harwood v. Quinby*, 44 Ia., 385. 1876.

53. — The statute of limitations would not operate to bar an action of *mandamus* to compel the trustees to perform this duty, in a case where the tax had been voted prior to the enactment of these statutes, until three years after they took effect. *Ib.*

54. Mandamus. A writ of mandate is the proper remedy to oblige the board of commissioners of a county to levy a tax in payment of a township subscription to the stock by a railway company. *Board of Commissioners of Decatur County v. The State*, 12 Amer. & Eng. R. R. Cases (Ind.), 604. 1883.

55. Narrow gauge railway. The construction of a narrow gauge railway is sufficient compliance with the law, unless it be shown that such narrow gauge road is unable to do the business of the country. *Casady v. Lowry*, 49 Ia., 523. 1878.

56. Proceedings. Proceedings for township subscription under various statutes examined. *Columbus, etc., R'y Co. v. Commissioners of Grant County*, 65 Ind., 427, 1879; *Petty v. Myers*, 49 ib., 1, 1874; *Reynolds v. Faris*, 80 ib., 14, 1881; *Peed v. Millikan*, 79 ib., 86, 1881; *Commissioners of White County v. Kapp*, 12 Amer. & Eng. R. R. Cases (Ind.), 642, 1883; *Gavin v. Commissioners of Decatur County*, 12 ib., 685 (Ind.), 1882; *Atchison, Topeka and Santa Fe R. R. Co. v. Comm'rs of Jefferson Co.*, 21 Kans., 309, 1878; *Zorger v. Township of Rapids*, 36 Ia., 175, 1872.

57. Published agreement; failure to comply therewith. The fact that the railroad company, prior to the election, caused to be published in a newspaper of the township an agreement or proposition that it would, within a certain time, expend a sum named in the erection of machine shops, etc., and that the company had not expended the amount stated, would not invalidate the tax, nor authorize the issuance of an injunction to restrain its collection. *Zorger v. Township of Rapids*, 36 Ia., 175. 1872.

58. Purchase of railway. Where taxes are voted by a township to a railway company, upon the condition that it will construct a railway between two points named, such company does not become entitled to such aid by forming an all-rail connection between such points by the purchase of a constructed road of another company for a portion of the distance, though the portion so constructed is entirely outside of the township voting the aid. *Iowa, Minn. and North Pacific R. R. Co. v. Schenck*, 7 Amer. & Eng. R. R. Cases (Ia.), 324. 1881.

59. Railways already built. Townships have no right to vote aid to railways already constructed. *Brokaw v. Commissioners of Gibson County*, 73 Ind., 543, 1881; 3 Amer. & Eng. R. R. Cases, 573; *State ex rel. v. County Court of Bates County*, 57 Mo., 70, 1874. See, also, *Lamb v. Anderson*, 54 Ia.,

 Employes — Abandonment — Conveyance.

190, 1880; *Iowa, Minn. and North Pacific R. Co. v. Schenck*, 56 Ia., 628, 1881.

60. School trustees' powers. A township not under township organization has no power to become, through the trustees of schools, a stockholder in a railroad company, with power to issue bonds and levy and collect taxes on the property in the township to pay the bonds. *People v. Dupuyt*, 71 Ill., 651, 1874.

61. Tax books. The validity of the tax did not depend upon its extension on the tax books in the year in which it was voted, and the fact that it was not so extended would not prevent it from being afterward entered thereon as an unpaid tax of a former year. *Harwood v. Brownell*, 48 Ia., 657, 1878.

62. Tax receipts. An instrument executed by the treasurer of a railroad company in the form of an advance receipt for taxes voted in a certain township in aid of the company, and which provided that it should be received by the company from the county treasurer in payment of so much of such taxes, was held not to be collectible from the company or an indorser until it had been tendered in payment of the taxes specified and refused by the county treasurer. *Lisle v. Ia., Minn. and North Pacific R. R. Co.*, 54 Ia., 499, 1880.

63. When tax becomes due. While, under ch. 48, Laws of 1868, it is the duty of the treasurer to collect and pay into the treasury a tax voted in aid of a railroad, yet the company cannot enforce this duty by *mandamus* until it shows itself fully entitled to the tax by presenting to the treasurer an order of the president or managing director, accompanied by certified estimates of the engineer, showing that an amount equal to the tax has been expended by the company within the county. Until this is done the tax does not become delinquent. *Harwood and Cedar Falls and Minnesota R'y Co. v. Case*, 37 Ia., 692, 1873.

64. Where money may be expended. When aid is subscribed by a township for the construction of a railway through the same, the money need not necessarily be expended on that part of the road within the limits of the township, but it may be expended on the road outside its limits.

Brokaw v. Commissioners of Gibson County, 73 Ind., 543, 1881; 3 Amer. & Eng. R. R. Cases, 573.

 SUNDAY LAWS.

1. Employes; sales to. Railway employes are *bona fide* travelers, and the keeper of a hotel may sell them excisable liquors on Sunday the same as to other travelers. *Brunton v. Bremner*, 4 Cowper's Justiciary (Scotch), 1, 1878.

2. Operation of railways. The running of its passenger trains by appellee, transporting passengers, baggage, etc., on the Sabbath day, is not a violation of § 10, art. 17, ch. 29, General Statutes. Such use of its trains on that day held to be a "work of necessity." *Commonwealth v. Louisville and Nashville R. R. Co.*, 80 Ky., 291, 1882; 6 Amer. & Eng. R. R. Cases, 216.

3. — Necessary repairs of a railway may be made on Sunday. *Yonoski v. The State*, 5 Amer. & Eng. R. R. Cases (Ind.), 40, 1882.

4. Street railways. This court is not prepared to hold that the running of street railroad cars on Sunday, in cities and the vicinity thereof, is not a work of necessity, as contemplated by s. 4579 of the Code. *Augusta and Summerville R. R. Co. v. Renz*, 55 Ga., 126, 1875.

 SUPERFLUOUS LAND.

1. Abandonment. The abandonment by the company of the undertaking for which the lands were purchased will not, independently of the legislative enactments, give the former owner any right to a reconveyance. *Astley v. Manchester R'y Co.*, 2 De Gex & Jones, 453; 59 Eng. Ch., 453, 1858.

2. Contract. A contract for sale of superfluous land construed. *Best v. Hamand*, Law Reports, 12 Chancery Division, 1, 1878.

3. Conveyance. The mere fact of a railway company purporting to convey away lands acquired by it for the purposes of its undertaking is not conclusive to show that the lands so conveyed are superfluous lands within the meaning of sec. 128 of the Lands Clauses Consolidation Act, 1845. *Hobbs v. Midland R'y Co.*, Law Reports, 20 Chancery

Compensation.

Division, 418, 1882; 10 Amer. & Eng. R. R. Cases, 53.

4. Surface. A railway company purchased land for the purpose of making an underground railway. It excavated the soil, constructed the line, and then built an arch over it, and replaced the surface over the arch. *Held*, by Fry, J., and by James and Cotton, L. JJ., Baggallay, L. J., doubting, that the company was not authorized, by sec. 127 of the Lands Clauses Consolidation Act, 1845, to sell the vacant space over the arch as "superfluous land." "Superfluous land" must be land separated by a vertical, not by a horizontal, boundary, from land required for the purposes of the company. *Metropolitan R'y Co., In re*, Law Reports, 13 Chancery Division, 607. 1879.

5. Statute. English statutes in relation to superfluous land construed. *London and Southwestern R'y Co. v. Gomm*, Law Reports, 20 Chancery Division, 562; 11 Amer. & Eng. R. R. Cases, 385, 1883; *Norton v. London and North Western R'y Co.*, Law Reports, 13 Chancery Division, 268, 1879; *Beauchamp v. Great Western R'y Co.*, Law Reports, 3 Chancery Appeal Cases, 745, 1888; *Coventry v. London, Brighton and South Coast R'y Co.*, Law Reports, 5 Equity Cases, 104, 1867; *City of Glasgow Union R'y Co. v. Caledonian R'y Co.*, 2 Paterson (House of Lords, Scotch App.), 1946, 1871; *May v. Great Western R'y Co.*, Law Reports, 8 Queen's Bench Cases, 26, 1872.

6. Unused land. Land which is taken compulsorily by a railway company for the purposes of its act, and which is *bona fide* retained by it with a reasonable expectation of using it for such purposes, does not, at the expiration of ten years from the time fixed for the completion of the works, vest in an adjoining owner as superfluous land, under the Lands Clauses Consolidation Act, 1845, s. 127, merely because, from insufficiency of traffic or from want of funds, the company cannot immediately apply it to such purposes, although it is, in the meanwhile, let out to yearly tenants and applied to purposes for which it is, in its then condition, suitable. *Betts v. Great Eastern R'y Co.*, Law Reports, 3 Exchequer Division, 182, 1878; 31 Eng. (Moak), 212.

7. — The fact that lands are in the vicinity

of a populous town is a circumstance to raise a presumption that such lands will be needed on account of the increased traffic of the railway. *Hooper v. Bourne*, 33 Eng. (Moak), 601; Law Reports, 5 Appeal Cases, 1. 1880. See, also, *Hooper v. Great Western R'y Co.*, Law Reports, 2 Queen's Bench Division, 339, 1877; 21 Eng. (Moak), 145; *Hooper v. Bourne*, Law Reports, 3 Queen's Bench Division, 258, 1877.

8. — Lands purchased for extraordinary purposes and not taken compulsorily are not to be deemed superfluous lands. *City of Glasgow Union R'y Co. v. Caledonian R'y Co.*, Law Reports, 2 Scotch & Divorce Appeal Cases, 160. 1871.

9. Wall. Where, by agreement, a wall has been built on land dividing the property of an individual from that of the company, and the individual and the company are, by the same agreement, the joint owners of the land on which the wall is built, that circumstance does not affect the individual, so as to prevent him from being considered an "adjoining owner." *London and South Western R'y Co. v. Blackman*, Law Reports, 4 English & Irish Appeal Cases, 600. 1870.

SUPERINTENDENT OF RAILWAY.

1. Compensation. If there is no special agreement fixing the amount the superintendent of a railroad company shall receive for his services as superintendent, he is entitled to receive the value of such services. *Bee v. San Francisco and Humboldt Bay R. Co.*, 46 Cal., 248, 1873; 7 Amer. R'y Rep., 504.

2. — If the superintendent of a railroad company, at the request of the company, before work is commenced in the field, performs work which is not technically within the line of a superintendent's duty, it will be presumed that in doing the work he acted in his capacity as superintendent. *Ib.*

3. — In an action by the superintendent of a railroad company, brought against the company to recover the value of his services as superintendent, if the company claim that his salary had been fixed at a stipulated sum, conversations between the plaintiff and directors of the company are admissible in

Appeal — Contract for Drainage — Evidence.

evidence to show that he dissented from the amount of salary proposed for him by the directors, and that he did not consider his salary as fixed at a stipulated sum. *Ib.*

SURETYSHIP.

1. Appeal. On the evidence, *held* that the surety upon an appeal bond was liable without further proceedings against the principal. *New Orleans, Mobile, etc., R. R. Co. v. Dugan*, 27 La. An., 465. 1875.

SURFACE WATER.

See EMINENT DOMAIN; LIMITATIONS.

1. Contract for drainage. The plaintiff gave a railway company free right of way across his land, but stipulating that it should not cause an overflow of water on his field, which the company contracted that it would observe by constructing a water-way large enough to prevent overflow. The company violated its contract by constructing an insufficient water-way, whereby much of plaintiff's growing crop was destroyed and unplanted ground injured, greater labor being required to prepare it for planting by reason of the overflow. In an action for damages against the company, *held*, that the damages to which plaintiff was entitled were such as are recoverable in an action of trespass. *Sabine and East Texas Ry Co. v. Joachimi*, 58 Tex., 456, 1883; 11 Amer. & Eng. R. R. Cases, 539. See, also, *Madden v. Railway Co.*, 36 Ohio St., 46, 1880; 3 Amer. & Eng. R. R. Cases, 232.

2. Conveyance. A deed gives the company no right to flood the remaining land with water brought by it from other lands when the consideration of the deed is only for the land conveyed. *Jacksonville, Northwestern and Southeastern R. R. Co. v. Cox*, 91 Ill., 500. 1879.

3. Easement. In an action against a railway company for diverting surface water, and turning it upon the plaintiff's land, the evidence tended to show that the railway embankment obstructed the flow of the surface water from the hills and down a ravine, and that the defendant had dug a ditch on

the upper side of the road, and had thereby conducted the water a distance of several rods, and discharged it, through a culvert under the road, upon land of the plaintiff, where it had not been accustomed to flow. The defendant claimed the right to do this, on the ground that it was necessary to the proper construction and maintenance of the railway. The jury returned a verdict of \$1 for the plaintiff. The question then arose as to the right of the plaintiff to costs; and the defendant asked the court to rule that, "if the right claimed at the trial existed merely as incident to the right to construct and maintain a railroad, it would not constitute an easement." The judge "declined so to rule, and ruled to the contrary," and thereupon made a certificate that a right to an easement was in fact involved in the action. *Held*, that no error appeared. *Rathke v. Gardner*, 134 Mass., 14. 1883.

4. Embankment. A complaint set forth that during the winter season large quantities of water flowed from some distance above plaintiff's premises along-side and parallel to a highway, and passed plaintiff's premises without collecting there; that a railroad company, whose lands adjoined plaintiff's, so constructed an embankment as to cause such water to collect on plaintiff's lands. *Held*, not a watercourse, and that an action was not maintainable for the obstruction. *Wagner v. Long Island R. R. Co.*, 5 Thompson & Cook (N. Y. Supreme Ct.), 163, 1874; appeal dismissed, 70 N. Y., 614, 1877. See, also, *Conhocton Stone Road Co. v. N. Y. and Erie R. R. Co.*, 5 Thompson & Cook (N. Y. Supreme Ct.), 651. 1875.

5. Evidence. In an action of trespass on the case for wrongfully and injuriously building an embankment on defendant's own land, so as to cause an obstruction and reflow of water on plaintiff's land, it is not error to refuse introduction of testimony on the part of the defendant, that the drain constructed by the defendant, to carry the water from the land of the plaintiff, was such a drain as is usual and customary to be constructed at such embankments on railroads generally, and have been found sufficient for the purposes of carrying off the water at like places. *Beatty v. Baltimore and Ohio R. R. Co.*, 6 West Va., 388. 1873.

Statute.

6. Negligence. While a railway company has a right to drain surface water from its road-bed so as to protect the same, the work must be so done as to occasion no unnecessary inconvenience or damage to the adjoining proprietor. And the latter may recover for injuries produced by mere negligence without proving malicious intent. *McCormick v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 57 Mo., 433, 1874; 9 Amer. R'y Rep., 133.

7. — No action will lie for changing the flow of surface water where reasonable care and skill are used by the railway company. *Wagner v. Long Island R. R. Co.*, 2 Hun (N. Y.), 633, 1874; appeal dismissed, *Same v. Same*, 70 N. Y., 614, 1877; *Morrison v. Buckport and Bangor R. R. Co.*, 67 Me., 353, 1877; *Atchison, Topeka and Santa Fe R. R. Co. v. Hammer*, 22 Kans., 763, 1879. See, also, *Munkers v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 60 Mo., 334, 1875; *Hosher v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, ib., 329, 1875; 9 Amer. R'y Rep., 230; *Munkers v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 72 Mo., 514, 1880; 5 Amer. & Eng. R. R. Cases, 79; *Mills v. G. and C. R. Co.*, 13 So. Car., 97, 1879; 5 Amer. & Eng. R. R. Cases, 55; *O'Connor v. Fond du Lac, Amboy and Peoria R'y Co.*, 52 Wis., 526, 1881; 5 Amer. & Eng. R. R. Cases, 82; *Cairo and Vincennes R. R. Co. v. Stevens*, 73 Ind., 278, 1881; 5 Amer. & Eng. R. R. Cases, 58; *Cairo and Vincennes R. R. Co. v. Houry*, 77 Ind., 364, 1881.

8. — A railroad company has no right, by an embankment or other artificial means, to obstruct the natural flow of the surface water, and thereby force it in an increased quantity upon the lands of another, and if it does so, it is liable for any injury that the owner of the land may sustain by reason thereof. *Toledo, Wabash and Western R'y Co. v. Morrison*, 71 Ill., 616, 1874; *Jacksonville, Northwestern and Southeastern R. R. Co. v. Coz*, 91 Ill., 500, 1879; *Cornish v. Chicago, Burlington and Quincy R. R. Co.*, 49 Ia., 378, 1878.

9. Nuisance; limitations. A railway company, by failing to keep open a ditch which ran along-side of an embankment constituting a part of its road-bed, it accumulated the

surface water in such quantities as to overflow adjoining lands, the owner of which made constant complaint, but delayed suit until more than seven years after the commencement of this wrong. *Held*, that each overflow was a distinct trespass, which, being committed without any claim of right by the company, and without the consent of the owner of the overflowed land, could not establish an easement by prescription or limitation. Twenty, and not seven, years is the period of prescription for an easement, such as a right of way or servitude of overflow. A benefit accruing is an essential element in an easement, and no period of prescription can create a right to maintain a nuisance which injures all whom it affects and benefits no one. *Louisville and Nashville R. R. Co. v. Hays*, 11 Lea (Tenn.), 382, 1833.

10. Overflow from river. A land owner has no right, by erecting an embankment, to stop the natural flow of surface water or to divert its course so as to throw it upon the land of his neighbor. Overflowed water from a river, in time of flood, is surface water, within the meaning of this rule. *Shane v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 71 Mo., 237, 1879; 5 Amer. & Eng. R. R. Cases, 64.

11. Pleadings. Where plaintiff charges that his land was flooded and damaged, by the diversion by a railroad company of a stream of water from its natural channel, he cannot recover on proof showing that the injuries were caused solely by surface water. And the distinction between the cases and the relative liability of the company should be explained to the jury under appropriate instructions. *Munkers v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 60 Mo., 334, 1875; 9 Amer. R'y Rep., 234.

SWAMP LANDS.

1. Statute. The statutes in relation to swamp lands construed. *Buena Vista County v. Iowa Falls and Sioux City R. R. Co.*, 55 Ia., 157, 1880; *Lockwood v. Hannibal and St. Joseph R. R. Co.*, 65 Mo., 233, 1877.

Assessments.

TAXATION.

See CHARTER; CERTIORARI; EXPRESS COMPANIES; INTERJUNCTION; LAND GRANTS; MORTGAGE.

- I. ASSESSMENTS.
- II. DIFFERENT KINDS OF TAX.
- III. COLLECTION OF TAX.
- IV. PLACE OF TAXATION.
- V. LAND GRANTS.
- VI. SPECIAL CHARTERS.
- VII. EXEMPTION.
- VIII. CONSTITUTIONAL LAW.
- IX. MUNICIPAL CORPORATIONS.
- X. FOREIGN CORPORATIONS.
- XI. STREET RAILWAYS.
- XII. GENERAL MATTERS.

I. ASSESSMENTS.

1. **Certiorari.** The return to the writ is not conclusive but may be controverted. *People ex rel. v. Smith*, 24 Hun (N. Y.), 66, 1881; *Same v. Sane*, 85 N. Y., 628, 1881.

2. — Assessments against the United Railroad and Canal Companies vacated, because the possession of the land assessed was appropriate to the enjoyment of the company's franchise. *State v. Binninger*, 1 Amer. & Eng. R. R. Cases (N. J.), 410. 1880.

3. **Description.** A government survey with a given number is a description of land well recognized and which can be easily located, but a lot therein of a certain number does not represent any ascertainable part of the survey, unless a plat has been made and recorded by competent authority, which divides the survey into lots. *People v. Chicago and Alton R. R. Co.*, 96 Ill., 369. 1880.

4. **Equalization.** Various statutes providing for boards of equalization construed. *Texas and Pacific R'y Co. v. Harrison County*, 54 Tex., 119, 1880; *International and Great Northern R. R. Co. v. Smith County*, 7 Amer. & Eng. R. R. Cases (Tex.), 263, 1880; *Central Pacific R. R. Co. v. Placer County*, 46 Cal., 667, 1873; *Washington County v. St. Louis and Iron Mountain R. R. Co.*, 58 Mo., 372, 1874; *St. Louis, Vandalia and Terre Haute R. R. Co. v. Surrell*, 88 Ill., 535, 1878; 21 Amer. R'y Rep., 356; *Paul v. Pacific R. R. Co.*, 4 Dillon (U. S. C.), 35, 1876. See *Ketchum v. Same*, ib., 41, 1876; *State Railroad Tax Cases*, 92 U. S.,

575, 1875; *Braden v. Union Trust Co.*, 25 Kans., 362, 1881; *Kansas Pacific R'y Co. v. Comm'rs of Riley Co.*, 20 Kans., 141, 1878; *Sioux City and Pacific R. R. Co. v. Washington County*, 3 Neb., 30, 1878.

5. **Franchise.** The franchise of a corporation is property; and the franchise of a railroad corporation should be assessed for taxation separate and apart from its other property, and without taking such other property into consideration. *Richmond and Danville R. R. Co. v. Brogden*, 74 N. C., 707, 1876; 13 Amer. R'y Rep., 114; *Wilmington, Columbia and Augusta R. R. Co. v. Comm'rs of Brunswick County*, 72 N. C., 10, 1875; *Wilmington Railway Bridge Co. v. Comm'rs of Hanover County*, 72 ib., 15. See *Carolina Central R. R. Co. v. Comm'rs of Richmond County*, 74 ib., 83. 1876.

6. **Inequality.** Whether the valuation of railroad property is represented solely in the valuation of its tangible property, or in the valuation of its tangible property and that of its capital stock, cannot be regarded as, *per se*, evidence of an unjust and fraudulent discrimination. *Chicago, Burlington and Quincy R. R. Co. v. Siders*, 88 Ill., 320, 1878; 21 Amer. R'y Rep., 304.

7. — Where assessors generally have assessed property at one-third of its value, but have assessed certain railroad property at its full value, the assessment of the latter will not be reduced on *certiorari*. *People ex rel. v. Dixon*, 8 Hun (N. Y.), 178. 1876.

8. **Leased lines.** Where a bill to enjoin the collection of the tax of a railway company charged that the state board of equalization assessed the capital stock of the company, including its franchise, beyond its actual value, and that, in making this assessment, they added to what they had determined the value of the capital stock, not only the indebtedness of the company, but also the indebtedness of six other railroad companies of which it was lessee, one of which lies without the state, for the payment of none of which the company was liable, such indebtedness of other companies so added being \$6,756,000, and this latter fact was admitted by a demurrer, and the court below sustained the demurrer, *held*, that the court erred in sustaining the demurrer. It was improper to take into consideration the

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indebtedness of the other companies in fixing the valuation of the property of the company seeking to enjoin the tax. *Chicago, Burlington and Quincy R. R. Co. v. Cole*, 75 Ill., 591. 1874.

9. Machine shops. The act of March 27, 1875, in relation to payment of assessments on branch railroads and machine shops (Sess. Acts 1875, p. 128), does not govern cases of money collected on assessments made prior to the passage of the act (as where assessment was made prior thereto on machine shops in the town of Moberly). *State ex rel. v. Ferguson*, 62 Mo., 77. 1876.

10. Manner of assessment. The capital stock, franchises, and all the real and personal property of corporations, are justly liable to taxation; and a rule which ascertains the value of all this by ascertaining the cash value of the funded debt and of the shares of the capital stock as the basis of assessment is probably as fair as any other. *State Railroad Tax Cases*, 92 U. S., 575. 1875.

11. — California. In an action to recover a tax, brought against a railroad company, the company avers in its answer that its superintendent furnished the assessor with a written statement of the real estate belonging to the company; the company cannot, on the trial, be heard to dispute the authority of its agent to give a list of its property, nor to deny that the property contained in the list belonged to the company. *People v. Stockton and Copperopolis R. R. Co.*, 49 Cal., 414. 1874.

12. — In California a railroad must be valued and assessed separately in each county, in the same manner as real estate. *Huntington v. Central Pacific R. R. Co.*, 2 Sawyer (U. S. C. C.), 503. 1874.

13. — The validity of the assessment of the property of a railroad company, and of the provisions of state law discriminating between the assessment for taxation of the property of such companies and the property of individuals; and whether the fourteenth amendment of the federal constitution applies to artificial as well as to natural persons, may depend upon the proper construction of such amendment; and the right of the company to a reduction in the estimated value of its property assessed for taxation,

depends upon the construction of said amendment, and constitutes a case for relief arising under the constitution and laws of the United States, and is removable into the circuit court. *San Mateo County v. Southern Pacific R. R. Co.*, 13 Federal Reporter, 145, 1882; 8 Amer. & Eng. R. R. Cases, 1.

14. — Georgia. The act of the general assembly of Georgia, February 28, 1874 (Laws of 1874, page 107), which requires railroad companies to return the value of their property to the comptroller-general to be taxed as the property of other citizens, gives no authority to local or municipal bodies to tax the property of such companies. *Savannah v. Atlantic and Gulf R. R. Co.*, 3 Woods (U. S. C. C.), 432. 1879.

15. — Illinois. Where a lot is returned by a railroad company in its list as being used for tracks, side-tracks, etc., in connection with the road and for railroad purposes, and the board of equalization assess the same, upon which the taxes are levied and paid, an assessment by the local assessor of the same lot will be a double assessment, and the tax extended upon the latter assessment will be illegal. *Chicago and Alton R. R. Co. v. The People*, 99 Ill., 464. 1881.

16. — Where only a portion of the lot is used for railway purposes, to that extent it is properly returnable to the board of equalization for assessment; and if any portion is not used as railroad track, and is properly assessable by the local assessor, he should so describe it as not to embrace any portion of that which is assessable as track, and thus avoid a double assessment. *Chicago and Alton R. R. Co. v. The People*, 99 Ill., 464. 1881.

17. — Railroad track should be assessed for taxation by the state board of equalization, but all other real estate of railroad companies, including the stations and other building and structures thereon, must be assessed by the local assessors. *Chicago, Burlington and Quincy R. R. Co. v. Paddock*, 75 Ill., 616. 1874.

18. — Land used by a railway company for its stations and machine shops, beyond the right of way, is properly assessed by the local assessors. *Ib.*

19. — The object of the legislature, in re-

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gard to the assessment of railways, is to subject each railroad company in the state to taxation, in proportion to the value of all its property liable to be taxed; whether tangible or intangible, real, personal or mixed, embracing, among other kinds of property, the franchises granted or exercised within this state. *Ohio and Mississippi R. R. Co. v. Weber*, 96 Ill., 443, 1880; 5 Amer. & Eng. R. R. Cases, 101.

20. — Where the local assessor assessed all of the lots in certain blocks, and also two hundred feet off the north side of the same, as the property used for a railroad track, and the county assessor continued the assessment on his books as to the latter strip of two hundred feet, but in transferring the assessment dropped the lots and entered the entire assessment upon the whole of the lots to the remaining two hundred and fifty feet on the south side of the blocks, *held*, that the latter strip could not be taxed for the entire blocks, but should be held for only a proportionate share of the whole valuation, to avoid double taxation. *People v. Ohio and Mississippi R. R. Co.*, 96 Ill., 411. 1880.

21. — Under the constitutional provision requiring that taxes shall be uniform, where the property belonging to individuals has been assessed at less than its actual value, railroad property in the same county must not be assessed at any greater per cent. of its value. The assessment must be uniform upon every species of property. *Chicago and Alton R. R. Co. v. Livingston County*, 68 Ill., 458. 1873.

22. — *Indiana*. Under the act of December 21, 1858 (1 G. & H., 85), as it stood at the time for the assessment of taxes for the year 1868, it was contemplated that railways, including all property used in running and operating the same, should be taxed as a unit; the road to be appraised by the appraisers of all the counties through which it may run, at a meeting to be held for that purpose on the line of the road, who were to appraise the value of the road per mile through their respective counties, taking into consideration the location of such line for business, the competition of other roads, its earnings above current expenses and repairs, its condition for present and future business, so as to enable them to arrive at

the actual present value of such road, independent of what it cost or the amount of its indebtedness. *Indianapolis, Cincinnati and Lafayette R. R. Co. v. Kilner*, 69 Ind., 71, 1879; 1 Amer. & Eng. R. R. Cases, 413.

23. — Sections 76, 82, 83 and 86, 1 G. & H., 94, 95, 96, all apply to personal property or to such real estate as is assessed in the ordinary method, and not to railways, concerning which the above special mode of taxing was provided. *Id.*

24. — In a suit to enjoin the collection of taxes under act of 1865, entitled "An act to secure a just valuation and taxation of all railroad property within the state," etc., *held*, that, under this act, there are but two instances in which separate pieces of railroad property can be listed and taxed upon their value as pieces of property; one is where the property held by the railroad company is not needed and used for railroad purposes; the other is where the assessment is made by a town or city of railroad buildings, fixtures and machinery connected therewith, within its limits. *Terre Haute, etc., R. R. Co. v. Commissioners of Marion County*, 1 Indianapolis Superior Court Reports, 380. 1873.

25. — The act in reference to the valuation and taxation of railway property in Indiana (3 Ind. Stat., 418) does not provide for any action by the district board of equalization upon the assessment made by the appraisers; and the only appeal authorized is an appeal from the action of the appraisers to the state board of equalization. *Jeffersonville, etc., R. R. Co. v. McQueen*, 49 Ind., 64, 1874; *Montgomery v. Jeffersonville, etc., R. R. Co.*, *ib.*, 204, 1874.

26. — *Kansas*. The proceeding under section 65 of the tax law of 1868 is not a judicial proceeding, but one in assessment, and an exercise of the legislative power of the state. And the fact that witnesses were not sworn, and testimony taken as upon a trial, does not invalidate a proceeding had thereunder. *Kansas Pacific R'y Co. v. Comm'rs Ellis Co.*, 19 Kans., 584. 1878.

27. — The railroad tax law of 1874 established the rule that the valuation of the owner should be accepted in respect to the valuation of railroad property, unless corrected by proceedings under § 65 of the act.

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Kansas Pacific R'y Co. v. Comm'rs Wyandotte Co., 16 Kans., 597. 1876.

28. — Kentucky. Railways are liable to taxation for county purposes equally and uniformly with the property of a citizen. *Lincoln County Court v. Louisville and Nashville R. R. Co.*, 7 Amer. & Eng. R. R. Cases (Ky.), 320. 1831.

29. — Missouri. Under § 3 of the act of September 20, 1852, it became the duty of the president of the Hannibal and St. Joseph R. R. Co. to furnish an annual statement under oath to the state auditor, showing the actual value of the railroad property, from which statement that officer shall assess the railroad state tax. *Held*, that this provision did not amount to a contract between the state and the company which rendered invalid the act of March 10, 1871 (Sess. Acts 1871, p. 56), subjecting the road to assessment for taxation by a special board of equalization; and the latter act, so far as inconsistent with the former, repealed it. *State v. Hannibal and St. Joseph R. R. Co.*, 60 Mo., 143, 1375; 9 Amer. R'y Rep., 239.

30. — The exemption of the road, under its charter of 1849, from county taxation still remains in force. Under the above acts the road is not exempt from school taxes. *Livingston County v. Hannibal and St. Joseph R. R. Co.*, 60 Mo., 516. 1875.

31. — Nebraska. It is the duty of the proper officers of a railroad company, whose road is situated in more than one county, to list under oath, for assessment and taxation, the road-bed, superstructure, right of way, rolling stock, side-tracks, telegraph lines, furniture and fixtures, and personal property, belonging to such corporation, and transmit the same to the state auditor, on or before the first day of March in each year. *Burlington and Missouri River R. R. Co. v. Comm'rs of Lancaster County*, 7 Neb., 33. 1878.

32. — All other property of a railroad company is to be assessed by the assessor of the city, ward or precinct in which it is situated, in the same manner as is provided for the assessment of real estate; but land used for necessary side-tracks is not subject to such assessment. *Ib.*

33. — Nevada. The cash value of a railroad is measured by the amount of cash re-

quired to procure it, provided its utility is commensurate with its cost; and the amount of cash required to procure a railroad is the necessary cost of its construction. *State v. Central Pacific R. R. Co.*, 10 Nev., 47. 1875.

34. — When a railway company claims that its taxes, as assessed by the county assessor, have been reduced, it must affirmatively show the jurisdictional fact that a complaint was made by it to the board of equalization of the assessor's valuation of the property. *State v. Central Pacific R. R. Co.*, 17 Nev., 259. 1883.

35. — If a written statement is not furnished by a railway company to the assessor of all the company's property within the county, as required by law (Stat. 1875, 105), the board of equalization has no power to reduce the assessment made by the county assessor. *Ib.*

36. — New Jersey. Where an assessment is made upon a corporation in an erroneous name, the assessment may be amended. *State v. Montclair and Greenwood Lake R. R. Co.*, 43 N. J. Law, 524. 1881.

37. — The prosecutor owned ten acres of upland, and claimed to own a right of reclamation over more than twenty acres of land under water in the Hudson river, fronting on the upland. *Held*, that a valuation of the whole as "thirty acres of land," at so much per acre, did not invalidate a tax based on such appraisement under the Railroad Taxation Act (Rev., p. 1166). *State v. Yard*, 43 N. J. Law, 121, 1881; 11 Amer. & Eng. R. R. Cases, 529.

38. — New York. The capital stock of the relator, a railroad corporation, having its principal place of business at Utica, was assessed at that place by the respondents at \$40,000. The relator applied to have this stricken out, upon an affidavit showing that its debts exceeded the value of its personal property, which application was denied. *Held*, that as it did not appear that the capital stock of the relator, uninvested in real estate on its road, did not exceed the sum assessed against it, that the assessment must be affirmed. *People ex rel. v. Shields*, 6 Hun (N. Y.), 556. 1876.

39. — North Carolina. The general assembly has no right to confer upon the governor, treasurer and auditor the power to

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value the tangible real and personal property of a railroad corporation; for such power is vested by the constitution in the township board of trustees alone, and cannot be taken from them. *Richmond and Danville R. R. Co. v. Brogden*, 74 N. C., 707, 1876; 13 Amer. R'y Rep., 114; *Wilmington, Columbia and Augusta R. R. Co. v. Comm'rs of Brunswick County*, 72 N. C., 10, 1875.

40. — So much of § 11, subsec. 3, ch. 184, of the laws of 1874–75, as provides that railroad beds listed for taxation "shall not be valued at less than \$8,000 per mile," without regard to its real value, is in conflict with the constitution, and therefore void. *Atlantic and North Carolina R. R. Co. v. Comm'rs of Carteret County*, 75 N. C., 474, 1876.

41. — In revising the tax lists the commissioners of a county *ex mero motu*, at their August meeting, increased the valuation put upon railway property, and then caused notice to be served upon the company to appear at their September meeting and show cause why the same should not be fixed at the increased sum. *Held*, that the notice was sufficient, and the action of the board warranted in law. *Commissioners of Cleveland County v. Atlanta and Charlotte Air Line R'y Co.*, 86 N. C., 541, 1882.

42. — Tennessee. An assessment, by which all the real and personal property of the company, both in and out of the state, are footed together, and the average value per mile determined, and that average fixed as the value per mile of the railway in a given county, is not objectionable. *Louisville and Nashville R. R. Co. v. State*, 8 Heiskell (Tenn.), 663, 1874; 19 Amer. R'y Rep., 107. This case overruled, and a statute providing for assessment in that manner held unconstitutional. *Chattanooga v. Nashville, Chattanooga, etc., R. R. Co.*, 7 Lea (Tenn.), 561, 1881.

43. **Rolling stock.** The rolling stock and track of railway companies are required to be assessed for taxation by the state board of equalization, but all other railroad property is to be assessed by the local assessors, and the state board has nothing to do with its valuation, except as a board of equalization. *Chicago, Burlington and Quincy R. R. Co. v. Siders*, 88 Ill., 320, 1878; 21 Amer. R'y Rep., 304.

44. — The rolling stock of a railroad company, as a general principle, should be assessed and taxed where the corporation has its residence. But this principle of law may be modified by the legislature. And it was competent for the general assembly, by the act of March 10, 1871 (Sess. Acts 1871, p. 56), to say that for the purposes of taxation property of that description should be distributed through the counties, cities or towns through which the road passed, in proportion to its length in those respective localities. *State ex rel., etc., v. Severance*, 55 Mo., 378, 1874.

45. **Road-bed.** A railway company cannot be heard to object to the payment of taxes on the ground that the board of equalization has failed to assess the value of the road-beds under the rails, including embankments, bridges, culverts, etc., of all railroad companies in the state, as tangible property. The rule, being uniform, cannot work to the prejudice of one more than another. *Chicago, Burlington and Quincy R. R. Co. v. Siders*, 88 Ill., 320, 1878; 21 Amer. R'y Rep., 304.

46. **Statutes.** Various statutes relating to assessments construed. *Rio Grande R. R. Co. v. Scanlan*, 44 Tex., 649, 1876; *Hall v. Houston and Texas Central R'y Co.*, 39 Tex., 286, 1873; *Carolina Central R. R. Co. v. Wilmington*, 72 N. C., 73, 1875; *Comm'rs of Union County v. Carolina Central R'y Co.*, 76 N. C., 123, 1877; 14 Amer. R'y Rep., 308; *Chicago and Northwestern R'y Co. v. The People*, 83 Ill., 467, 1876; *Chicago, Rock Island and Pacific R. R. Co. v. People*, 4 Bradwell (Ill.), 468, 1879; *Quincy R. R. Bridge Co. v. Quincy*, 77 Ill., 107, 1875; *Burlington and Missouri River R. R. Co. v. Saline County*, 12 Neb., 396, 1882; 7 Amer. & Eng. R. R. Cases, 347; *Auditor General v. Pullman Palace Car Co.*, 34 Mich., 59, 1876; *Pacific R. R. Co. v. Clerk of Franklin County*, 57 Mo., 223, 1874; *State v. St. Louis, Kansas City and Northern R'y Co.*, 75 Mo., 526; 10 Amer. & Eng. R. R. Cases, 652, 1882; *People ex rel. v. Nester and Delaware R. R. Co.*, 25 Hun (N. Y.), 186, 1881; *Burlington and Missouri River R. R. Co. v. Seward County*, 10 Neb., 211, 1880.

47. **Stock.** Corporation stock should be assessed at its actual and not at its par value.

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People ex rel. v. Commissioners of Taxes, 64 Howard's Practice (N. Y.), 405. 1883.

48. — The assessment of stock at its par value, where the evidence shows the market value to be higher, is valid. *St. Charles St. R. R. Co. v. Board of Assessors*, 31 La. An., 852. 1879. A law making the market value the basis of assessment is constitutional. *Ib.*; also *New Orleans and Carrollton R. R. Co. v. Board of Assessors*, 32 ib., 19. 1880.

49. — The fact that the state board of equalization finds the equalized value of the capital stock of some railroad companies does not exceed the equalized value of their tangible property, thus leaving nothing but the latter upon which to extend taxes, when such assessment is honestly made, and with no fraudulent intent, affords no ground for enjoining the collection of taxes upon another railroad company which is assessed for the capital stock in excess of the value of its tangible property. *Chicago, Burlington and Quincy R. R. Co. v. Siders*, 88 Ill., 320, 1878; 21 Amer. R'y Rep., 304.

50. — Stock belonging to resident shareholders must be listed by them and not by the corporation, and they are allowed to deduct from the tax on their shares a ratable part of the tax paid upon the corporate property by the corporation itself. *Raleigh and Gaston R. R. Co. v. Commissioners of Wake*, 87 N. C., 414. 1882.

II. DIFFERENT KINDS OF TAX.

51. **Bonds.** A railway company is taxed, not for the face of the bonds upon which it negotiates a loan, but for the amount of the loan. *Lake Shore and Michigan Southern R'y Co. v. The People*, 46 Mich., 193. 1881.

52. **Capital and debt.** The act of 1864 provides that railway and horse railway companies should pay a tax of one-fourth of one per cent. on the market value of their capital stock and their funded and floating debt, and that this tax should "take the place of all other taxes on railroads and horse railroad property and franchises within this state." *Held*, that all the property of a railway company was exempted by the act from all other taxation, whether used for railway purposes or not.

Osborn v. New York and New Haven R. R. Co., 40 Conn., 491, 1873; 5 Amer. R'y Rep., 218.

53. **Dividends.** A railway company leased its road to another company for nine hundred and ninety-nine years, at twelve per cent. per annum on its capital; the first company increased the number of its shares seventy-one per cent. (the par value of both the original and increased shares being \$50), on which the stockholders were to receive seven per cent. dividend, being the same amount they would have received on the original number of shares at twelve per cent. *Held*, that this increase was not subject to state taxation as a dividend or profits. *Commonwealth v. Pittsburgh, Fort Wayne and Chicago R'y Co.*, 74 Pa. St., 83, 1873; 6 Amer. R'y Rep., 50. See, also, *Commonwealth v. Erie and Pittsburgh R. R. Co.*, 74 Pa. St., 94, 1873; 6 Amer. R'y Rep., 66.

54. — Stock dividends and issues of stock proportioned to that previously held by stockholders must stand on the same footing with original stock, and should be taxed as far as it is considered paid in. *Lake Shore and Michigan Southern R'y Co. v. The People*, 46 Mich., 193. 1881.

55. — Under s. 15, act July 14, 1870, providing for levy of a tax on interest and dividends paid by corporations, the dividends and earnings of a railway company for the last six months of 1870 are not taxable. *Metropolitan R. R. Co. v. Slack*, 1 Holmes (U. S. C. C.), 375. 1874.

56. — The issue of what was termed "interest certificates" held to be a scrip dividend, and taxable under the Internal Revenue Law of 1864. *Bailey v. Railroad Co.*, 22 Wallace, 604; 11 Amer. R'y Rep., 121, 1874; 106 U. S., 109, 1882.

57. — The undivided profits of a railway company in 1871, carried to an account on the books of the company, known as "unexpended earnings," and used for construction, are liable for taxation under the act of congress amending the act of 1866, passed July 14, 1870, which provides that there "shall be collected for and during the year 1871 a tax of two and one-half per centum . . . on all undivided profits of such corporation which shall have accrued and been earned and added to any surplus, contingent

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or other fund." *United States v. Marquette, Houghton and Ontonagon R. R. Co.*, 17 Federal Reporter, 719. 1893.

58. — The Corporation Tax Act of May 1, 1868, § 1, requiring the taxes to be deducted from dividends, is not repealed by § 4 of act of April 24, 1874, but stands as a necessary part of the system intended to be perfected by the act of 1874. *Catawissa R. R. Co.'s Appeal*, 78 Pa. St., 59. 1875.

59. — A railroad company in embarrassed circumstances sold a large amount of stock below par, and afterwards paid a dividend on its whole capital, there being no proof that this was profits. *Held*, that the company was not liable to the tax on profits for this amount. *Commonwealth v. Erie and Pittsburgh R. R. Co.*, 10 Philadelphia, 465. 1873.

60. — The dividend tax law of Pennsylvania construed. *Pennsylvania R. R. Co. v. Commonwealth*, 94 Pa. St., 474. 1880.

61. — A profit upon the capital of a corporation, either made or passed to the stockholders without declaration of a dividend or a dividend declared, becomes the measure of the state tax upon dividends. *Commonwealth v. Pittsburgh, Fort Wayne and Chicago R'y Co.*, 74 Pa. St., 88, 1873; 6 Amer. R'y Rep., 50.

62. — Dividends declared and payable by railroad companies during the last five months of 1870 are not liable to taxation by the United States. A seizure by a collector of United States revenue is illegal. *Philadelphia and Reading R. R. Co. v. Kenney*, 9 Philadelphia, 408. 1873.

63. **Freight tax.** An act of assembly imposing a tax upon freight sent from this state into any other, or from any other into this, is contrary to the constitution of the United States, and is void. The legislature has the power to lay a tax upon freight carried from place to place with the state. *Commonwealth v. Delaware, Lackawanna and Western R. R. Co.*, 1 Pearson (Pa.), 356, 1866; *Commonwealth v. Philadelphia and Reading R. R. Co.*, ib., 379, 1867.

64. **Gas rates.** Where, by a special act for lighting with gas the town of Chesterfield, by 6 Geo. IV., c. 77, and s. 34, rates are to be imposed on the tenants or occupiers of all houses, warehouses, cellars, vaults,

stables, coach-houses, counting-houses, brew-houses, and all buildings, erections, works, tenements and hereditaments, except as after mentioned; and by s. 36 no person is to be rated for or on account of any land whatsoever, *held*, that a line of railway within the limits of the act is liable to be rated as a work within s. 34, although such a work was not contemplated at the passing of the act. *Regina v. Midland R'y Co.*, 30 Eng. Law & Equity, 399. 1855.

65. **Gross receipts.** The legislature may lawfully levy a tax upon the gross receipts of a railway, unless there is some exemption therefrom provided in its charter. *State v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 45 Md., 361, 1876; *Commonwealth v. Buffalo and Erie R'y Co.*, 2 Pearson (Pa.), 376, 1870.

66. — The "gross earnings," upon which three per centum is to be paid to the state in lieu of taxes, under the charter of this defendant (Laws 1857, Ex. Sess., ch. 1), do not include the compensation paid to it by another company for the right to run trains over its lines. *State v. St. Paul, Minneapolis and Manitoba R'y Co.*, 30 Minn., 311. 1883.

67. — Where a corporation is assessed on its gross receipts, under the provisions of "An act for the assessment and taxation of express and telegraph companies" (S. & S., 769-771), and pays such assessment to avoid the penalties and disabilities incurred by a refusal to pay, but under protest, and after notifying the treasurer that an action would be brought to recover the same back, such payment is not voluntary, and an action may be maintained to recover back the amount so paid, if the tax is illegal. *Western Union Telegraph Co. v. Mayer*, 28 Ohio St., 521. 1876.

68. **Highway tax.** Various road tax laws construed. *Sioux City and St. Paul R. R. Co. v. County of Osceola*, 45 Ia., 168, 1876; *Milwaukee and St. Paul R'y Co. v. Kossuth County*, 41 Ia., 57, 1875; *Leavenworth, Lawrence and Gulf R. R. Co. v. Clemmans*, 14 Kans., 82, 1874; *Burlington and Missouri River R. R. Co. v. Comm'rs of Saunders County*, 9 Neb., 507, 1880.

69. **Income.** A tax upon a corporation may be proportioned to the income received as well as to the value of the franchise.

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granted or the property possessed. *Delaware Railroad Tax*, 18 Wallace, 206, 1873; 7 Amer. R'y Rep., 312.

70. — A state cannot impose a tax on the movement of persons or property from one state to another. *Railroad Co. v. Maryland*, 21 Wallace, 456, 1874; 6 Amer. R'y Rep., 483.

71. — The lien of the income tax (Act July 13, 1866, 14 St. at Large, 107; Rev. St., § 3186) relates back, upon demand, to the time when the tax was due, but only attaches to the property belonging to the person from whom the tax was due at the time when the demand for the payment of the tax was made. *United States v. Pacific R. R. Co.*, 1 Federal Reporter, 97; 1 McCrary (U. S. C. C.), 1. 1880.

72. — The expression "profits used in construction" (within the meaning of § 127 of the Internal Revenue Act of June 30, 1864, 13 Stat., 284) does not embrace earnings expended in repairs, but has reference to new constructions adding to the permanent value of the capital; and when these are made to take the place of prior structures, it includes only the increased value of the new over the old, when in good repair. *Grant v. Hartford and New Haven R. R. Co.*, 93 U. S., 225. 1876.

73. **Interest tax.** The act of May 1, 1863, does not impose a tax upon corporations, but directs their officers to retain it from the interest of the money due to their creditors, residents of this commonwealth, and pay it into the state treasury. This law is constitutional. *Commonwealth v. Reading and Wilmington R. R. Co.*, 2 Pearson (Pa.), 394. 1875.

74. — During the period when § 122 of the act of June 30, 1864, c. 173, as amended by the act of July 13, 1866, ch. 184, was in force, a railway company paid to alien non-resident holders of its bonds the entire interest due from time to time thereon. *Held*, that the company, no claim having been made here against it for any penalty, is liable to the United States for five per cent. on the amount so paid, with interest thereon at the rate of six per cent. per annum. *United States v. Erie R'y Co.*, 106 U. S., 327. 1882.

75. — A corporation authorized to build a railway, though not in terms authorized

to engage in traffic as a carrier, and which has actually engaged in the carriage of freight and passengers, is liable to the tax on coupons provided for in the act of July 13, 1866. *Improvement Co. v. Slack*, 100 U. S., 648; *Railroad Co. v. Slack*, ib., 659. 1879.

76. — A railroad company paid to the holders of its bonds the entire amount of semi-annual interest accruing thereon from January 1 to July 1, 1870. *Held*, that the proper internal revenue officer of the United States rightfully assessed against the company a tax of five per cent. upon the amount so paid. *Railway Co. v. Rose*, 95 U. S., 78. 1877.

77. — The "tax of two and one-half per centum on the amount of all interest or coupons paid on bonds or other evidences of debt, issued and payable in one or more years after date," by any railroad company, is a tax on the interest, not as it accrues, but when it is paid. *Railroad Co. v. United States*, 101 U. S., 543. 1879.

78. — The tax on interest paid by corporations under § 122 of the internal revenue law, as amended by the act of July 13, 1866 (14 Stat., 138), is an excise tax on their business, to be paid by them out of their earnings, income and profits. *Railroad Co. v. Collector*, 100 U. S., 595. 1879.

79. **Land tax.** Under the revenue act of 1869, the words "land tax" were not designed to include town and city lots, right of way of railroad companies, etc., though lands lying within the limits of a town or city, and not subdivided, are subject to the tax. *Burlington and Missouri River R. R. Co. v. Lancaster County*, 4 Neb., 293. 1876.

80. **License.** Under §§ 1211-1213, R. S., the amount of license money to be paid by an applicant for a license to operate a railway in Wisconsin is to be determined by the aggregate mileage of all of the railways operated by such applicant, within the state, during the preceding calendar year, and the aggregate amount of the gross earnings of all of such roads during that time. *State ex rel. v. McFetridge*, 56 Wis., 256, 1882; 8 Amer. & Eng. R. R. Cases, 536.

81. **Lien.** The internal revenue act of July 13, 1866 (Rev. Stats., § 3186), provides, in reference to certain taxes, that if any person, liable to pay the same, "neglects or

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refuses to pay them after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with interest, penalties and costs upon all "property and rights of property belonging to such person." *Held*, that a demand is necessary to create and bring into operation this lien. *United States v. Pacific R. R. Co.*, 4 Dillon (U. S. C. C.), 71. 1877.

82. Passenger fares. A tax levied upon a railway company of ten cents for each passenger carried, so far as it affects passengers carried into or out of the state, is in effect a regulation of commerce, and invalid under the federal constitution. *Clarke v. Philadelphia, Wilmington and Baltimore R. R. Co.*, 4 Houston (Del.), 158, 1869; 6 Amer. R'y Rep., 7.

83. Poor rates. Under the charter of defendant it was held that its railway and land should be rated in any particular parish according to its actual value there, although such value was owing in a great measure to station-houses and other works not within the parish. *Regina v. London R'y Co.*, 1 Adolphus & Ellis (N. S.), 558; 41 E. C. L., 670. 1842.

84. School tax. Various statutes in relation to school taxes construed. *State v. St. Louis, Kansas City and Northern R'y Co.*, 75 Mo., 523, 1882; *Livingston County v. Hannibal and St. Joseph R. R. Co.*, 60 ib., 516, 1875; *Caldwell County v. Same*, ib., 521, 1875.

85. Sinking fund. A "sinking fund tax" is a tax raised to be applied to the payment of the interest and principal of a public loan, and it cannot under the statute be levied for the payment of floating indebtedness. *Union Pacific R. R. Co. v. Buffalo County*, 9 Neb., 449, 1880; *Union Pacific R. R. Co. v. York County*, 10, ib., 612. 1880.

86. United States tax. The obligation or duty to pay taxes assessed by the United States is one which may be enforced by suit — by an action at law or a bill in equity, according to the nature of the relief sought. *United States v. Pacific R. R. Co.*, 4 Dillon (U. S. C. C.), 66. 1877.

87. — The internal revenue tax on coupon bonds is payable by the holder, and not by the obligor. *Haight v. Pittsburgh, Ft. Wayne and Chicago R. R. Co.*, 3 Pittsburgh (U. S. C. C.), 105. 1867.

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88. Attorney; collection by. Where an attorney has collected taxes from a railway company upon a consent decree, which decree was obtained by such attorney, the county is bound by the acts of the attorney in collecting the same. *Conway County v. Little Rock and Ft. Smith R'y Co.*, 39 Ark., 50. 1882.

89. Chattel mortgage lien. Where the decree, upon a bill to enjoin the levy of a collector's warrant upon personal property of the complainant, issued upon an assessment of the same against a former owner, finds that the mortgage under which the complainant claims was a valid lien on the property prior to the assessment and delivery of the warrants to the collector, this will amount to a finding that the mortgage was properly acknowledged and recorded, or that possession must have been taken under it before it expired, the presumption being in favor of the finding of the court. *Binkert v. Wabash R'y Co.*, 98 Ill., 205, 1881; 5 Amer. & Eng. R. R. Cases, 113.

90. Collection by court. If no one can be found able and willing to collect the taxes, when levied by the county court to pay creditors who have obtained a decree on interest coupons, on bill filed, this court will entertain jurisdiction. In such case the court will direct the payment of taxes so assessed into the registry, to be applied in satisfaction of complainants' decree; and against each defendant debtor, who shall not so pay within the time specified in the order, an execution will issue. *Post & Co. v. Taylor County*, 2 Flippin (U. S. C. C.), 518. 1879.

91. Collection of taxes for past years. The legislature may properly pass a law for the collection of taxes for past years. The right to pass such law is not affected by lapse of time. *North Carolina R. R. Co. v. Comm'rs of Alamance County*, 82 N. C., 259. 1880.

92. Injunction. A collector of taxes, in violation of an agreement between the county court and a railway company, was about to enforce collection of certain taxes assessed against the real estate of the latter; *held*, that injunction would lie to prevent a

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sale. *St. Louis, Iron Mountain and Southern R'y Co. v. Anthony*, 73 Mo., 431, 1881; 7 Amer. & Eng. R. R. Cases, 386.

93. — An injunction will not be granted to restrain the collection of a tax by a sale of the real estate of the tax-payer. *Central Pacific R. R. Co. v. Corcoran*, 48 Cal., 65, 1874.

94. Interest. As the taxes against the railway company were not levied till in 1877, interest will not commence till that date, although the tax levied was for previous years. The assessment held to have the same force as if made in 1875, with the exception of the interest. *Nashville, Chattanooga, etc., R. R. Co. v. Franklin County*, 5 Lea (Tenn.), 707, 1880; 7 Amer. & Eng. R. R. Cases, 258.

95. Judgment. The collection of a public tax as much belongs to the authority of the state as its levy and assessment. The tax, when assessed, although levied for a specific purpose, is not a fund which can be dealt with by a court as an equitable asset or chose in action subject to an implied trust, and United States courts have no power to appoint a receiver to collect such taxes even where there is no state officer to perform that duty. *Thompson v. Allen County*, 13 Federal Reporter, 97, 1882.

96. Limitations. As it was made the duty of the railway company, under the acts of 1866 and 1870, to make returns to the proper United States internal revenue officer, of the amount of income, profits and taxes, when no returns have been made by the company, a failure on the part of the government to demand such tax, or to institute proceedings to recover the same until 1881, cannot constitute a bar to an action to recover such tax, when it does not appear that the delay has prejudiced the company by the disappearance or loss of evidence essential to its defense. *United States v. Marquette, Houghton and Ontonagon R. R. Co.*, 17 Federal Reporter, 719, 1883.

97. Penalty. A penalty of \$1,000 is the only liability incurred by a railroad company for failing to comply with the provisions of § 121 of the internal revenue act of June 30, 1864 (13 Stat., 284), as amended by the act of July 13, 1866 (14 ib., 138). *Ers- kine v. Milwaukee and St. Paul R'y Co.*, 94

U. S., 619, 1876; *Elliott v. Railroad Co.*, 99 ib., 573, 1878.

98. — The penalty of one hundred per cent. on reassessment of an internal revenue tax, for false omission (Act March 2, 1867), cannot be collected if the reassessment includes a sum not legally taxed. *Michigan Central R. R. Co. v. Slack*, 1 Holmes (U. S. C. C.), 231, 1873.

99. — Where an action was brought against a corporation under § 120 of the act of June 30, 1864, as amended by the act of July 14, 1870 (16 St., p. 260, § 15), to recover penalties for failure to make return of interest and pay the tax on a bond of the defendant, held, that only one penalty is recoverable for all failures to make the required returns prior to the commencement of the action to recover penalties for such failure. *United States v. Brooklyn and Newtown R. R. Co.*, 14 Federal Reporter, 284, 1882.

100. — The statutes of Nebraska construed. *Kane v. Union Pacific R. R. Co.*, 5 Neb., 105, 1876.

101. Pleading. The pleadings examined in actions relating to the recovery of taxes. *Chicago and Northwestern R'y Co. v. Town of Langlade*, 55 Wis., 116, 1882; *Curtis v. Flint and Pere Marquette R'y Co.*, 32 Mich., 291, 1875.

102. Replevin. Where certain cars, etc., of a railway company were levied upon for the taxes of another person, for which such property was not liable, the property may be recovered back by replevin. *Lake Shore and Mich. Southern R'y Co. v. Roach*, 80 N. Y., 339, 1880; 1 Amer. & Eng. R. R. Cases, 184. But see *Baltimore and Ohio R. Co. v. Hamilton*, 16 Federal Reporter, 181, 1883.

103. — Where a train and engine were seized for taxes, and in an action of replevin the verdict was for defendant, held, that the verdict was not sufficient as it failed to specify the amount of defendant's lien. *Farmers' Loan and Trust Co. v. St. Clair*, 34 Mich., 518, 1876.

104. Seizure. Where the tax collectors proceed summarily to seize property, they must show on what property the assessment is made, and the percentage upon its value. *Clinton and Port Hudson R. R. Co. v. Tax Collector*, 30 La. An., 626, 1878.

Place of Taxation.

105. Statutes. Various statutes construed. *People ex rel. v. Treasurer of Saginaw County*, 32 Mich., 260, 1875; *Iowa Railroad Land Co. v. Guthrie*, 53 Ia., 383, 1880; *Iowa Falls and Sioux City R. R. Co. v. Storm Lake Bank*, 55 Ia., 696, 1881.

106. Tax lists. The statute regulating the manner in which the lists of delinquent tax-payers shall be made out is directory; and if its essential requirements be complied with, it is sufficient. *Houston and Texas Central R'y Co. v. The State*, 39 Tex., 148, 1873.

107. — The Kansas statutes in relation to road tax lists construed. *Kansas City, Fort Scott and Gulf R. R. Co. v. Tontz*, 29 Kans., 460, 1883.

108. Tax sale. Property of a railway company in the limits of towns may be assessed and taxed for municipal purposes. But the cars of the company are not subject to seizure and sale by a ministerial officer to satisfy such taxes. *Elizabethtown and Paducah R. R. Co. v. Trustees of Elizabethtown*, 12 Bush (Ky.), 233, 1876.

109. — A railway is an entire thing, not legally subject to coercive severance or dislocation. The locomotives, cars, etc., are treated as fixtures of the road. *Ib.*

110. — Where the property of a railroad company has been sold by the tax collector for the non-payment of taxes which have been remitted, by act of the legislature, before the sale, and the purchaser makes no attempt to assert his right to the property, but allows the company to retain possession, a court of equity will entertain a bill by the railroad company to annul the sale, cancel the deed made to the purchaser, and to enjoin him from asserting any claim to the property. *Mobile and Girard R. R. Co. v. Peebles*, 47 Ala., 317, 1872.

111. — The mere fact that a railroad company is a purchaser of certain tracts of land at a tax sale does not prove that such purchase is *ultra vires*, and the tax sale certificate in the hands of the corporation null and void, so as to release the county from the obligation to refund the money in case the sale proves to be invalid. *School District No. 15 v. Comm'rs of Allen Co.*, 22 Kans., 568, 1879.

112. — S. entered into a contract in writ-

ing, in 1868, with a railroad company, to purchase certain real estate, and covenanted to pay all taxes which should be lawfully imposed on the premises. Under the contract, he went into possession of the land, paid a small portion of the purchase money, and made valuable improvements. He defaulted as to the payment of taxes for the years 1873, 1874, 1875 and 1876. In May, 1877, there was a settlement between S. and the company, and S. relinquished all his right in the land and all his improvements to the company; the company accepted the surrender of his written contract, and released all its claims against him under the covenants thereof. *Held*, that S. was thereby relieved of all duty or obligation to pay past or future taxes on the premises; and after such settlement S. was not debarred from acquiring a valid tax title to the premises, on account of his former relation with the railroad company, under the contract of purchase. *Shoup v. Central Branch Union Pacific R. R. Co.*, 24 Kans., 547, 1880; 5 Amer. & Eng. R. R. Cases, 125.

113. License. The licensee of real estate cannot acquire a tax title thereto as against his licensor, whose right of possession has continued for more than five years after the execution of the tax deed. *Keokuk and Des Moines R. R. Co. v. Lindley*, 48 Ia., 11, 1878.

114. — A tax deed confers a *prima facie* title. *New York, Ontario and Western R'y Co. v. Davenport*, 65 Howard's Practice (N. Y.), 484, 1883.

IV. PLACE OF TAXATION.

115. Foreign bonds. Investments in bonds and stocks of foreign corporations by residents of Ohio may lawfully be taxed in Ohio; and the provisions of the act of April 5, 1859 (2 S. & C., 1438), imposing a tax on such bonds and stocks, are not unconstitutional. *Worthington v. Treasurer of Hamilton County*, 25 Ohio St., 1, 1874.

116. Foreign held bonds. A state cannot tax the bonds of a railway company held by non-residents. *Commonwealth v. Chesapeake and Ohio R. R. Co.*, 27 Grattan (Va.), 344, 1876; *Appeal Tax Court of Baltimore v.*

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Gill, 50 Md., 377, 1878; *United States v. Erie R'y Co.*, 9 Benedict (U. S. D. C.), 67, 1877.

117. Local taxation of railways. After the passage of the act of March 10, 1871, in relation to railroad taxation, the city of Jefferson had no authority under its charter to assess the property of railroad companies situate within its limits, and collect taxes thereon for the year 1871. *Pacific R. R. Co. v. Watson*, 61 Mo., 57. 1875.

118. Principal office. A certificate of incorporation, which, under the statute, specifies the place where the principal office of the company is to be located, is conclusive as to the location of such office for purposes of taxation. *Pelton v. Transportation Co.*, 87 Ohio St., 450. 1882.

119. Property in transit. The personal property of a non-resident of this state at a railroad station, and awaiting shipment to the residence of the owner, has no permanent situs here, and is not taxable in this state. *Standard Oil Co. v. Bachelor*, 89 Ind., 1. 1883.

120. Stock held by non-residents. Under ch. 483, Acts 1874, the stock held by non-residents is taxable at the place where the corporation has its principal office. *Mayor, etc., of Baltimore v. Baltimore R. R. Co.*, 57 Md., 31, 1881; 7 Amer. & Eng. R. R. Cases, 362.

V. LAND GRANTS.

See sub-title EXEMPTION, *post*.

*** 121. When taxable.** When the railroad company became entitled to any portion of the lands granted by act of congress of May 15, 1856, by the completion of any part of its road, as prescribed by federal or state legislation, such portion of the grant thereupon became subject to assessment and taxation. *C. R. and M. R. R. Co. v. Carroll County*, 41 Ia., 153. 1875.

122. — But the land is not taxable till the company is entitled to the patents. *Central Pacific R. R. Co. v. Howard*, 51 Cal., 229, 1876; 12 Amer. R'y Rep., 98.

123. — If a grant by congress to a railroad company of public land to aid in its construction contains conditions by which the grant is liable to be defeated, the land cannot be taxed while the conditions are in force

and are not fulfilled. *Central Pacific R. R. Co. v. Howard*, 52 Cal., 227, 1877; 20 Amer. R'y Rep., 111.

124. — Lands selected by the Illinois Central R. R. Co., under the act of congress, are liable to taxation when sold by the company and paid for, although no conveyance may have been made. *Champaign County v. Reed*, 100 Ill., 304. 1881.

125. — The act of the general assembly of Arkansas of January 12, 1853, incorporating the Cairo and Fulton R. R. Co., and exempting forever its capital stock and dividends from taxation, does not exempt the lands granted by the act of February 9, 1853 (10 Stat., 155), to that state, and by her transferred to the company. *Railway Co. v. Loftin*, 98 U. S., 539, 1878; *Same v. Same*, 105 ib., 258, 1881.

VI. SPECIAL CHARTERS.

126. Various charters. The Western and Atlantic R. R. Co. is subject to a tax of one-half of one per cent. on its net income, but to no more. *State v. Western and Atlantic R. R. Co.*, 66 Ga., 563. 1881.

127. — The payment of this income tax covers all such property as may be necessary and proper for the use and enjoyment of the franchise secured by the lease to the company, whether it was received from the state or has been purchased since the lease began. Other property of the company would be subject to taxation as the property of individuals. *Ib.*

128. — The tax of one-twentieth of one per cent. authorized by § 13 of the charter of the Missouri and Mississippi R. R. Co. (Acts 1865, page 86) is the only tax authorized by law to be collected to pay bonds issued under that charter. The common fund of the county collected for the purpose of defraying the current expenses of the county government is not applicable to their payment. *State ex rel. v. Macon County Court*, 68 Mo., 29. 1878.

129. — One who takes county bonds issued under a statute which limits the rate of taxation that may be imposed for their payment to one-twentieth of one per cent. is chargeable with knowledge of the limitation. *Ib.*

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130. — A provision in an act of the legislature of Delaware, under which the original Wilmington and Susquehanna R. R. Co. was united with the Delaware and Maryland R. R. Co., requiring the new company to pay annually into the treasury of the state a tax of one-quarter of one per cent. upon its capital stock of \$400,000, did not prevent a subsequent legislature from imposing a further or different tax upon the company. The amount designated was only a declaration of the tax payable annually until a different rate should be established. *Delaware Railroad Tax*, 18 Wallace, 206, 1873; 7 Amer. R'y Rep., 312.

131. — Various charters construed. *Goldsmith v. Central R. R. Co.*, 62 Ga., 509, 1879; *Goldsmith v. Ga. R. R. Co.*, 63 Ga., 485, 1879. See, also, *Same v. Rome R. R. Co.*, ib., 478, 1879; *Same v. Central R. R. Co.*, ib., 509; *Goldsmith v. Rome R. R. Co.*, 62 Ga., 475, 1879; *Moore v. Holliday*, 4 Dillon (U. S. C. C.), 52, 1876; *State v. Receiver of Taxes of Camden*, 39 N. J. Law, 299, 1876; 13 Amer. R'y Rep., 50; *Chicago, Milwaukee and St. Paul R'y Co. v. Pfaender*, 23 Minn., 217, 1877.

VII. EXEMPTION.

132. Authority to create exemption. The legislature of a state or territory has power to exempt property from taxation. *Winona and St. Peter R. R. Co. v. Deuel County*, 7 Amer. & Eng. R. R. Cases (Dak.), 348, 1882; *Louisville and Nashville R. R. Co. v. Gaines*, 3 Federal Reporter, 263, 1880.

133. Additional works. Additional works, not contemplated in a grant of exemption, will be subject to taxation. *Alexandria Bridge Co. v. Dist. of Columbia*, 1 Mackey (Dist. of Columbia), 217, 1881; 7 Amer. & Eng. R. R. Cases, 325.

134. Arbitrators. Under the statute the arbitrators may not determine what property is exempt, but their award reducing the valuation of taxable property is binding. *State ex rel. v. Board of Assessors*, 30 La. An., 261. 1878.

135. Bonds and mortgages. Bonds of the Baltimore and Ohio R. R. Co. and of the Northern Central R'y Co., not alleged to be secured by mortgages upon property within

this state, are not embraced in the terms of the exemption contained in the act of 1876, ch. 260, s. 1, which exempted from taxation "mortgages upon property in this state, and the mortgaged debts respectively secured therefrom." *Appeal Tax Court of Baltimore v. Gill*, 50 Md., 377. 1873.

136. Branch lines. Upon the amendment of a charter of a railroad company (whose road was exempt from taxation), authorizing it to construct a branch road, the branch road when constructed became subject to the provisions of the original charter, and the right of exemption from taxation therein granted attached with full force to the branch road. *Atlantic and Gulf R. R. Co. v. Allen*, 15 Fla., 637. 1876.

137. Certiorari. Where an assessment of taxes has been made in good faith on property which, by the prosecutor's charter, is exempt from taxation, costs will not be allowed to the prosecutor on setting aside the taxes on *certiorari*, where the application for relief has not been made to the local authorities, unless the defense in the *certiorari* suit has been conducted vexatiously. *Lehigh Valley R. R. Co. v. Newark*, 44 N. J. Law, 323. 1882.

138. Change of constitution. The charter of a railroad company exempting it from taxation is not repealed by a constitutional provision adopted after acceptance of the charter, declaring that "no property shall be exempt from taxation, except," etc. *Scotland County v. Missouri*, *Iowa and Nebraska R'y Co.*, 65 Mo., 123. 1877.

139. — Sec. 16, art. 11, of the constitution of 1865, was not designed to withdraw existing exemptions from taxation. It was intended to operate prospectively only. *Ib.*

140. Charters and statutes. Various charters and special statutes in relation to exemption construed. *State v. Woodruff*, 36 N. J. Law, 94, 1872; 12 Amer. R'y Rep., 424; *State v. Leggett, Comptroller*, 41 N. J. Law, 319, 1879; *State v. Comm'r of Railroad Taxation*, 38 N. J. Law, 472, 1875; *Galveston, Harrisburg and San Antonio R'y Co. v. State*, 38 Tex., 224, 1873; *County Com'rs Anne Arundel County v. Annapolis, etc.*, *R. R. Co.*, 47 Md., 592, 1877; 18 Amer. R'y Rep., 359; *Commonwealth v. Pittsburgh and Connellsville R. R. Co.*, 2 Pearson (Pa.), 389,

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1872; *Commonwealth v. Chesapeake and Ohio R. R. Co.*, 27 Grattan (Va.), 344, 1876; *City of Petersburg v. Petersburg R. R. Co.*, 29 Grattan (Va.), 773, 1878; *Illinois Central R. R. Co. v. Irvin*, 72 Ill., 452, 1874; *Wisconsin Central R. R. Co. v. Taylor County*, 52 Wis., 37, 1881; 1 Amer. & Eng. R. R. Cases, 532; *Mayor, etc., of Macon v. Central R. R. and Banking Co.*, 50 Ga., 620, 1874; *Western and Atlantic R. R. Co. v. State*, 54 Ga., 428, 1875; *State v. Ga. R. R. and Banking Co.*, 54 Ga., 423, 1875; *Chesapeake and Ohio R. R. Co. v. Virginia*, 94 U. S., 718, 1876; 16 Amer. R'y Rep., 155; *North Missouri R. R. Co. v. Maguire*, 20 Wallace, 46, 1873; 6 Amer. R'y Rep., 445; *Paul v. Missouri Pacific R. R. Co.*, 3 Dillon (U. S. C. C.), 25, 1874; *Parmley v. St. Louis, Iron Mountain and Southern R. R. Co.*, 3 Dillon (U. S. C. C.), 25, 1874; *Raleigh and Gaston R. R. Co. v. Commissioners of Wake*, 87 N. C., 414, 1882; *Richmond and Danville R. R. Co. v. Comm'rs of Alamance County*, 76 N. C., 212, 1877; 14 Amer. R'y Rep., 304. See *North Carolina R. R. Co. v. Same*, 77 ib., 4, 1877; *State v. Dexter and Newport R. R. Co.*, 69 Me., 44, 1879; *Poughkeepsie, Hartford and Boston R. R. Co. v. Simpson*, 23 Hun (N. Y.), 43, 1880; *State v. Winona and St. Peter R. R. Co.*, 21 Minn., 315, 1875; 18 Amer. R'y Rep., 440; *State v. Southern Minn. R. R. Co.*, 21 Minn., 344, 1875; *Chesapeake and Ohio R. R. Co. v. Miller*, 19 W. Va., 408, 1882; *South Pacific R. R. Co. v. Laclede County*, 57 Mo., 147, 1874; *Barry County v. Atlantic and Pacific R. R. Co.*, ib., 149; *Lawrence County v. Same*, ib., 149, 1874.

141. — The Central Pacific Railroad is not exempt from taxation. *Central Pacific R. R. Co. v. State Board*, 60 Cal., 35, 1882; *Huntington v. Central Pacific R. R. Co.*, 2 Sawyer (U. S. C. C.), 503, 1874; *State v. Central Pacific R. R. Co.*, 10 Nev., 47, 1875; *County of Santa Clara v. Southern Pacific R. R. Co.*, 18 Federal Reporter, 385, 1883.

142. — The charter of the Baltimore and Ohio R. R. Co. construed, and the property of the company held exempt from taxation. Its hotels, built for use of its general traffic, likewise held to be exempt. But its hotels for summer resort were held taxable the same as ordinary hotel property. *State v.*

Baltimore and Ohio R. R. Co., 48 Md., 49, 1877. But see *Baltimore and Ohio R. R. Co. v. Dist. of Columbia*, 3 MacArthur (Dist. of Columbia), 122, 1879.

143. — The exemption from all taxation and assessment contained in the St. Paul and Pacific Act was not simply a personal privilege conferred upon the company, but was in the nature of a conditional grant, appurtenant to its several lines of railroad, and charged with the perpetual burden of an annual payment of the specified sum therein provided, dating from the time when any portion of such lines, equal in extent to thirty miles, should be completed and in operation. *Chicago, Milwaukee and St. Paul R'y Co. v. Pfaender*, 23 Minn., 217, 1877.

144. — In case of a severance and division of such lines of road and the franchises thereto appertaining among the different companies, reference must be had to the time when such first thirty miles of completed road were built and put in operation, in ascertaining and fixing the rate per cent. and amount of gross earnings each company is to pay during any given year as to its line of road. *Id.*

145. — The franchise of the Atlantic, Tennessee and Ohio R. R. Co. is subject to tax. It is a distinct species of property from that enumerated in the clause of the charter exempting the road-bed, etc., from taxation for a limited period. *Atlantic, Tennessee and Ohio R. R. Co. v. Mecklenburg*, 87 N. C., 129, 1882.

146. — Shares in the capital stock of the North Carolina R. R. Co. are not exempt from taxation by a legislative enactment that "all real estate held by said company for right of way, for station places of whatever kind, and for work shop location, shall be exempt from taxation until the dividends or profits of said company shall exceed six per centum per annum." *Belo v. Comm'rs of Forsyth County*, 82 N. C., 415, 1880. See *Richmond and Danville R. R. Co. v. Commissioners of Alamance*, 84 N. C., 504, 1881.

147. — The charter of the New Haven and Northampton Co. construed, and held that the exemption of a canal company was not lost by its change to a railway company.

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Nichols v. New Haven and Northampton Co., 42 Conn., 103. 1875.

148. — amendment to charter. An exemption from taxation contained in the charter of a corporation cannot be repealed without the consent of the corporation. *Oliver v. Memphis and Little Rock R. R. Co.*, 30 Ark., 128, 1875; *St. Louis, Iron Mt. and Southern R. R. Co. v. Loftin*, ib., 693, 1875; *Atlantic and Gulf R. R. Co. v. Allen*, 15 Fla., 637, 1876. But see *Hewitt v. N. Y. and Oswego Midland R. R. Co.*, 12 Blatchford (U. S. C. C.), 452, 1875; *Hand v. Savannah and Charleston R. R. Co.*, 17 So. Car., 219, 1881; *Scotland County v. Missouri, Iowa and Nebraska R'y Co.*, 65 Mo., 123, 1877.

149. — A corporation having an irrevocable charter which provides for a special mode of taxation, and that "no other or further tax or imposition shall be levied or imposed upon the said company," may consent to other taxation, or a different mode of assessment from that specified in its charter, by the acceptance of subsequent legislative acts, without impairing the exemption from general taxation contained in its charter. In such event, the new taxation becomes part of the original contract, and modifies its terms to that extent, leaving the restriction therein on further taxation in full force. *State v. Comm'r of Railroad Taxation*, 37 N. J. Law, 240. 1874.

150. — The amendment of a town charter authorizing it to levy a tax upon the property of railway companies in the limits of the town does not operate as a constructive repeal of the charter of a railway company passed since the statute of 1856, by which the property of the company was exempted from taxation until the road was completed. *Elizabethtown and Paducah R. R. Co. v. Trustees of Elizabethtown*, 12 Bush (Ky.), 233. 1876.

151. — An act changing the name of a railroad company, and continuing to it under the new name all its rights, privileges, etc., under its former name, did not revive provisions of the charter granting exemption from taxation which had been repealed by prior amendments. If otherwise, the reviving act, being passed after the adoption of the Code, would not interpose a constitutional barrier so as to prevent the legislature

from taxing the company like natural persons. *Macon and Augusta R. R. Co. v. Goldsmith*, 62 Ga., 463. 1879.

152. Conditions. Under the act of 1839, the exemption from taxation previously granted to the Charleston and Savannah R. R. Co. was revoked by acceptance of that act, and the company was required to complete its road from Charleston to Savannah by January 1, 1870; and it was further provided "that no tax shall be assessed or levied upon said road until the same shall have been completed." In March, 1870, the line was completed to such extent that, by the use under the lease of another company's track for three miles, and by means of a ferry boat belonging to this company, freight and passengers were transported by the company from Charleston to Savannah. *Held*, that the company was liable to taxation for the year 1870 and all subsequent years. And for the payment of such claim the state can, in court, demand a sale of the road. *Hand v. Savannah and Charleston R. R. Co.*, 12 So. Car., 314. 1879. See *Same v. Same*, 17 So. Car., 219. 1881.

153. Consideration. An act of the legislature exempting property of a railroad from taxation is not a "contract" to exempt it, unless there be a consideration for the act. *Tucker v. Ferguson*, 22 Wallace, 527. 1874.

154. Consolidation of railways. A corporation, formed, under an act of the legislature, by the consolidation of existing companies, and "vested with all the rights, privileges, franchises and property which may have been vested in either company prior to the act of consolidation," acquires no greater immunity from taxation than they severally enjoyed as to the portions of the road which belonged to them under their respective charters. Whatever property was subject to taxation would, after the consolidation, remain so. *Chesapeake and Ohio R. R. Co. v. Virginia*, 94 U. S., 718, 1876; 16 Amer. R'y Rep., 155.

155. — Immunity from taxation held to pass to a consolidated corporation. *Louisville and Nashville R. R. Co. v. Gaines*, 2 Flip-pin (U. S. C. C.), 621, 1880; *State v. Comm'r of Railroad Taxation*, 37 N. J. Law, 240, 1874; *State Treasurer v. Auditor-General*, 3 Amer. & Eng. R. R. Cases (Mich.), 565, 1881.

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156. — Consolidated companies held subject to taxation, notwithstanding the exemption of the former corporations. *Atlanta and Richmond Air Line R. R. Co. v. State*, 68 Ga., 483, 1879; 1 Amer. & Eng. R. R. Cases, 399; *Railroad Co. v. Maine*, 96 U. S., 499, 1877; *Railroad Co. v. Georgia*, 98 U. S., 359, 1878; *State v. Northern Central R'y Co.*, 44 Md., 131, 1875.

157. Constitutional law. Section 28 of art. 2 of the Const. of 1834, to wit: "All lands liable to taxation, held by deed, grant or entry, town lots, bank stock, etc., and such other property as the legislature may, from time to time, deem expedient, shall be taxable," imposed no restriction upon the power of the legislature to stipulate for total or partial exemptions from taxation in charters of incorporation. *Knoxville and Ohio R. R. Co. v. Hicks*, 9 Baxter (Tenn.), 442, 1877; 15 Amer. R'y Rep., 197.

158. — The act of February 28, 1874, taxing the Atlantic and Gulf R. R. Co. an amount exceeding one-half of one per cent. upon its annual net income, is not unconstitutional, as impairing the obligations of the contract embraced in its charter. *Atlantic and Gulf R. R. Co. v. State*, 53 Ga., 312, 1875.

159. Construction. No presumption exists in favor of a contract by a state to exempt lands from taxation. Every reasonable doubt should be resolved against it. *Tucker v. Ferguson*, 22 Wallace, 527, 1874; *Bailey v. Magwire*, 22 ib., 215, 1874; 11 Amer. R'y Rep., 470; *North Missouri R. R. Co. v. Maguire*, 20 Wallace, 46, 1873; 6 Amer. R'y Rep., 445; *Hoge v. Railroad Co.*, 99 U. S., 348, 1878; *Baton Rouge, etc., R. R. Co. v. Kirkland*, 33 La. An., 622, 1881; *County Comm'rs Anne Arundel County v. Annapolis, etc., R. R. Co.*, 47 Md., 592, 1877; 18 Amer. R'y Rep., 359; *Louisville, Cincinnati and Lexington R. R. Co. v. Commonwealth*, 10 Bush (Ky.), 43, 1873; *Alexandria Bridge Co. v. Dist. of Columbia*, 1 Mackey (Dist. of Col.), 217, 1881; 7 Amer. & Eng. R. R. Cases, 325; *Nashville, Chattanooga, etc., R'y Co. v. Marion County*, 7 Lea (Tenn.), 663, 1881; *Scotland County v. Missouri*, *Iowa and Nebraska R'y Co.*, 65 Mo., 123, 1877.

160. Eating-house. Thus, where it appears that it was necessary in 1873, for the

proper accommodation of persons traveling by defendant's railway, that defendant should maintain an eating and lodging house for them at Prairie du Chien, beside its road, and that a certain building owned by defendant upon its land adjacent to its road was principally used for that purpose, more than nine-tenths of its business, probably, consisting in furnishing entertainment to travelers by and employes upon said railway, it is held to have been exempt from local taxation; and the facts that plaintiff's tenant (not charged with rent), by whom it was conducted, took the profits thereof, and that commercial travelers, reaching and leaving Prairie du Chien by railway, were entertained at the house for one or more days while transacting their business in that vicinity, will not prevent such exemption, where the house was not kept as a general hotel for the accommodation of the whole public. *Chicago, Milwaukee and St. Paul R'y Co. v. Crawford County*, 43 Wis., 666, 1880. See, also, *State v. Baltimore and Ohio R. R. Co.*, 48 Md., 49, 1877.

161. Elevators. Railway companies are not required to furnish storage for grain transported, after their connection with it as common carriers has ceased, nor can they condemn property for the purpose of erecting "elevators" thereon; and such elevators, erected by the plaintiff company, with the land on which they are situated, are taxable for all purposes. Such elevators are not exempt from taxation as railway property. *Milwaukee and St. Paul R'y Co. v. City of Milwaukee*, 34 Wis., 271, 1874.

162. Employes; road work. The employes of the N. C. and St. L. R. R. Co. held exempt from work in the public roads, under the charter of the Nashville and North Western R. R. Co., with which the former company was consolidated. *Hawkins v. Small*, 9 Amer. & Eng. R. R. Cases (Tenn.), 432, 1881.

163. Foreign corporation. It being settled law that the language by which a state surrenders its right of taxation must be clear and unmistakable, a grant by one state to a corporation of another state to exercise a part of its franchise within the limits of the state making the grant, as above stated, and laying a tax upon it at the time of the

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grant, does not, of itself, preclude a right of further taxation by the same state. *Erie R'y Co. v. Pennsylvania*, 21 Wallace, 492, 1874; 6 Amer. R'y Rep., 206.

164. Gross receipts. The levy of a tax on the gross receipts of the Pacific Railroad held to impair the obligation of a contract for exemption contained in its charter. *Pacific R. R. Co. v. Maguire*, 20 Wallace, 36, 1873; 6 Amer. R'y Rep., 437.

165. — The statute taxing the gross earnings of railway companies in lieu of all other taxation, and making the amount uniform for ten years, is unconstitutional. *Ellis v. Louisville and Nashville R. R. Co.*, 8 Baxter (Tenn.), 530. 1876. But see *Memphis and Charleston R. R. Co. v. Gaines*, 3 Tenn. Ch., 604. 1877.

166. Injunction. A temporary injunction until final hearing will be granted to restrain the assessment of the property of railway companies, where their charters provide for exemption from taxation. *Memphis and Charleston R. R. Co. v. Gaines*, 3 Tenn. Ch., 478. 1877.

167. — Pleadings considered in an injunction proceeding. *Marquette, Houghton and Ontonagon R. R. Co. v. City of Marquette*, 35 Mich., 504, 1877; 16 Amer. R'y Rep., 179.

168. Jurisdiction. In such proceedings to enforce payment of taxes, the fact that the land against which a tax is sought to be enforced is exempted from taxation, does not affect the jurisdiction of the court in which the proceedings are brought, to try and determine the legality of the tax. *County of Chisago v. St. Paul and Duluth R. R. Co.*, 27 Minn., 109. 1830.

169. — federal jurisdiction. Where a state has by valid contract exempted certain property from taxation, it cannot by subsequent legislation subject that property to taxation nor prohibit the United States courts from using their injunctive powers to protect the contract from violation. *Louisville and Nashville R. R. Co. v. Gaines*, 2 Flippin (U. S. C. C.), 621; 3 Federal Reporter, 266, 1880.

170. Land grants. While the lands here in question were held by the state in trust for the building of a proposed railroad now owned by the plaintiffs, and hence were not subject to taxation, the legislature had the

power, in furtherance of that object and in execution of the trust, to exempt such lands from taxation for a term of years; and such power, having been exercised, could, within the discretion of the legislature, be exercised anew by granting an extension of the exemption. *Wisconsin Central R. R. Co. v. Taylor County*, 52 Wis., 37, 1881; 1 Amer. & Eng. R. R. Cases, 532.

171. — The grant to the Illinois Central R. R. Co. construed. *Illinois Central R. R. Co. v. Goodwin*, 94 Ill., 262. 1883.

172. — The grant to the St. Paul and Sioux City R. R. Co. construed. *County of Nobles v. Sioux City and St. Paul R. R. Co.*, 26 Minn., 294. 1879.

173. — The *Railway Company v. Prescott* (16 Wallace, 603) modified and overruled so far as it asserts the contingent right of preemption in lands granted to the Pacific Railroad Company, to constitute an exemption of those lands from state taxation. But affirmed so far as it holds that lands on which the costs of survey have not been paid, and for which the United States have not issued a patent to the company, are exempt from state taxation. *Railway Co. v. McShane*, 22 Wallace, 444, 1874; 11 Amer. R'y Rep., 456.

174. Lands. A statute, after laying a certain tax on a "railroad company"—a specific annual tax of one per cent. on the cost of the road,—and reserving a right to impose a further tax upon gross earnings, enacted that "the above several taxes shall be in lieu of all other taxes to be imposed within the state." Held, that the statute imposed a tax in reference to the railroad itself, and had no relation to lands owned by the company and not used nor necessary in working the road, and in the exercise of its franchise, but which it had mortgaged and was holding for sale, even though the chief purpose of the sale was to pay the mortgage debt, a heavy one, and one which had been contracted for the exclusive purpose of building the road. And that these lands might be taxed notwithstanding the above-mentioned agreement. *Tucker v. Ferguson*, 22 Wallace, 527. 1874. See, also, *Mobile and Ohio R. R. Co. v. Moseley*, 52 Miss., 127. 1876.

175. — Certain assessments against the

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United Railroad and Canal Companies vacated, because the possession of the land assessed, was appropriated to the enjoyment of the company's franchise. *State v. Binninger*, 42 N. J. Law, 528. 1880.

176. — Under the act of April 8, 1869, lands acquired by grant, donation or subscription, in aid of the construction of a railroad, were exempt from taxation until conveyed to an actual purchaser. *Cairo and Fulton R. R. Co. v. Parks*, 32 Ark., 131. 1877.

177. **Local improvements.** Under the charter of this company, which exempts its property (other than its land grant) from all assessments and taxes whatever, by the territory or future state, or by any county, city, town, village or other municipal authority in the territory or state, its property held by it for the purposes of its railroad is not subject to assessments for local improvements. *St. Paul and Pacific R. R. Co. v. St. Paul*, 21 Minn., 526, 1875; 18 Amer. R'y Rep., 435; *St. Paul v. St. Paul and Sioux City R. R. Co.*, 23 Minn., 469. 1877.

178. — In assessing depot grounds of a railway company having an exemption from taxation in its charter for benefits derived from local improvements, supposed benefits arising from the probable increase of business in consequence of increased facilities of access to its depot, cannot be made the basis of assessment. An assessment on that principle would be a tax on the business of the company in violation of the exemption in the act of incorporation. *State v. Jersey City*, 36 N. J. Law, 56, 1872; 12 Amer. R'y Rep., 302.

179. **Military reservation.** Kansas has power to tax a railway situated exclusively in the Leavenworth military reservation. *Ft. Leavenworth R. R. Co. v. Lowe*, 27 Kans., 749. 1882.

180. **Municipal corporation.** Municipal corporations have no power to grant exemption from or commutation of taxes, and a contract which undertakes to do so is void. *State v. Hannibal and St. Joseph R. R. Co.*, 75 Mo., 208, 1881; *City of New Orleans v. St. Charles St. R. R. Co.*, 28 La. An., 497. 1876.

181. **Privilege tax.** Where a corporation is exempted from taxation by its charter for

a certain time, such corporation cannot be subjected to a "privilege tax." *Grand Gulf and Port Gibson R. R. Co. v. Buck*, 58 Miss., 246. 1876.

182. **Statute.** The statutes of Wisconsin construed. *Milwaukee and St. Paul R'y Co. v. City of Milwaukee*, 34 Wis., 271. 1874.

183. — All lots of land necessarily used by the company for its repair shops or yards, or depot grounds, or for the preservation and protection of its track, or for the purpose of obtaining gravel and earth therefrom for its road (the same being adjacent to the road), are exempt from taxation, but dwelling-houses and the land occupied by them are not so exempt. *Id.*

184. — Various statutes in relation to exemption from taxation construed. *Utah and Northern R'y Co. v. Crawford*, 1 Idaho, 770, 1880; *Richmond and Danville R. R. Co. v. Comm'rs of Orange County*, 74 N. C., 506, 1876; *Petersburg R. R. Co. v. Comm'rs of Northampton County*, 81 N. C., 487, 1879.

185. **Steamboats.** Steamboats are not railroad property, and are not, although owned and used by a railroad company, exempt from taxation as such, under a charter which exempts such railroad company from taxation. *Illinois Central R. R. Co. v. Irvin*, 72 Ill., 452. 1874.

186. **Stock.** A railway company whose stock is by law exempt from taxation cannot be taxed on property owned and used by it in the operation of its railway and necessary for that purpose. The stock is but the representative of the property. *Scotland County v. Missouri, Iowa and Nebraska R'y Co.*, 65 Mo., 123. 1877.

187. — A corporation claimed exemption from state taxes on its capital stock under the following act of assembly: "The bonds issued and to be issued by said company under the charter, and all municipal bonds now owned by said company, are hereafter to be issued in payment of subscription to the capital stock, and the property, real and personal, which said company now holds or may acquire, shall be exempt from taxation," etc. *Held*, that this company was not relieved, as the stock was the property of the stockholders, not the corporation which issued it. *Commonwealth v. Danville, Ha-*

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zelton, etc., R. R. Co., 2 Pearson (Pa.), 400. 1875.

188. Stock owned by state. The provision contained in sec. 6, art. V, of the constitution, exempting property belonging to the state from taxation, does not embrace the interest of the state in business enterprises, such as railroads, and the like, but applies to the property of the state held for state purposes. The railway is taxable although the state owns two-thirds of the capital stock of the company. *Atlantic and North Carolina R. R. Co. v. Comm'rs of Carteret County*, 75 N. C., 474. 1876.

189. Time. A provision in the charter of a railroad company that "the capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including workshops, machinery and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road, and no longer," does not, after the expiration of that period, exempt from taxation the road, with its fixtures, etc., although the same were purchased with or represented by capital. *Railroad Co. v. Gaines*, 97 U. S., 697. 1878.

190. — Under a charter declaring that the property of the company shall be exempt from taxation for ten years after the completion of the road, the corporation cannot claim immunity from the beginning of its existence up to the completion of the road. *Dennis v. Vicksburg, Shreveport and Pacific R. R. Co.*, 34 La. An., 954. 1883.

191. — The provisions of the statute (Laws of Vt., 1874, act No. 1, p. 16) providing for the taxation of railway property are not rendered invalid by reason of the fact that lands improved by having a railroad built on them are not made taxable until they have been so improved for ten years. *Wells v. Central Vermont R. R. Co.*, 14 Blatchford (U. S. C. C.), 426. 1878.

192. — A railway was by charter exempt from taxation for twenty years, which ended in March, 1877. The taxes assessed for 1878 were assessed in April. The company paid a *pro rata* amount. *Held*, the company was liable for all the taxes assessed for 1877. When the taxes were assessed no exemption existed. *McClellan v. Memphis and*

Charleston R. R. Co., 11 Lea (Tenn.), 336. 1883.

193. Transfer. The purchase of the railway and franchise of the Henderson and Nashville R. R. Co., held not to pass to the purchaser the right of exemption from taxation. *Evansville, Henderson and Nashville R. R. Co. v. Commonwealth*, 9 Bush (Ky.), 433, 1872; *Morgan v. Louisiana*, 93 U. S., 217, 1876; *Railroad Co. v. Commissioners*, 103 ib., 1, 1880; *Railroad Cos. v. Gaines*, 97 U. S., 697, 1878; *Railroad Co. v. County of Hamblen*, 103 U. S., 273, 1880; *Annapolis and Elk Ridge R. R. Co. v. Comm'rs of Anne Arundel County*, 2 Amer. & Eng. R. R. Cases (U. S. C. C.), 422; *Same v. Same*, 1 Amer. & Eng. R. R. Cases, 403, 1880; 103 U. S., 1.

194. — Under an act of the legislature the state loaned its bonds to a railroad corporation, which, by its charter, was exempt from taxation; said act reserving a right in pursuance of which a subsequent act was passed, providing for the enforcement of the state's lien in a court which was expressly empowered to determine all questions touching the rights of the state and all other parties. In a proceeding instituted by the state against said corporation, it was adjudged, in pursuance of said act, that a sale of the property and franchises of the company would vest the purchasers with "all the rights, privileges and immunities" appertaining to the same. *Held*, that under the decree immunity from taxation passed to the purchasers; that the state having provided for the adjudication of these questions, and the purchase having been made on the faith thereof, it cannot question the validity of the adjudication. *Knoxville and Ohio R. R. Co. v. Hicks*, 9 Baxter (Tenn.), 442, 1877; 15 Amer. R'y Rep., 197.

195. — A statute exempted from paying tax a certain tract known as "B. farm." A part of this land was subsequently occupied by a railway. *Held*, that the exemption was not affected by this change of occupancy. *Todd v. London and South Western R'y Co.*, 7 Manning & Granger, 366; 49 E. C. L., 366. 1844.

196. Uncompleted railway. The exemption of railway property from taxation until the road is completed exempts from all taxa-

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tion imposed by authority of the state government, whether for general or local purposes. *Elizabethtown and Paducah R. R. Co. v. Trustees of Elizabethtown*, 12 Bush (Ky.), 233. 1876.

197. Water front. The New York, Lake Erie and Western R. R. Co., as the grantee of the Weehawken Docks, is not liable to taxation on lands under water in front of their docks which have never been reclaimed, and over which the tide ebbs and flows. The title to such lands is in the state. *State v. Yard*, 48 N. J. Law, 632, 1881; 11 Amer. & Eng. R. R. Cases, 529.

VIII. CONSTITUTIONAL LAW.

198. Authority of states. The state may impose taxes upon the corporation as an entity existing under its laws as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. *Delaware Railroad Tax*, 18 Wallace, 206, 1873; 7 Amer. R'y Rep., 312.

199. — The exercise of the authority which every state possesses to tax its corporations and all their property, real and personal, and their franchises, and to graduate the tax upon the corporations according to their business or income, or the value of their property, when this is not done by discriminating against rights held in other states, and the tax is not on imports or tonnage or transportation to other states, cannot be regarded as conflicting with any constitutional power of congress. *Ib.*

200. California constitution. By art. 13 of the constitution of California, "a mortgage, deed of trust contract, or other obligation by which a debt is secured, is treated, for the purposes of assessment and taxation, as an interest in the property affected thereby," and, "except as to railroad and other quasi public corporations," the value of the property affected, less the value of the security, is to be assessed and taxed to its owner, and the value of the security is to be assessed and taxed to its holder. § 4. But by the same article the "franchise, roadway,

road-bed, rails and rolling stock of all railroads operated in more than one county," are to be assessed at their actual value, and apportioned to the counties, cities and districts in which the roads are located, in proportion to the number of miles of railway laid therein, no deduction from this value being allowed for any mortgages on the property. *Held*, that in the different modes thus prescribed of assessing the value of the property of natural persons and the property of railroad corporations as the basis of taxation, there is a departure from the rule of equality and uniformity. *San Mateo County v. Southern Pacific R. R. Co.*, 13 Federal Reporter, 722. 1882. See, also, *County of Santa Clara v. Southern Pacific R. R. Co.*, 18 Federal Reporter, 385. 1883.

201. — The provisions of the constitution of California in relation to taxation of mortgages construed. *County of San Mateo v. Southern Pacific R. R. Co.*, 8 Sawyer (U. S. C. C.), 238; 8 Amer. & Eng. R. R. Cases, 1, 1882; *San Francisco and North Pacific R. R. Co. v. Dinwiddie*, 8 Sawyer (U. S. C. C.), 312, 1882; *Same v. State Board*, 60 Cal., 12, 1882.

202. — The constitution and laws of California making no provision for notice to the owner, and no opportunity to be heard at any stage of the proceedings, are in conflict with the constitution of the United States. *Ib.*

203. — No deduction is to be made on account of mortgages. *Central Pacific R. R. Co. v. State Board*, 60 Cal., 35. 1882.

204. Coal shipments; tonnage tax. The act of 1872, ch. 274, imposing a tax of ten cents per ton upon all coal mined in the state and transported by any of the ways enumerated to any place in the state or elsewhere, for sale, in so far as it affects to impose the tax upon coal transported from the mines in the state to places beyond the state for sale, is unconstitutional and void, being repugnant to that provision of the constitution of the United States which declares that "congress shall have power to regulate commerce with foreign nations and among the several states." *State v. Cumberland and Pa. R. R. Co.*, 40 Md., 22. 1873.

205. Diversion of tax to payment of railway bonds. Sec. 7 of chap. 90 of the Laws

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of 1870, p. 90 [and of chap. 84, Comp. Laws of 1879, pp. 796, 797], so far as it attempts to divert any portion of the general county tax or general township tax to the payment of a certain class of township railroad bonds, is void, being in contravention of sec. 4 of art. 11 of the constitution, which provides that "no tax shall be levied, except in pursuance of a law which shall distinctly state the object of the same, to which object only such tax shall be applied." *National Bank of Laurence v. Barber*, 24 Kans., 534, 1880; 5 Amer. & Eng. R. R. Cases, 181.

203. Franchise. The tax authorized by Stat. 1880, ch. 249, entitled "An act relating to the taxation of railroads," is a tax upon railway corporations on account of their franchises and not upon their real or personal estate; and the tax is one which it was constitutionally competent for the legislature to impose. *State v. Maine Central R. R. Co.*, 74 Me., 376. 1883.

207. Length of line. An act which requires every railway company within the state to pay to the treasurer, for the use of the state, a sum of money, determined by the length of its road, is a tax upon property, and is unconstitutional and void, because not laid upon the value of the property. *State v. Railroad Corporations*, 4 So. Car., 376. 1873.

208. North Missouri Railroad. The ordinance of April 8, 1865, adopted by the people of Missouri, as a part of the constitution of the state established on that day, was, as respected the North Missouri R. R. Co., a true exercise of the taxing power of the state, and not a mere change of the order of disbursing the receipts of the earnings of the company as prescribed by the act of legislature above named. *North Missouri R. R. Co. v. Maguire*, 20 Wallace, 46, 1873; 6 Amer. R'y Rep., 445.

209. Release. Ch. 26, § 9, Laws of 1872, by releasing railway companies from the payment of taxes already levied, impairs the obligation of a valid contract, and is unconstitutional and void. *Dubuque v. Illinois Central R. R. Co.*, 39 Ia., 56, 1874; 20 Amer. R'y Rep., 124; *Davenport v. Chicago, Rock Island and Pacific R. R. Co.*, 38 Ia., 633, 1874; *Iowa Railroad Land Co. v. Woodbury County*, 39 ib., 172, 1874.

210. Statutes. The constitutionality and construction of various statutes passed upon. *Francis v. Atchison, Topeka and Santa Fe R. R. Co.*, 19 Kans., 303, 1877; 19 Amer. R'y Rep., 20; *Dubuque v. C. D. and M. R. R. Co.*, 47 Ia., 196, 1877; *State ex rel. v. Cage*, 34 La. An., 506, 1882; *Chesapeake and Ohio R. R. Co. v. Miller*, 19 W. Va., 408, 1882; *Assessment Board v. Ala. Central R. R. Co.*, 59 Ala., 551, 1877; *State v. Haight, Receiver*, 36 N. J. Law, 54, 1872.

211. Town boundaries. The word "town," as used in the constitution of Wisconsin, denotes a civil division of contiguous territory; and under the power granted to county boards by the statute "to set off, organize, vacate and change the boundaries of the towns in their respective counties" (R. S., § 670, subd. 1), such a board cannot make a valid order, changing the boundaries of a town, so that it shall consist of two separate and detached tracts of land. *Chicago and Northwestern R'y Co. v. Town of Oconto*, 50 Wis., 189. 1880.

IX. MUNICIPAL CORPORATIONS.

212. Action to recover tax. An action at law can be maintained by a city for the recovery of municipal taxes upon the property of a railroad, notwithstanding the legislature may have provided a special remedy therefor. *Burlington v. Burlington and Mo. River R. R. Co.*, 41 Ia., 134, 1875; *Dubuque v. Ill. Central R. R. Co.*, 39 ib., 56, 1874.

213. Decree of federal court. The fact that a decree has been rendered in the circuit court of the United States, enjoining a city from the collection of taxes from a railroad company, in a suit instituted by a stockholder to which the company was neither privy nor party, and of whose proceedings it did not claim the benefit, cannot be pleaded in bar of a recovery of municipal taxes. Ch. 26, § 9, Laws of 1872, releasing the property of railroad companies from the payment of municipal taxes, is in conflict with § 2 of art. 8 of the state constitution, and therefore inoperative and void. *Davenport v. Chicago, Rock Island and Pacific R. R. Co.*, 38 Ia., 633. 1874.

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214. Extension of city limits. A tax levied by the city of Troy, in 1872, on real estate not originally included in said city, nor then included in said city by any authority except by an invalid ordinance, is illegal and void. *Atchison and Nebraska R. R. Co. v. Maquillin*, 12 Kans., 301. 1873.

215. Gross earnings. The payment, by a railroad company, of a tax of one per centum on the gross earnings of the road, under ch. 169, Acts of 1868, did not relieve the company from the payment of municipal taxes upon property within city limits. *Davenport v. Chicago, Rock Island and Pacific R. R. Co.*, 38 Ia., 633. 1874.

216. License. By the provisions of § 5, art. 2, of the charter of Los Angeles, the city is empowered to prescribe either an ordinary action for the recovery of a license tax, or a penalty for non-payment, or both. The city had power under its charter to establish a license tax "for every steam railroad company having a depot in said city," and the fact that the business of defendant extends beyond the city limits does not relieve it from the payment of a license tax for conducting its business within the city. *City of Los Angeles v. Southern Pacific R. R. Co.*, 61 Cal., 59. 1892.

217. Stock. A city has the right to tax its citizens for stock owned by them in a foreign railway company, although a tax has been paid thereon in the state where the corporation is located. *Seward v. City of Rising Sun*, 79 Ind., 351. 1881.

X. FOREIGN CORPORATIONS.

218. Authority to tax. The legislature has the power to impose taxation upon foreign corporations to whatever extent it may, in its discretion, choose as the condition upon which they shall be allowed to exercise their franchises and privileges in this state. *Western Union Telegraph Co. v. Lieb*, 76 Ill., 172, 1875; *Commonwealth v. Buffalo and Erie R'y Co.*, 2 Pearson (Pa.), 376, 1870; *Burlington and Southwestern R'y Co. v. Putnam, etc.*, Counties, 5 Dillon (U. S. C. C.), 289, 1879; *State v. American Express Co.*, 7 Bissell (U. S. C. C.), 227, 1876.

219. — A railroad four hundred and fifty-

five miles long, forty-two miles of which were in a state other than that by which it was incorporated, held to be "doing business" within the state where the forty-two miles were, within the meaning of an act taxing all railroad companies "doing business within the state, and upon whose road freight may be transported." *Erie R'y Co. v. Pennsylvania*, 21 Wallace, 492. 1874; 6 Amer. R'y Rep., 206.

220. Gross receipts. The state of Indiana cannot tax that part of the gross receipts of an Illinois corporation in its treasury in Illinois which was earned in doing business in Indiana. The taxing power cannot be exercised on persons and property beyond the territory or jurisdiction of the state. *State of Indiana ex rel. v. Pullman Palace Car Co.*, 11 Bissell (U. S. C. C.), 561; 16 Federal Reporter, 193. 1883. *Contra, Western Union Telegraph Co. v. Mayer*, 28 Ohio St., 521. 1876.

221. License; federal corporation. A company incorporated by an act of congress is not a foreign corporation within the meaning of the Revenue Act of June 7, 1879, § 16 (Pamph. Laws, 120), and although it does business in Pennsylvania, is not, therefore, obliged to take out the license and to pay the tax provided for by said section. *Commonwealth v. Texas and Pacific R. R. Co.*, 98 Pa. St., 90. 1881.

222. Railway in two states; valuation. A statute provided for taxing railways one per cent. upon a certain valuation of their franchise and property, with a provision that when only part of a railway lay in Connecticut the company owning such road should pay one per cent. on such proportion of the valuation as the length of its line lying in that state bore to its entire length. A corporation owning a railway that ran from the southern line of the state to the Massachusetts line on the north, took a perpetual lease, upon a fixed rent, of two Massachusetts railways, one connecting at the state line with its own road, and the other with the latter at its northern terminus, and thereafter the two roads in Massachusetts were operated and maintained by the Connecticut company, as if they were its own property and the three roads were one entire road. Held, that the Connecticut company

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was not to be regarded as "owning" the Massachusetts roads, within the meaning of the statute, and that it was not therefore entitled to a deduction from the valuation of its property on account of them. *State v. Housatonic R. R. Co.*, 48 Conn., 44, 1880; 7 Amer. & Eng. R. R. Cases, 238.

223. Statutes. The statutes of Pennsylvania construed. *Commonwealth v. Erie R'y Co.*, 93 Pa. St., 127. 1881.

224. Stock. By the provisions of the act of May 11, 1878 (75 Ohio L., 436), a resident owner of shares of stock in a foreign corporation is required to list the same for taxation, notwithstanding the capital of the corporation is taxed in the state where the corporation is located. The provisions of said act subjecting such shares of stock so owned to taxation in Ohio are constitutional. *Bradley v. Bander*, 36 Ohio St., 23. 1880.

XI. STREET RAILWAYS.

225. Charter; license. A charter held not to be a contract limiting the amount of license fees. *Railway Co. v. Philadelphia*, 101 U. S., 528. 1879. See, also, *Union Passenger R'y Co. v. City of Philadelphia*, 83 Pa. St., 429, 1877; 15 Amer. R'y Rep., 431.

226. — A franchise conferred by the legislature on private persons to construct a railroad track through the streets of a city, and to run cars thereon, and prescribing certain conditions to be performed by the grantees, is not a contract in such sense as to exempt the occupation of operating the road from proper police regulations, or from taxation by the municipal authorities in cases authorized by law. *San Jose v. San José and Santa Clara R. R. Co.*, 53 Cal., 475. 1879.

227. — The fact that the railroad extends and the cars are run beyond the corporate limits does not exempt the occupation from taxation by the municipality. *Ib.*

228. — The appellee, the Union R. R. Co., has an easement in the way occupied by its road, and whether under or over a public street, it is an element of value to the road, and as such should be included in the valuation of the road itself. An easement enjoyed in the bed of a public street may be assessed and taxed as real estate. *Appeal*

Tax Court of Baltimore v. Western Md. R. R. Co., 50 Md., 274. 1878.

229. Exemption. Under a contract between a municipal corporation and a street railroad company, that "the road, rolling and live stock of said company" should be exempted from taxation, stables, shops, houses for storage of lumber, and other like conveniences were not exempted. *Atlanta R. R. Co. v. Atlanta*, 66 Ga., 104. 1880.

230. — The word "road" is not a technical word requiring explanation by the testimony of experts; nor does it alter the case that the president of the road, and another witness interested therein, testified that, at the time the franchise was granted, they understood it to include such appurtenances or conveniences as "rolling and live stock of the company, stables, shops," etc. *Ib.*

231. Statute. The statute of Maryland construed. *Mayor, etc., of Baltimore v. Baltimore R. R. Co.*, 57 Md., 31, 1881; 7 Amer. & Eng. R. R. Cases, 362.

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232. Application of payments. The taxpayer has the right to pay the full amount of any one tax listed against him, while refusing to pay others; and where plaintiff deposited a sum of money with the county treasurer, with instructions not to apply it to the payment of certain taxes, and the treasurer, receiving no further instructions, after April 1st used it *pro tanto* for the discharge of the taxes which plaintiff had forbidden to be paid, *held*, that plaintiff was not bound by the act of the treasurer, and that the money should have been appropriated as plaintiff directed. *Iowa Railroad Land Co. v. Carroll County*, 39 Ia., 151. 1874.

233. Apportionment. Matters of apportionment of railway taxes determined. *Hannibal and St. Joseph R. R. Co. v. State Board of Equalization*, 64 Mo., 294, 1876; *Union Trust Co. v. Weber*, 93 Ill., 346, 1880; 3 Amer. & Eng. R. R. Cases, 583; *Wilson, Receiver, etc., v. Weber*, 96 Ill., 454, 1880; 5 Amer. & Eng. R. R. Cases, 112; *State Auditor v. Jackson County*, 65 Ala., 142, 1880; 7 Amer. & Eng. R. R. Cases, 273; *Rich-*

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mond and Danville R. R. Co. v. Comm'rs of Alamance, 84 N. C., 504, 1881; 7 Amer. & Eng. R. R. Cases, 339.

234. Branch lines. Where branch lines were worked at a loss, on account of the increased traffic furnished to the main line, such losses should not be deducted in rating for taxation. *Regina v. Great Western R'y Co.*, 6 Adolphus & Ellis (N. S.), 179; 51 E. C. L., 178. 1844. See, also, *Louisville, Cincinnati and Lexington R. R. Co. v. Commonwealth*, 10 Bush (Ky.), 43. 1873.

235. Bridges. Various questions determined in relation to taxation of bridges. *Quincy Bridge Co. v. County of Adams*, 88 Ill., 615, 1878; 21 Amer. R'y Rep., 378; *State v. Mutchler*, 41 N. J. Law, 96, 1879; *State v. Mutchler*, 42 N. J. Law, 461, 1880; 1 Amer. & Eng. R. R. Cases, 395; *Hudson River Bridge Co. v. Patterson*, 11 Hun (N. Y.), 525, 1877; *State ex rel. v. St. Louis, Kansas City and Northern R'y Co.*, 9 Mo. App., 532, 1881; *Wabash, St. Louis and Pacific R'y Co. v. Binkert*, 106 Ill., 298, 1883; *Cook v. City of Burlington*, 59 Ia., 251, 1882; *Chicago, Rock Island and Pacific R. R. Co. v. Davenport*, 51 Ia., 451, 1879; *Dunlieth and Dubuque Bridge Co. v. County of Dubuque*, 55 Ia., 558, 1881; *Hudson River Bridge Co. v. Patterson*, 74 N. Y., 365, 1878.

236. Carrying mails. By the act of July 13, 1866 (14 Stat., 135, § 103 of the act of 1864, as amended), "every . . . corporation owning . . . any railroad . . . engaged or employed in . . . transporting the mails of the United States upon contracts made prior to August 1, 1866, shall be subject to and pay a tax of two and one-half per cent. of the gross receipts" from such service. In a suit against a railroad company to recover said tax no express contract for carrying the mails was proved, but it appeared that the company had been carrying them, and that the services for which it had been paid commenced before August 1, 1866, and continued without interruption until January 1, 1870. *Held*, that the law implies that a contract was entered into prior to August 1, 1866; that the company is liable for that tax. *Railroad Co. v. United States*, 101 U. S., 543. 1879.

237. Change of rate. The right of the state to impose a tax, rate or imposition in

future cannot be taken away by a mere implication arising from a direction to pay a certain sum. *Union Passenger R'y Co. v. City of Philadelphia*, 83 Pa. St., 429, 1877; 15 Amer. R'y Rep., 431.

238. Compromise. The attorney-general may assume control of suits for the collection of taxes and may take appeals in such cases. *County of Sacramento v. Central Pacific R. R. Co.*, 61 Cal., 250. 1883.

239. — The attorney-general has no authority of himself to settle tax executions at less than their full amount; such authority must come from the state in order to bind it. *State v. Southwestern R. R. Co.*, 66 Ga., 403. 1881. See, also, *State v. Central Pacific R. R. Co.*, 9 Nev., 79. 1873.

240. Consolidation of railways. In *Tomlinson v. Branch*, 15 Wall., 460, and *City of Charleston v. Branch*, ib., 470, it was held that the respective roads and property of the two companies, which had become consolidated in the hands of the South Carolina R. R. Co., retained their original status towards the public and the state the same as if the consolidation had not taken place; that the entire line of road between Branchville and Charleston was subject to taxation; and that "*prima facie* the railroad terminus and depot in Charleston, and the property accessory thereto, belong to the South Carolina Canal and R. R. Co. portion of the joint property." Repairs and improvements upon the old line become a part thereof and subject to taxation. *Branch v. City of Charleston*, 92 U. S., 677. 1875.

241. — Where two or more corporations with a special exemption from general taxation, the amount of taxation being dependent upon certain precedent acts to be done by such corporation thus to be exempted, are incorporated into a new corporation, which is neither required nor able to do and perform the acts which are to precede such limited and special exemption, the new corporation cannot claim such exemption. *State v. Maine Central R. R. Co.*, 66 Me., 488, 1877; 19 Amer. R'y Rep., 323.

242. Contractors. Contractors binding themselves to construct and equip a railroad, and who are to receive therefor subscriptions to the stock and bonds and mortgages on the road, and are to furnish and pay for

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all materials, labor and machinery, and who are placed in possession of the road to enable it to perform the contract, and authorized to operate the road, and receive the earnings thereof, paying to the railroad company the net profits, are not vested with the franchise and right of way, and are not the owners of the road for purposes of taxation. *Union Trust Co. v. Weber*, 96 Ill., 346, 1880; 3 Amer. & Eng. R. R. Cases, 583.

243. — The listing or assessing of railroad property in a wrong name as owner forms no ground for enjoining the collection of the tax thereon. Property is liable to pay a tax without reference to its ownership. *Ib.*

244. Counties. County boundaries and unorganized counties considered. *State ex rel. v. Francis*, 23 Kans., 495, 1880; *Chicago and Northwestern R'y Co. v. Langlade County*, 56 Wis., 614, 1883.

245. Depots on leased ground. The city of Baltimore had leased two lots of ground to the P., W. and B. R. R. Co., for ninety-nine years, renewable forever, and which lots were improved by the lessee, by the erection thereon of depots, shops, etc. *Held*, that under the Acts of 1876, ch. 159 and ch. 260, the company should be assessed only with the value of the leasehold estate, subject to the rent reserved in the lease; the interest and estate of the city in the premises being exempt by statute from taxation. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Appeal Tax Court of Baltimore*, 50 Md., 397, 1878. See, also, *Appeal Tax Court of Baltimore v. Western Md. R. R. Co.*, 50 Md., 274, 1878.

246. Elevated railways. Foundations for piers or columns placed in a public street, by an elevated railroad, by legislative authority, whether standing alone, or with columns and a superstructure thereon, are properly taxable as real estate. *People v. Commissioners*, 19 Hun (N. Y.), 460, 1879; affirmed, *Same v. Same*, 82 N. Y., 459, 1880; 2 Amer. & Eng. R. R. Cases, 343.

247. — In assessing such foundations and superstructures the assessors are not confined to the consideration of the land covered thereby, but may consider their position and its incidents, and the business and profits to be derived therefrom. *Ib.*

248. — The manner of assessment and

taxation of elevated railways determined. *People ex rel. v. Tax Commissioners*, 19 Hun (N. Y.), 460, 1879.

249. Elevators. The warehouses and elevators of a transportation company are taxable for local purposes. *County of Erie v. Erie and Western Transportation Co.*, 87 Pa. St., 434, 1878.

250. Express companies. A license or privilege tax imposed by a state on the business of an express company engaged solely in commerce between the states, where there is no intention by this means to obstruct or prohibit the business, is not unconstitutional. *Memphis and Little Rock R. R. Co. v. Nolan*, 14 Federal Reporter, 532, 1882.

251. — A railroad company which organizes an express company and carries on a regular express business as a part of the business of the railroad company, under the management and control of its officers and by its own agents, is subject to pay a privilege tax imposed by the statute upon express companies. *Memphis and Little Rock R. R. Co. v. State*, 9 Lea (Tenn.), 218, 1882.

252. — The city of Montgomery has authority, under its charter, to levy and collect a specific tax on all express companies doing business within its corporate limits; and this power is not taken away as to the Southern Express Company, by that provision of the act in relation to said company, approved February 26, 1872, which declares: "Nor shall any municipal corporation levy any percentage tax upon the receipts of said company," nor by any other provisions of said act. *City Council of Montgomery v. Shoemaker*, 51 Ala., 114, 1874.

253. Estoppel. The failure of a taxpayer to take steps to prevent an illegal levy of taxes will not estop him to resist their collection. *State ex rel. v. St. Louis, Kansas City and Northern R'y Co.*, 74 Mo., 163, 1881.

254. Federal corporation. The license tax on foreign corporations does not apply to a federal corporation. *Commonwealth v. Texas and Pacific R'y Co.*, 1 Pennypacker (Pa.), 215, 1881.

255. Ferries. The liability of ferry corporations carrying between different states determined. *Irvin v. New Orleans, St. Louis and Chicago R. R. Co.*, 94 Ill., 105,

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1879; *Commonwealth v. Gloucester Ferry Co.*, 98 Pa. St., 105, 1881.

256. Illegal tax. Where the county commissioners of Sedgwick county, in levying taxes for the year 1874, levied for current expenses a tax of one per cent., which tax was all that they had any power to levy during that year for that purpose, and then, in addition to said tax, and apparently without any authority, they levied another tax of eight mills on the dollar to meet a deficit in the county revenue of the preceding year, *held*, that the levy of said eight-mill tax was illegal. *Atchison, Topeka and Santa Fe R. R. Co. v. Woodcock*, 18 Kans., 20. 1877.

257. — recovery back. Taxes illegally levied and paid under protest by a railway company cannot be recovered back from the county commissioners. *Commissioners of Pawnee County v. Atchison, Topeka and Santa Fe R. R. Co.*, 21 Kans., 743. 1879. See, also, *Ranny v. Bader*, 67 Mo., 476. 1878.

258. — An action will not lie to recover from the county for taxes, paid under a misapprehension in regard to the ownership of the taxed property, where the tax-payer had full knowledge of all the facts upon which his claim of title is based. The rule applied to tax paid on a railroad land grant. *Dubuque and Sioux City R. R. Co. v. Webster County*, 40 Ia., 16. 1874. See, also, *Railroad Co. v. Commissioners*, 98 U. S., 541. 1878.

259. — In Wisconsin an action by a railway company to restrain the state from collecting taxes and penalties was held to be improperly brought; such action could only be brought after having been presented to and disallowed by the legislature. *Chicago, Milwaukee and St. Paul R'y Co. v. State*, 53 Wis., 509. 1881.

260. — Demand for illegal tax must be made before instituting suit to recover back such tax paid under protest. *Burlington and Missouri River R. R. Co. v. Buffalo County*, 14 Neb., 51. 1883.

261. Injunction. The nature and extent of the jurisdiction in equity to restrain the collection of taxes considered. The jurisdiction will only be exercised to prevent irreparable injury. *Parmley v. St. Louis, Iron Mountain and Southern R. R. Co.*, 3 Dillon (U. S. C. C.), 13, 1874; *Bailey v. Atlantic and*

Pacific R. R. Co., 3 Dillon (U. S. C. C.), 22, 1874; *Atchison, Topeka and Santa Fe R. R. Co. v. Williams*, 16 Kans., 195, 1876; *Burlington and Mo. River R. R. Co. v. York County*, 7 Neb., 487, 1878; *Oliver v. Memphis and Little Rock R. R. Co.*, 80 Ark., 128, 1875; *Wright v. Southwestern R. R. Co.*, 64 Ga., 783, 1880; *Union Pacific R. R. Co. v. Carr*, 1 Wyoming, 96, 1872; *Louisville and Nashville R. R. Co. v. Gaines*, 2 Flippin (U. S. C. C.), 621, 1880; *Houston and Texas Central R. R. Co. v. County of Presidio*, 53 Tex., 518, 1880; *International and Great Northern R. R. Co. v. Smith County*, 54 ib., 1, 1880.

262. Jurisdiction of federal courts. The jurisdiction of the United States courts in matters of taxation determined. *Manhattan R'y Co. v. Mayor of New York*, 18 Federal Reporter, 195, 1883; *United States v. N. Y., New Haven and Hartford R. R. Co.*, 10 Benedict (U. S. D. C.), 144, 1878.

263. Lands outside of right of way. Where a railway company has completed its road and appendages, so far as is at present contemplated, at its several stations, the land lying outside the roadway limitation of one hundred feet, not being in actual use, nor in present contemplation of use by the company, is liable to taxation. *State v. Collector of Middle Township*, 38 N. J. Law, 270, 1876; 13 Amer. R'y Rep., 47; *State v. Fuller*, 40 N. J. Law, 328, 1878; *State v. Wetherell*, 41 N. J. Law, 147, 1879.

264. Leased lines. Where the charter authorizes a railway company to acquire, by lease, purchase or otherwise, any extension of its road, necessary and proper to its business, and provides that all property so acquired shall become part of the property of such corporation, and in pursuance thereof it leases other railroads forever, and provides by the terms of the leases that the roads so leased shall become, and be operated as, a part of the main line of the company leasing, the property so leased will, if not for all purposes, at least for the purposes of taxation, be regarded as the property of the company operating it under such leases. *Huck v. Chicago and Alton R. R. Co.*, 86 Ill., 352. 1877.

265. — Rolling stock held under a lease must be returned for assessment to the auditor of state. Ch. 84, Laws 1876. *Com-*

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missioners of Shawnee County v. Topeka Equipment Co., 26 Kans., 363. 1881.

266. — Where one railroad company builds a car hoist and lays a third rail upon its own ground, and at its own expense, which is attached to and becomes a part of the soil, another railroad company using the same jointly with the owner, for which it pays a compensation, cannot be taxed for one-half its value. *Irvin v. New Orleans, St. Louis and Chicago R. R. Co.*, 94 Ill., 105. 1879.

267. — A contract between two railroad companies, whereby one is to take charge of the road of the other, with all its equipments, and operate the same as a continuous line with its own line, and exercise all the rights and privileges of the other under its franchise, for a consideration named, does not change the ownership of any of the property of the latter company, and the rolling stock of such company is liable to distraint for taxes assessed upon its capital stock. *Archer v. Terre Haute and Indianapolis R. R. Co.*, 102 Ill., 493, 1882; 7 Amer. & Eng. R. R. Cases, 249.

268. — When the charter of a railroad company declares "that the said railroad and the property of said company shall not be subject to be taxed higher than one-half of one per cent. on its annual income," in measuring a tax imposed on the property of said company, the per cent. is to be counted on the gross and not on the net income. The lease of the road to another company by authority of the legislature does not affect the basis of taxation. The income contemplated by the charter is not the annual rental, but the earnings of the road. The act authorizing the lease not having any provision in regard to taxation, the limit in the charter was not lost or changed by the lease. *Goldsmith v. Augusta and Savannah R. R. Co.*, 62 Ga., 468. 1879.

269. — Assessment held valid in a special case. *Railroad Co. v. Vance*, 96 U. S., 450. 1877.

270. Legalizing acts. Since the legislature has the power to pass a general law for the levy and collection of special taxes, for the purpose of paying judgments, without limitation as to rate, it may rightfully legalize levies in excess of lawful authority at the time they are made. *Iowa Railroad Land*

Co. v. Soper, 39 Ia., 112; 9 Amer. R'y Rep., 29, 1874; *Same v. Sac County*, 39 Ia., 124, 1874.

271. Levy. Levy of taxes under various statutes examined. *Union Pacific R. R. Co. v. Dawson County*, 12 Neb., 254, 1882; *Burlington and Missouri River R. R. Co. v. Lancaster County*, ib., 324, 1882; *Same v. Clay County*, 13 ib., 367, 1882; *Town of Lebanon v. Ohio and Mississippi R'y Co.*, 77 Ill., 539, 1875; *Va. and Tenn. R. R. Co. v. Washington County*, 30 Grattan (Va.), 471, 1878.

272. Mortgage. A conveyance of land to trustees to secure a debt is only a mortgage, and does not preclude the owner from claiming the title in fee and seeking relief from an illegal tax. *Flint and Pere Marquette R'y Co. v. Auditor-General*, 41 Mich., 635. 1879.

273. Payment; tender of state coupons. The interest coupons upon Virginia bonds are receivable for taxes, and, in case of the refusal of the tax collector to receive them, he may be enjoined from collecting the tax by distress. *Baltimore and Ohio R. R. Co. v. Allen*, 17 Federal Reporter, 171. 1883.

274. Practice. Practice in correcting errors of taxation considered. *Goldsmith v. Southwestern R. R. Co.*, 62 Ga., 495, 1879; *Same v. Ga. R. R. Co.*, ib., 542, 1879; *Hoge v. Richmond and Danville R. R. Co.*, 93 U. S., 1, 1876; *United States v. Erie R'y Co.*, 107 U. S., 1, 1882.

275. Receiver. Property in the hands of a receiver is not exempt from taxation. *Stevens v. New York and Oswego Midland R. R. Co.*, 13 Blatchford (U. S. C. C.), 104, 1875; *State v. Board of R. R. Comm'rs*, 41 N. J. Law, 235, 1879.

276. Release. That the commissioners' court acquiesced in the unconstitutional act of 1870 (which remitted certain taxes assessed against the railroad company), by not requiring the tax collector to collect or account for the said company's tax the previous year, is no surrender of the claim or bar to its subsequent assertion. *Perry County v. Selma, Marion and Memphis R. R. Co.*, 58 Ala., 546, 1877; 20 Amer. R'y Rep., 372.

277. Right of way. Town lots used by a railroad company as right of way, and assessed under the denomination of "railroad track," are only liable for taxes as right of

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way, and cannot be taxed both as right of way and as town or city lots. *Chicago and Northwestern R'y Co. v. Miller*, 72 Ill., 144. 1874. See, also, *State v. Collector of Middle Township*, 38 N. J. Law, 270, 1876; 13 Amer. R'y Rep., 47.

278. Rolling stock. The land constituting the right of way of a railroad, with the ties, rails, etc., in place on the track, and turn-outs, depot grounds, and the buildings on the same, are real estate, but the rolling stock is made by statute, for the purposes of taxation, personal property. *Union Trust Co. v. Weber*, 96 Ill., 346, 1880; 3 Amer. & Eng. R. R. Cases, 583.

279. — The rolling stock of the appellant was held alternately at Wilmington, Del., and Baltimore, Md., seldom staying over night in Baltimore. Its principal place of business was in Philadelphia. *Held*, that such rolling stock was not taxable in Baltimore. *Philadelphia, Wilmington and Baltimore R. R. Co. v. Appeal Tax Court of Baltimore*, 50 Md., 397, 1878; *Appeal Tax Court of Baltimore v. Northern Central R'y Co.*, ib., 417, 1878.

280. Side-tracks. Land held and used by a railroad company for side-tracks, switches and turn-outs must be regarded, within the meaning of the revenue law, as a part of the right of way of the company, notwithstanding it may have machine-shops, depots, round-houses and other superstructures thereon, necessary for the successful use of the road. *Chicago and Alton R. R. Co. v. The People*, 98 Ill., 350, 1881; 5 Amer. & Eng. R. R. Cases, 94.

281. Sleeping cars. The carriage of passengers from one state to another in sleeping cars is interstate commerce and cannot be regulated or taxed by a state. *State of Indiana ex rel. v. Pullman Palace Car Co.*, 11 Bissell (U. S. C. C.), 561; 16 Federal Reporter, 193, 1883; *Appeal Tax Court of Baltimore v. Pullman Palace Car Co.*, 50 Md., 452, 1878.

282. — A privilege tax on the running and using of sleeping cars on railroads in this state, not owned by the railroads, is constitutional and valid, although the owner may be a foreign corporation, and the cars may be used for the accommodation of pas-

sengers traveling through the state. *Pullman Southern Car Co. v. Gaines*, 3 Tenn. Ch., 587. 1877.

283. — By a written agreement with the Pullman Palace Car Co., a railroad company employed on its road sleeping cars of the car company, hauled the same, furnished fuel and lights, kept them in running order, and received its ordinary fare for the transportation of passengers in them. The car company was bound to keep in repair the carpets, upholstery and bedding, excepting repairs necessary from accident and casualty while being run on the road; received the fare for the extra accommodation, and furnished its own employes to receive the same and wait upon passengers. *Held*, that although the general property in the cars was in the car company, yet the railroad company had such a community of interest that, for the purposes of taxation, they must be regarded, under the statute, as belonging to the rolling stock of the railroad company, and subject to be taxed as such. *Kennedy v. St. Louis, Vandalia and Terre Haute R. R. Co.*, 62 Ill., 395, 1872; 7 Amer. R'y Rep., 346.

284. — By the second section of 5 and 6 Vict., c. 79, and the schedule to that act, a duty at the rate of five per cent. is made payable upon all sums received or charged for the hire, fare or conveyance of passengers conveyed for hire upon any railway. The defendant, by a local act, was prohibited from charging to its passengers more than specified sums per mile, which sums were to include all expenses incidental to their conveyance, except government duty. The defendant, in addition to the sum charged by it to its passengers for conveyance, charged to and received from such passengers a further sum at the rate of five per cent. on the former, to cover the government duty. The crown claimed duty on the latter sum as well as on the former. *Held*, affirming the decision of the exchequer division, that the crown was entitled to duty on the whole amount received from the passengers, even though such amount should exceed the maximum charge for conveyance fixed by the local act. *Attorney-General v. London and North Western R'y Co.*, Law Reports, 6 Queen's Bench Di-

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vision, 216, 1880; 29 Eng. (Moak), 572; 1 Amer. & Eng. R. R. Cases, 578; *Attorney-General v. London and North Western R'y Co.*, Law Reports, 6 Queen's Bench Division, 216, 1880; 1 Amer. & Eng. R. R. Cases, 592; *Same v. Same*, Law Reports, 5 Exchequer Division, 247, 1880.

285. Statutes. Various statutes in relation to taxation construed. *Porter v. Rockford, Rock Island and St. Louis R. R. Co.*, 76 Ill., 561, 1875; *Chicago, Pekin and South-western R. R. Co. v. Raymond*, 97 ib., 212, 1881; *State ex rel. v. Union Trust Co.*, 68 Mo., 463, 1878. See, also, *State v. St. Louis, Iron Mountain and Southern R'y Co.*, 71 ib., 88, 1879; *Whelen v. Catawissa R. R. Co.*, 9 Philadelphia, 220, 1874; *Union Pacific R. R. Co. v. Comm'rs of Saunders County*, 7 Neb., 228, 1878; *New York Central and Hudson River R. R. Co., In re*, 7 Abbott's New Cases (N. Y.), 408, 1880; *Sleight v. The People*, 74 Ill., 47, 1874; *Atchison, Topeka and Santa Fe R. R. Co. v. Jaques*, 20 Kans., 639, 1878.

286. Steamboat lines. A railway company was empowered by its charter to own and run steamboats in connection with its line. Instead of doing this it made an arrangement with a steamboat company in which it had no interest, to run its boats from its wharves, freight being way-billed through and the gross receipts divided in certain proportions. The court inclined to regard the arrangement as an indirect method of exercising its charter rights with regard to running steamboats, and the premises used by the steamboat company as not liable, by reason of such use, to local taxation. *Osborn v. Hartford and New Haven R. R. Co.*, 40 Conn., 498, 1873; 5 Amer. R'y Rep., 226.

287. Stock and stockholders. The tax on the value of stock should be abated to the extent of the tax upon the corporate property. *Raleigh and Gaston R. R. Co. v. Commissioners of Wake*, 87 N. C., 414. 1882.

288. — The value of all property owned by a corporation, in whatever consisting, and including the franchise, is the true and fair measure of the value of all its stock. *Ib.*

289. — A stockholder in a railway company cannot, in his own name, institute proceedings to set aside the illegal levy of taxes

against the corporation until he has first made an honest and earnest effort to induce the corporation to take the necessary steps to obtain relief. *Huntington v. Palmer*, 104 U. S., 482. 1881.

290. Street improvements. Railway property held subject to taxation for street improvements. *City of Ludlow v. Cincinnati Southern R'y Co.*, 78 Ky., 357, 1880; 7 Amer. & Eng. R. R. Cases, 231; *New York, New Haven and Hartford R. R. Co. v. New Britain*, 49 Conn., 40, 1881.

291. Telegraph companies. An occupation tax imposed on a telegraph company, which graduates the tax according to the business done, regardless of a distinction between business done wholly within the state and business done in part without the state, is free from the objection that it regulates or obstructs interstate commerce. *Western Union Telegraph Co. v. The State*, 55 Tex., 314. 1881.

292. — The act to provide for a uniform assessment of property (Acts 1872, p. 57) does not contain any provision in relation to the manner of assessing the capital of foreign corporations. The stock of a foreign telegraph company owning and operating a line of telegraph in Indiana cannot be assessed under the provisions of that statute. *Riley v. Western Union Telegraph Co.*, 47 Ind., 511. 1874.

293. — The city of Richmond has the lawful right to impose a license tax upon a foreign telegraph company having an agency and doing business in the city. *Western Union Tel. Co. v. Richmond*, 26 Grattan (Va.), 1. 1875.

294. Title of land in county. Where a county under obligation to convey its swamp lands to a railroad company, under contract between them, refuses so to do, it will be thereby estopped from afterward claiming that during such time the title was in the company, and thus subject to taxation. *Iowa R. R. Land Co. v. Story County*, 36 Ia., 48. 1872.

295. Void order abating taxes. The district attorney is authorized to commence suit for delinquent taxes stricken off the delinquent list by a void order of the county commissioners. *State v. Central Pacific R. R. Co.*, 10 Nev., 87. 1875.

Contracts — Transmission of Messages.

TELEGRAPHS.

I. CONTRACTS.

II. TRANSMISSION OF MESSAGES.

III. GENERAL MATTERS.

I. CONTRACTS.

1. **Contract with railway company.** Certain contracts in relation to telegraph lines construed. *Railroad Co. v. Telegraph Co.*, 38 Ohio St., 24, 1882; *Pittsburgh and Connellsville R. R. Co.'s Appeal*, 99 Pa. St., 177, 1881; *Western Union Tel. Co. v. Western and Atlantic R. R. Co.*, 91 U. S., 283, 1875.

2. **Construction.** A contract for placing and using an additional wire upon a line of telegraph poles construed. *Marietta and Cincinnati R. R. Co. v. Western Union Telegraph Co.*, 10 Amer. & Eng. R. R. Cases (Ohio), 887. 1832.

3. **Illegal clauses.** A railway company, authorized and required by the act of its organization to construct a telegraph line, entered into a contract with a telegraph company for the construction of such line. *Held*, such contract could not be avoided by the railway company, either as a usurpation of its function or for want of capacity to make it. *Western Union Telegraph Co. v. Kansas Pacific R'y Co.*, 4 Federal Reporter, 284. 1880.

4. — Such contract also provided for the transmission without charge, by the telegraph company, of the family, private and social messages of the executive officers of the railroad. *Held*, that as such free use of the telegraph was not limited to the officers who made the contract, it could be rescinded after the expiration of thirteen years. *Ib.*

5. **Injunction.** Where a contract was made between two telegraph companies, whereby it was agreed that certain unassigned messages should be sent on the wires of one of the companies, and the other company, pending the life of the contract, should sell out all its property to a third company, its members taking stock in and becoming members of the company created by such consolidation, it is no ground for an injunction at the suit of one of the original parties to the contract against such consolidated company to prevent carrying out the

consolidation agreement. *Compagnie Francaise v. Western Union Telegraph Co.*, 11 Federal Reporter, 842. 1881.

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6. **Cipher messages.** In order to make a telegraph company liable for ulterior and remote consequences for a failure to properly transmit a message, the importance of which, from the face of the message, it could not be advised, it is the duty of the sender to disclose to the company the purport and meaning of the communication. So, where a cipher message is sent, of the import of which the company is not advised, only nominal damages, or the cost of the message, can be recovered. *Western Union Telegraph Co. v. Martin*, 9 Bradwell (Ill.), 587. 1881.

7. **Condition as to time of claiming damages.** A condition printed on a telegraph blank, "that no claim for damages shall be valid unless presented in writing within twenty days from sending the message," is reasonable and valid. A delay in receiving the dispatch, though caused by a mistake of the company, would not modify the condition or extend the time, if a reasonable time was left, after the knowledge of the mistake, to present the claim. *Heiman v. Western Union Telegraph Co.*, 57 Wis., 532. 1883.

8. **Damages.** In case of delay or total failure of delivery of dispatches, relating to matters not connected with business, the company should not escape with mere nominal damages on account of the want of strict commercial value in such messages. *Gulf, Colorado and Santa Fe R'y Co. v. Levy*, 12 Amer. & Eng. R. R. Cases (Tex.), 96, 1888; *Same v. Same*, *ib.*, 90. See, also, *Logan v. Western Union Telegraph Co.*, 84 Ill., 468, 1877; *So Relle v. Western Union Telegraph Co.*, 55 Tex., 303, 1881.

9. — In case of failure to deliver a message, the company is only liable for such damages as naturally flow from the breach of contract, or such as may fairly be supposed to have been within the contemplation of the parties at the time the contract was made. *First National Bank of Barnesville v. Western Union Telegraph Co.*, 30 Ohio St., 555. 1870.

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10. — Where, in an action against a telegraph company for damages, resulting from failure to deliver a message for four days, directing plaintiff to "ship his hogs at once," the measure of damages is the difference between the market value of the hogs on the day plaintiff was enabled to place them on the market, after receiving the dispatch, and their value on the day he could, if there had been no delay in the delivery, have gotten them into market by the ordinary course of transportation. *Manville v. Western Union Tel. Co.*, 37 Ia., 214. 1873.

11. — One B. sent a telegram by defendant's line to plaintiff, asking for \$500. By the negligence of defendant's employes the message was changed to \$5,000, which sum plaintiff sent to B., who, upon receipt, appropriated it to his own use and absconded. In an action to recover damages, the referee allowed the amount of the loss. *Held*, error; that defendant's negligence was not the proximate cause of the loss, as the embezzlement of B. did not naturally result therefrom, and could not reasonably have been expected. *Lowery v. Western Union Telegraph Co.*, 60 N. Y., 198. 1875.

12. — option deals. Although a speculation in cotton futures may be an illegal contract, yet an agent who incurs expense or loss on behalf of his principal in carrying out such contract may recover the amount thereof from his principal. If such loss or expense was caused by the improper transmission of a telegram from the principal to the agent, the former, on paying the loss to the agent, would have sustained a damage through the negligence of the telegraph company, for which he could recover from it. The illegality of the speculation would not relieve the company from damages resulting from its negligence in transmitting a telegram according to its contract for a valuable consideration. *Western Union Telegraph Co. v. Blanchard*, 68 Ga., 299. 1832.

13. Degree of care required. The highest degree of care is not required of telegraph companies in the transmission of messages over its lines; if ordinary care is exercised by its agents, employes or operators, it is sufficient to exonerate them from liability for loss or damage. *White v. Western Union*

Telegraph Co., 14 Federal Reporter, 710, 1882; *Western Union Tel. Co. v. Fontaine*, 58 Ga., 433, 1877.

14. Delay. A telegraph company is in some respects like a common carrier, and is under a duty to perform the service it undertakes in a prompt and skilful manner, and for any breach of this duty it is liable to the party injured, whether he be the sender or receiver of the message. *Western Union Telegraph Co. v. Hope*, 11 Bradwell (Ill.), 289. 1883.

15. — It is incumbent upon the company to show, at least, that it used ordinary care and diligence in attempting to deliver the message. *Pope v. Western Union Telegraph Co.*, 9 Bradwell (Ill.), 283. 1881.

16. Duty to transmit. Upon payment or tender of its usual charges, a telegraph company is bound by law to transmit any dispatch couched in decent language which is placed in the hands of its agent for that purpose, though it may refuse to transmit one couched in indecent terms. *Western Union Telegraph Co. v. Ferguson*, 57 Ind., 495. 1877.

17. Evidence. In a suit against a telegraph company for damages resulting from alleged failure to deliver a message, parol evidence of the contents of the message may be resorted to by the plaintiff to establish the contents of the message, and this without the necessity of first giving the defendant notice to produce the written message. *Reliance Lumber Co. v. Western Union Telegraph Co.*, 58 Tex., 394. 1883.

18. — In an action against a telegraph company for damages for mistake in the transmission of a message, it is within the discretion of the court to require the company to produce the original message and the copies as received at the other points upon its line where it was written down. *Phelps v. Atlantic and Pacific Telegraph Co.*, 46 Wis., 263. 1879.

19. — In an action against a telegraph company for failure to transmit a message, by reason of which the plaintiff lost the advantage of certain contracts made by him with other parties, the action is not founded on such contracts, but on the contract of the company to transmit and deliver the message; therefore said contracts with other

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parties may be proved, under the allegations of the complaint, to have been in writing. *Western Union Telegraph Co. v. Hopkins*, 49 Ind., 223. 1874. *Contra*, *Reliance Lumber Co. v. Western Union Telegraph Co.*, 58 Tex., 394. 1883.

20. Exclusive privilege. A telegraph company having a grant from a railroad of an exclusive right to construct a line along the right of way is entitled to an injunction against actual interference with its line, but not against such interruption of its business as results from mere competition by other companies constructing rival lines along said railroad. *Western Union Telegraph Co. v. American Union Telegraph Co.*, 9 Bissell (U. S. C. C.), 72. 1879.

21. Half-rate messages. A telegraph company is not a common carrier. It may impose reasonable terms upon the sender of a message, and may properly restrict its liability in sending "half-rate" messages. *Schwartz v. Atlantic and Pacific Telegraph Co.*, 18 Hun (N. Y.), 157, 1879; *Aiken v. Telegraph Co.*, 5 So. Car., 358, 1874; *Jones v. Western Union Telegraph Co.*, 18 Federal Reporter, 717, 1883. *Contra*, so far as such limitation attempts to excuse negligence. *Hibbard v. Western Union Telegraph Co.*, 33 Wis., 558, 1873; *Candee v. Western Union Telegraph Co.*, 34 Wis., 471, 1874.

22. Indiana statute. The statute of Indiana in relation to messages construed. *Western Union Telegraph Co. v. Hamilton*, 50 Ind., 181, 1875; *Western Union Telegraph Co. v. Fenton*, 52 Ind., 1, 1875; *Western Union Telegraph Co. v. Meek*, 49 Ind., 53, 1874; *Western Union Telegraph Co. v. Lewelling*, 58 Ind., 367, 1877.

23. Liability for fictitious messages. If the agent of a telegraph company at one of its stations, with power to delegate his authority, employs another person to transmit and receive messages, and such other person sends a false message purporting to come from the cashier of a bank, directing another bank to pay a fictitious person a sum of money, and the sender then personates the fictitious person and obtains the money, without any neglect on the part of the bank, the telegraph company is responsible to the bank for the same. *Bank of California v. Western Union Tel. Co.*, 52 Cal., 280. 1877.

24. Libel. A telegraph company is liable for the transmission of a libel over its lines. *Silver v. Dominion Telegraph Co.*, 2 Russell & Geldert (Nova Scotia), 17. 1881.

25. Limitation of liability. While a telegraph company may, by special agreement, or by reasonable rules and regulations, limit its liability to damages for errors in the transmission and delivery of messages, it cannot stipulate or provide for immunity from liability, where the error or mistake results from its own negligence. Such a stipulation or regulation, being contrary to public policy, is void. *Telegraph Co. v. Griswold*, 87 Ohio St., 301, 1831; *Womack v. Western Union Telegraph Co.*, 58 Tex., 176, 1882; *White v. Western Union Telegraph Co.*, 14 Federal Reporter, 710, 1882; *Western Union Telegraph Co. v. Blanchard*, 68 Ga., 299, 1882; *Candee v. Western Union Telegraph Co.*, 34 Wis., 471, 1874; *Western Union Telegraph Co. v. Neill*, 57 Tex., 283, 1882.

26. — A regulation that a telegraph company will not be responsible for the correctness of messages, unless repeated, is not so far contrary to private interest or the public good as to justify a court of justice in pronouncing it void. *Passmore v. Western Union Tel. Co.*, 9 Philadelphia, 90, 1873; *Passmore v. Western Union Telegraph Co.*, 78 Pa. St., 238, 1875; *Becker v. Western Union Telegraph Co.*, 11 Neb., 87, 1881. *Contra*, *Western Union Telegraph Co. v. Tyler*, 74 Ill., 168, 1874; *Western Union Telegraph Co. v. Blanchard*, 68 Ga., 299, 1882.

27. Market reports. It is no part of the corporate duty or business of a telegraph company to collect and send out market reports, and though it voluntarily contracts to do so, it may terminate such contract, and it cannot be compelled to enter into another. *Metropolitan Grain and Stock Exchange v. Mutual Union Telegraph Co.*, 11 Bissell (U. S. C. C.), 531; 15 Federal Reporter, 847. 1883.

28. — The sender of an unrepeatd message, written upon a blank of the company having a printed heading in which it is specified that the company shall not be liable for errors in the transmission of any unrepeatd message beyond the amount received for sending the same, cannot recover a greater sum for a mistake in its transmission, not caused by gross negligence or fraud.

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Redpath v. Western Union Telegraph Co., 112 Mass., 71, 1873; *Grinnell v. Western Union Telegraph Co.*, 113 Mass., 299, 1873. But see, as to delay in delivery, *Western Union Telegraph Co. v. Fenton*, 52 Ind., 1, 1875.

29. Mistakes. Where a telegraph operator made a mistake in transcribing a message received at his office and delivered the next day, his admission of the fact, made several days afterwards, is not evidence against the company, it being no part of the *res gestæ*. *Aiken v. Telegraph Co.*, 5 So. Car., 358, 1874.

30. — Where a telegraph company undertakes to furnish market reports from a point beyond its own line, it will be presumed, in the absence of evidence to the contrary, that the report was correctly delivered to it at the place where its own line commences. The burden is upon the telegraph company to show that a mistake in the report occurred from causes which would relieve it from liability. *Turner v. Hawkeye Telegraph Co.*, 41 Ia., 458, 1875.

31. — Where the inaccuracy in the transmission of a message is proved, the *onus* of relieving the telegraph company sending the same, from the presumption of negligence thereby raised, rests upon the company, by showing that the error was caused by some agency for which it is not liable. *Western Union Telegraph Co. v. Tyler*, 74 Ill., 168, 1874.

32. — In an action for damages for negligence in the transmission of a message by a telegraph company, whereby the sender of the message suffered pecuniary loss, the burden of proof rests upon the plaintiff to show that the error or mistake occurred through the culpable carelessness and gross negligence of the operators or employes of the company; a simple mistake in transmitting a dispatch is not sufficient to render the company liable. *White v. Western Union Telegraph Co.*, 14 Federal Reporter, 710, 1882.

33. — Where the terms of a message are seriously changed, and the name of the sender entirely disfigured, either by the transmission or copying, it will import negligence on its face. *Western Union Telegraph Co. v. Meek*, 49 Ind., 53, 1874.

34. — A telegraph company, having received and transmitted a message, but with an error in its terms, resulting in loss to the sender, proof of due care by the company, or of the absence of negligence and carelessness on its part, is a good defense to an action brought to recover for such loss. *Pinckney v. Western Union Telegraph Co.*, 19 So. Car., 71, 1882.

35. Penalty. The statutes of Indiana providing penalties against telegraph companies construed. *Western Union Telegraph Co. v. Astell*, 69 Ind., 199, 1879; *Western Union Telegraph Co. v. Adams*, 87 Ind., 598, 1882; *Western Union Telegraph Co. v. Gougar*, 84 Ind., 176, 1882; *Western Union Telegraph Co. v. Roberts*, 87 Ind., 377, 1882; *Carnahan v. Western Union Telegraph Co.*, 89 Ind., 526, 1888; *Western Union Telegraph Co. v. Lindley*, 62 Ind., 371, 1878.

36. Pleadings. The pleadings in an action against a telegraph company, for failure to send a message, examined. *May v. Western Union Telegraph Co.*, 112 Mass., 90, 1873; *Pinckney v. Western Union Telegraph Co.*, 19 So. Car., 71, 1882; *Western Union Telegraph Co. v. Meek*, 49 Ind., 53, 1874.

37. Printed blanks. Where a telegraph company furnishes its customers printed blanks containing the terms upon which it proposes to transmit messages, a delivery to the company of a message written upon one of such blanks is an acceptance of the terms and constitutes a contract between the parties. *Young v. Western Union Telegraph Co.*, 65 N. Y., 163, 1875; *Womack v. Western Union Telegraph Co.*, 58 Tex., 176, 1882.

38. Repeated messages. A telegraph company received a message from a banking house acting as agent of the plaintiff, directed to another banking house in New Orleans, to protect his note then about to mature. The price of repeating the message was paid as demanded by the regulations of the company. The message never reached its destination, nor could it ever be traced beyond a town in a county adjoining the one from which it was sent. There was no testimony showing that the company was negligent in selecting competent employes, or that the facts above stated were ever communicated to any of its general officers, or that the company ever approved the conduct

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of the operator who undertook to transmit the message. The duty of the operator who transmitted the message was to inquire after it, and, if necessary, to repeat it. His failure to do this was negligence which subjected the company to such actual damages as the plaintiff sustained from a failure to deliver the message. *Western Union Telegraph Co. v. Brown*, 58 Tex., 170. 1882.

39. Sunday law. The statutory penalty given by "An act to regulate electric telegraph companies" (1 R. S. 1876, p. 868) cannot be recovered by a person who has delivered his message for transmission and delivery on Sunday. A contract for transmitting a message, made on Sunday, is void, and the retention of the dispatch and of the consideration paid by the sender does not constitute a ratification. *Rogers v. Western Union Telegraph Co.*, 78 Ind., 169. 1881.

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40. Eminent domain. The power of appropriating private property for public purposes and deferring payment, which exists in the state, or in some instances in public corporations, is not vested in and cannot be constitutionally exercised by a private corporation. Under the general act for the incorporation of telegraph companies (L. 1848, c. 265, as amended by L. 1853, c. 471), the payment of compensation to owners along the proposed route is a condition *precedent* to the right to erect lines, and applies to public roads, streets and highways and any other lands which the company is authorized to occupy. *Dusenberry v. Mutual Tel. Co.*, 11 Abbott's New Cases (N. Y.), 440. 1883.

41. — A telegraph company, by condemnation proceedings, does not acquire the fee to the land, or the right to use it for any other purpose than to erect and maintain telegraph lines upon it. This, of course, gives the company the right, at all times, when necessary to construct or to repair the line, to enter upon the strip condemned, doing as little damage as possible. The company cannot cultivate such strip, or take exclusive possession of it, or enjoy it for any other purpose. *Lockie v. Mutual Union Telegraph Co.*, 103 Ill., 401. 1882.

42. — A contract ceding to a telegraph company the exclusive right of operating and maintaining its lines over the right of way of a railroad company, even if otherwise valid, cannot debar the state, in the exercise of the right of eminent domain, from authorizing the establishment of another telegraph line over the same right of way. *New Orleans, Mobile and Tex. R. R. Co. v. Southern and Atlantic Telegraph Co.*, 53 Ala., 211, 1875; 13 Amer. R'y Rep., 185.

43. — The question of damages in the location of a telegraph line examined. *Mutual Union Telegraph Co. v. Katkamp*, 103 Ill., 420. 1882.

44. Exclusive grant by a state. The section of an act of a state legislature which purported to give the exclusive right to a telegraph company, incorporated by it, to erect and use lines of telegraph within certain counties of the state, is in conflict with the act of congress approved July 22, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes," and the section conferring such exclusive right is therefore null and void. *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 2 Woods (U. S. C. C.), 643. 1875.

45. Foreign company; power to transact business. The congress of the United States having exercised its power to regulate commerce between the states as to the construction of telegraph lines, no state can directly, or indirectly, by legislative prohibition or otherwise, exclude a foreign telegraph company from doing business within its limits. *American Union Telegraph Co. v. Western Union Telegraph Co.*, 67 Ala., 26. 1880.

46. Highway. A telegraph company laying its lines over a highway must compensate the owner of the fee. *Board of Trade Telegraph Co. v. Barnett*, 107 Ill., 507. 1883.

47. — In a suit for injuries from defendant's negligence in permitting its telegraph wires to be down and lying across a highway at a certain spot, proof that defendant's poles and wires were down at other places a few miles distant from the place of the injury, and at other times within a few months of the time of the injury, *would seem* to be admissible to show defendant's negligence.

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Randall v. Northwestern Telegraph Co., 54 Wis., 140. 1882.

48. Injunction to restrain injury to telegraph. Where the record shows that the plaintiff was a railroad company owning and operating a line of railway, and that it was constructing a telegraph line along its road, which was a necessary adjunct to the road to aid in the safe operating of the same, and that the defendant cut down three telegraph poles and threatened to prevent by violence the construction of the telegraph line, and having been temporarily enjoined from interfering with the building of the telegraph, *held*, that it was error to dissolve the injunction upon a showing that was evenly balanced whether the plaintiff had the right of way or not. The restraining order should have been continued until the rights of the parties could be finally determined. *St. Joseph and Denver R. R. Co. v. Dryden*, 11 Kans., 186. 1873.

49. Lease. A lease of a telegraph line, fixtures and apparatus confers no authority or power on the lessee to build new lines on new routes. *Philadelphia v. Western Union Tel. Co.*, 11 Philadelphia, 327. 1876.

50. Monopoly. An agreement by which the receipts and expenses of two telegraph companies, incorporated under the laws of the state of New York, are added together and divided between the two companies in certain proportions fixed by the agreement, is within the powers conferred upon such corporations by the statute of that state, and is not *ultra vires*. *Benedict v. Western Union Telegraph Co.*, 9 Abbott's New Cases (N. Y.), 214. 1878. Such agreement is not against public policy. *Ib.*

51. — The statute of Florida approved December 11, 1866, so far as it grants to the Pensacola Telegraph Co. the exclusive right of establishing and maintaining lines of electric telegraph as therein specified, is in conflict with the acts of congress and therefore inoperative against a corporation of another state. *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S., 1. 1877.

52. — A contract between a railway company and a telegraph company, whereby each was to contribute, in certain respects, in establishing a telegraph line along the

railroad, and the telegraph company was to operate the same, when completed, on certain terms, and in which the railway company agreed to give the telegraph company the exclusive right of way, so far as it legally might, and to discourage competition, was held not to be contrary to public policy, so far as it went to the exclusion of competitors from the line of poles occupied by the telegraph company. If the railway company authorized any other telegraph company to put up another line upon the same poles, a court of equity would enjoin such act. *Western Union Telegraph Co. v. Chicago and Paducah R. R. Co.*, 86 Ill., 246. 1877.

53. — It is not competent for a railroad company to grant to a telegraph company the exclusive right to establish lines of telegraph communication along its right of way, such contracts being in restraint of trade and contrary to public policy. *Western Union Telegraph Co. v. Burlington and Southwestern R'y Co.*, 11 Federal Reporter, 1; 3 McCrary (U. S. C. C.), 130, 1832; *Western Union Telegraph Co. v. American Union Telegraph Co.*, 65 Ga., 160, 1880.

54. Navigable streams. Those navigating a public navigable stream for commercial purposes have the primary and paramount right to it, and every interference with or obstruction of the navigation, or hindrance to the free passage of vessels, is *prima facie* a nuisance. Telegraph cables so laid or suspended in navigable waters as to catch upon the keels, or to come in contact with vessels navigating the stream, and which, but for such cables, would pass without difficulty or interruption, are improperly placed, and injuriously interrupt navigation. *Blanchard v. Western Union Tel. Co.*, 60 N. Y., 510. 1875; reversing *Same v. Same*, 3 Thompson & Cook (N. Y. Supreme Ct.), 775, and *Same v. Same*, 67 Barbour (N. Y.), 228, 1874.

55. Pacific railroads. The statutes, in relation to telegraphs on the Pacific railroads, construed. *Western Union Telegraph Co. v. Union Pacific R'y Co.*, 3 Federal Reporter, 721, 1890; *Same v. Same*, 1 McCrary (U. S. C. C.), 418, 1890; *Same v. Same*, 3 Federal Reporter, 423; 1 McCrary (U. S. C. C.), 553, 1890; *Same v. Same*, 3 Federal Reporter, 1; 1 McCrary (U. S. C. C.), 581; 1890; *Central*

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Branch Union Pacific R. R. Co. v. Western Union Telegraph Co., 3 Federal Reporter, 417; 1 McCrary (U. S. C. C.), 551, 1880.

56. Poles. It is competent for city authorities, unless bound by an absolute contract permitting telegraph poles and wires to stand where they are, to take reasonable measures to have the same removed. *Mutual Union Telegraph Co. v. City of Chicago*, 11 Bissell (U. S. C. C.), 539; 16 Federal Reporter, 309, 1883.

57. — In a suit against a telegraph company for injuries sustained by the falling of one of its poles, the evidence tended to show that the accident was occasioned by an unusually severe snow storm; there was evidence also from which the jury could have found that the line, as originally constructed, was sufficient for such storms as could have been reasonably expected. The court refused to charge that defendant was not bound so to make or manage its line as to guard against storms of unusual severity, the occurrence of which could not be reasonably expected. *Held*, error. *Ward v. Atlantic and Pacific Telegraph Co.*, 71 N. Y., 81. 1877.

58. — On the trial of an action against a telegraph company for negligently permitting telegraph poles to fall and suspend the wires across a highway, where a question is raised as to the soundness of the poles, it is error to admit evidence of the condition of other poles forty or sixty rods away, without any showing that they were of the same kind, put up at the same time, and equally exposed. *Western Union Telegraph Co. v. Levi*, 47 Ind., 552. 1874.

59. — A telegraph company placed its poles at a sufficient distance from the traveled portion of a highway to be safe from collision with vehicles passing along it, under ordinary circumstances. *Held*, that it was not liable for the damages resulting from an accident arising from the breaking and fall of one of the poles, where the proximate cause of the fall was a collision with a runaway team. *Allen v. Atlantic and Pacific Telegraph Co.*, 21 Hun (N. Y.), 22. 1880.

60. — The breaking of a telegraph pole by a runaway team, where the pole is placed at a safe distance from the traveled portion of a highway, whereby another team is fright-

ened and runs away and causes an injury, will not render the telegraph company liable for the damages. *Allen v. Atlantic and Pacific Telegraph Co.*, 21 Hun (N. Y.), 22. 1880.

61. — The right to erect telegraph poles in the streets of a city does not carry with it the right to erect broken and unsightly poles. *Forsythe v. Baltimore and Ohio Telegraph Co.*, 12 Mo. App., 494. 1883.

62. — The erection of a telegraph pole so as to incommode the public gives an individual no right of action to abate the nuisance unless he has sustained special damage. *Gay v. Mutual Union Telegraph Co.*, 12 Mo. App., 485. 1883.

63. — It appeared by the affidavits that defendant cut plaintiff's poles in a highway and carried them to the ditches and side fences of the road, and left them. *Held*, that, conceding the poles and wires could have been made the subject of a conversion after they had been severed, no such conversion actually took place; also, that as an order of arrest was granted for the cutting, as well as the conversion, even if such conversion took place, the order should be vacated, for the reason that the right of arrest is not applicable to all the causes of action. *American Union Telegraph Co. v. Middleton*, 80 N. Y., 408. 1880.

64. Powers of cities. Notwithstanding telegraph lines are instruments of commerce, a city has the right to determine how, in what manner, and upon what condition, a telegraph company shall enter the city and pass through it. *Mutual Union Tel. Co. v. Chicago*, 16 Federal Reporter, 309. 1883.

65. Railway right of way. A telegraph company has no authority, under the statutes of New York, granting it power to erect its lines along public roads, streets and highways, to erect its poles and lines upon the right of way of a railway company. *New York City and Northern R. R. Co. v. Central Union Telegraph Co.*, 21 Hun (N. Y.), 261, 1880.

66. — A railway company may erect or cause the erection of a telegraph line within its right of way. *Prather v. Western Union Telegraph Co.*, 39 Ind., 501, 1883; *Western Union Telegraph Co. v. Rich*, 19 Kans., 517, 1878.

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67. — The statutory right to construct a line of telegraph "directly across" a railway does not authorize the construction of the same by excavation "under" the railway. *South Eastern Ry Co. v. European Telegraph Co.*, 9 Welsby, Hurlstone & Gordon (Exchequer), 368. 1854.

68. **Stock.** Under the laws of New York, a telegraph company may issue stock for the purchase of the property, etc., of any telegraph company organized under the laws of this or any other state, upon complying with certain statutory provisions. *Williams v. Western Union Tel. Co.*, 48 N. Y. Superior Ct., 349, 1882; *Hatch v. American Union Tel. Co.*, 9 Abbott's New Cases (N. Y.), 223, 1881. See, also, *Williams v. Western Union Tel. Co.*, 9 ib., 419, 1881; *Same v. Same*, 9 ib., 437, 1881; 1 N. Y. Civil Procedure Rep., 194, 1881.

69. **Statutory control; previous contracts.** The statute (Session Laws of 1879, ch. 36, amending Gen. Statutes, p. 342, § 8) requiring all telegraph and telephone companies to receive dispatches from all other telegraph and telephone lines, and transmit them on payment of the usual charges, could not operate to compel the Connecticut corporation to do what it had no right to do by virtue of a previous contract. A Massachusetts statute to the same effect was to be regarded as applying to the action of the Massachusetts corporation as a carrier of speech in that state, and as not affecting its right to manufacture its instruments and sell or lease them in other states as the owner of the patent. *American Rapid Telegraph Co. v. Connecticut Telephone Co.*, 49 Conn., 352. 1881.

70. **Streets.** Where the poles of a telegraph line in an incorporated town are erected outside of the streets and on private property, and the wires hung thereon, where they overhang the streets, are placed at an elevation sufficiently high not to impede, obstruct or endanger the full, free and safe use of the streets, the town authorities have no right to destroy them. *American Union Telegraph Co. v. Town of Harrison*, 31 N. J. Eq., 627. 1879.

71. — Under § 8 of the general telegraph law, the authorities of an incorporated town have a right to designate the street route on

which a telegraph line shall pass through the town, but they have no right to refuse to allow the line to pass at all. *Ib.*

72. **Summons; service.** Sufficiency of service on a telegraph company determined. *Western Union Telegraph Co. v. Lindley*, 62 Ind., 371. 1878.

73. **Taxation.** In respect to its foreign and interstate business, a telegraph company is, as an instrument of commerce, subject to the regulating power of congress, and, if it accepts the provisions of title 65 of the Revised Statutes, it becomes an agent of the United States, so far as the business of the government is concerned. Where it has accepted those provisions, state laws, so far as they impose upon it a specific tax on each message which it transmits beyond the state, or which an officer of the United States sends over its lines on public business, are unconstitutional. *Telegraph Co. v. Texas*, 105 U. S., 460. 1881.

74. — Stat. 1880, ch. 246, entitled "An act for the taxation of telegraph companies," is constitutional, and a tax imposed under its provisions is valid. *State v. Western Union Telegraph Co.*, 73 Me., 518. 1882.

75. **Ticker in "bucket shop."** A telegraph company cannot be compelled to furnish a telegraph "ticker" to an office in which gambling contracts in grain are made. *Bryant v. Western Union Telegraph Co.*, 17 Federal Reporter, 825. 1883.

TENANTS IN COMMON.

1. **Injunction.** The court will restrain one tenant in common from the wilful destruction of the common property; but where a railroad company had obtained a lease from five out of six tenants in common, and had, against the wishes of the remaining tenant in common, built a railway on the property, which, at law, had been held to be an ouster, the court refused to interfere by injunction to prevent the dissenting tenant in common removing the rails, etc., though the rent agreed to be paid by the company was three times the former rent. *Durham and Sunderland R. R. Co. v. Wason*, 3 Beavan (Eng. Ch.), 119. 1840.

Miscellaneous.

TERMINUS.

1. **Charter.** The amended charter of the Pacific Railroad Co. gave the right to construct a road "from the Mississippi river, or any point in the city of St. Louis," and its charter required that its roads should be commenced within seven years and completed within ten years thereafter. The company chose the point at which it would commence, and built its road westward from that point. *Held*, that, having maintained that location for twenty years, it could not then change its terminus; and that, having failed to build its branch roads within the time prescribed, it could not build a branch road to continue from its terminus eastward to the Mississippi river, nor treat a track laid between these points as a mere switching or spur track. *Atlantic and Pacific R. R. Co. v. St. Louis*, 3 Mo. App., 315. 1877.

2. **Contract.** G. conveyed a lot to defendant for use as its terminus at Windsor, the consideration and condition of the grant being the establishment of the terminus at that point. *Held*, that the contract was not violated by the ferriage of defendant's cars to Detroit. *Geauyeau v. Great Western R'y Co.*, 3 Ontario Appeal Reports, 412. 1878.

TEXAS CATTLE LAW.

See CARRIAGE OF LIVE STOCK.

1. **Constitutional law.** An unconstitutional law, prohibiting railway companies from carrying Texas or Cherokee cattle into or through Illinois will afford no excuse for a refusal or delay in receiving and shipping such cattle when offered. Such a statute can neither be regarded as imposing obligations nor as affording protection. *Chicago and Alton R. R. Co. v. Erickson*, 91 Ill., 613. 1879.

2. — The constitutionality of the act to prevent the importation of Texas or Cherokee cattle into Illinois, approved February 27, 1867, has been frequently affirmed and recognized by this court in numerous cases, and as there is nothing in the amendment to that act, approved April 16, 1869, to which the reasoning in these cases is not equally applicable, it seems that the question of the

constitutionality of the amendment is settled. *Chicago and Alton R. R. Co. v. Gasaway*, 71 Ill., 570. 1874. See, also, *Railroad Co. v. Husen*, 95 U. S., 465, 1877; 15 Amer. R'y Rep., 325.

3. **Construction.** By the act of 1869, Texas and Cherokee cattle may be brought into Illinois at any time, if first acclimated or wintered in either of the states of Kansas, Missouri, Nebraska or Wisconsin; but it is made a penal offense to own such cattle, unless they shall have been brought into Illinois between October 1 and March 1 of the following year. *Frye v. Chicago, Burlington and Quincy R. R. Co.*, 78 Ill., 399. 1874.

4. **Seizure of cattle.** The fact that a contract for the transportation of cattle provides that the owner shall be entitled to pass, free of charge, on the train with the cattle to take care of them, and that the cattle are to be fed, watered, loaded and unloaded by him at his own risk, does not confer on him the right to decide when, where, and under what circumstances, the loading and unloading shall take place; but rather imposes on him the duty of loading and unloading wherever and whenever the exigencies of the transportation may, in the judgment of the company, render it necessary. *McAlister v. Chicago, Rock Island and Pacific R. R. Co.*, 7 Amer. & Eng. R. R. Cases, 373, 1881; 74 Mo., 351.

5. — The seizure and sale of the cattle by state officials under an unconstitutional law will not render the carrier liable for the resulting damages. *Ib.*

TICKET OFFICE.

1. **Lease; general agent.** The powers of the general agent of the owner of a railroad are such as will warrant him in executing a lease of property to be used as a ticket office for the road. *Ecker v. Chicago, Burlington and Quincy R. R. Co.*, 8 Mo. App., 223, 1880; 1 Amer. & Eng. R. R. Cases, 357.

TICKETS.

See BAGGAGE; CONDUCTOR; COUNTERFEITING; INJURIES TO PASSENGERS; MALICIOUS PROSECUTION.

1. **Action for failure to produce ticket.** A by-law by a railway company imposed

Change of Location of Depot — Conditions.

upon a passenger failing or refusing to produce his ticket the liability to pay the amount of the fare from the station whence the train, by which such passenger traveled, had originally started. *Held*, that there must be a demand of the specific amount of such fare, in order to enable the company to recover it. *Brown v. Great Eastern R'y Co.*, Law Reports, 2 Queen's Bench Division, 406, 1877; 21 Eng. (Moak), 185.

2. Change of location of depot. A suit was brought against a railroad company for failing to carry plaintiff to its original depot. It appeared that the company had abandoned its old depot for one half a mile short of that terminus. *Held*, that although the change had been adopted only a few weeks prior to his purchase of ticket, yet, the running of the trains having been uniformly to the new depot since that change, would be considered as a usage of the company, in reference to which plaintiff must be held to have contracted. That *a fortiori* such is the case where plaintiff knew of the change at the time of procuring his ticket. *Martindale v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 60 Mo., 508. 1875.

3. Classes. By 8 Vict., c. 20, s. 103: "If any person, having paid his fare for a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance, without previously paying the additional fare, . . . and with intent to avoid payment thereof, he shall for every such offense forfeit 40s." By s. 108: "The company, subject to this and the special act, may make regulations for regulating the traveling upon or using and working the railway." By s. 109: "For better enforcing the allowance of all and any of such regulations, it shall be lawful for the company, subject, etc., to make by-laws, . . . provided that such by-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special act." By a by-law made under the above act "any person traveling without the special permission of some duly authorized servant to the company, or by a train of a superior class to that for which his ticket was issued, is hereby subject to a penalty not exceeding 40s., and shall in addition be liable to pay his fare ac-

cording to the class of carriage in which he is traveling from the station where the train originally started, unless he shows that he had no intention to defraud." The appellant was convicted in a penalty of 10s. under this by-law for traveling in a first-class carriage with only a second-class ticket; but it was found as a fact that he had no intention to defraud the company. *Held*, that the conviction must be quashed, for without deciding whether the by-law did or did not make proof of the absence of fraudulent intention an exemption from the penalty as well as from the extra fare, it was, if it made the fraudulent intention immaterial in the case of the penalty, repugnant to 8 Vict., c. 20, s. 103, and *ultra vires* the company. *Bentham v. Hoyle*, Law Reports, 3 Queen's Bench Division, 289. 1873.

4. Commutation. Where the holder of a commutation ticket, in violation of its terms, has permitted it to be used by other persons, the company has the right to take up the ticket and demand payment of fare, and, upon failure of payment, to expel the offending person from its train. *Freidenrich v. Baltimore and Ohio R. R. Co.*, 53 Md., 201, 1879; 2 Amer. & Eng. R. R. Cases, 280.

5. Conditions. Outside the cover of a paper book of coupons forming a railway ticket, issued to the plaintiff by the defendants, was printed the name of their railway, the words "Cheap return ticket, London to Paris and back, second class," and a statement of the period and journey for which the ticket was available, but no reference to the inside of the cover. On the inside, and apparent on turning the leaf, was a condition limiting the responsibility of the defendants to their own trains. The plaintiff having been injured while traveling by virtue of the ticket, in a French train, sued the defendants. They set up the condition. The plaintiff had not read and did not know of it. The jury were directed that if it was brought to his notice it would afford a defense, and, on being asked the question, suggested in *Parker v. South Eastern R'y Co.*, (2 C. D., 416), whether what was done by the company was reasonably sufficient to bring the condition to the notice of the plaintiff, answered that it was not, and found a verdict in his favor. He moved for judgment.

Conductor's Check — Contract without the State.

Held, distinguishing *Henderson v. Stevenson* (L. R., 2 H. L. (Sc.), 470), that the whole book was the contract accepted by the plaintiff, and that he, therefore, could not reject the condition which was one of its terms, and that judgment should be entered for the defendants. *Burke v. South Eastern R'y Co.*, Law Reports, 5 Common Pleas Division, 1, 1879; 30 Eng. (Moak), 671.

6. **Conductor's check.** A conductor's check, given to a traveler in lieu of one of several coupons attached to his ticket, is a full equivalent therefor, and if the traveler fail to produce it to another conductor on a demand made before the distance for which the check is good has been traveled, and refuses to pay his fare, he may lawfully be ejected. *Jerome v. Smith*, 48 Vt., 230; 16 Amer. R'y Rep., 387. 1876. But see *Chicago, Burlington and Quincy R. R. Co. v. Griffin*, 68 Ill., 499. 1873.

7. **Connecting lines.** The sale for one sum of a railroad ticket, composed of coupons invalid if detached, and each bearing the name of the railway company selling it, empowering the purchaser to pass over the connecting roads of different corporations, does not make the selling corporation liable to the purchaser for an injury received upon a connecting road. *Hartan v. Eastern R. R. Co.*, 114 Mass., 44. 1873.

8. — If one of several companies, composing a public line of travel, by agreement with the others, receive fare and give a "through ticket" over the entire route, the company selling the ticket shall be regarded as the agent of the other companies, when the ticket itself imports this and nothing else appears. *Nashville and Chattanooga R. R. Co. v. Sprayberry*, 20 Amer. R'y Rep., 55; 9 Heiskell (Tenn.), 852, 1872; *Furstenheim v. Memphis and Ohio R. R. Co.*, 9 Heiskell (Tenn.), 238, 1872.

9. — Where a railroad company issues a ticket entitling the holder to a passage over its own and connecting lines to the place of destination mentioned in the ticket, and there is no limitation in it upon the right of the holder to transfer it to another, *held*, that, upon the refusal of a connecting line to accept the ticket, and of the contracting company to furnish a local ticket over that line or the amount of money necessary to pro-

cure one, the holder has a right of action against the original contracting company for breach of contract; and this right is assignable, under the laws of the state of Colorado, so as to give a right of action to the assignee. *Hudson v. Kansas Pacific R'y Co.*, 9 Federal Reporter, 879; 3 McCrary (U. S. C. C.), 249, 1882.

10. **Continuous passage.** M. purchased a through emigrant ticket at reduced rates. The ticket, among other things, provided that it should not be transferable. At Omaha the ticket was taken up by the conductor and a check given calling for "one continuous passage" to San Francisco. At Palisade M. left the train and sold the check to C., who attempted to use it on the same train. *Held*, that C. was not entitled to travel upon the check. *Cody v. Central Pacific R. R. Co.*, 4 Sawyer (U. S. C. C.), 114. 1876.

11. — Where a ticket provides that it shall be good only for a continuous trip, and for two days only, *held*, that such stipulation is valid, and the holder has no right to stop off for a few days and then renew his journey without payment of fare. *Livingstone v. Grand Trunk R'y Co.*, 21 Lower Canada Jurist, 13, 1876; *Craig v. Great Western R'y Co.*, 24 Upper Canada (Queen's Bench), 504, 1865; *Briggs v. Grand Trunk R'y Co.*, ib., 510, 1865. See, also, *Gale v. Delaware, Lackawanna and Western R. R. Co.*, 7 Hun (N. Y.), 670. 1876.

12. — A ticket good for a continuous passage over several lines construed. *Held*, that it was good for a continuous passage over *each* line and not merely good for a continuous passage over the entire connecting lines. *Auerbach v. N. Y. Central and Hudson River R. R. Co.*, 89 N. Y., 231, 1882; 6 Amer. & Eng. R. R. Cases, 334.

13. **Contract without the state.** A person purchasing in another state, where such sale is lawful, a railway ticket from a dealer who is not an authorized agent of the company, may maintain an action in the courts of Pennsylvania for the refusal of the company to carry him between a point in the state where he bought the ticket, and a point within Pennsylvania, in pursuance of the terms of said ticket. *Sleeper v. Pennsylvania R. R. Co.*, 100 Pa. St., 259, 1882; 9 Amer. & Eng. R. R. Cases, 291.

Coupons — Failure to Show Ticket.

14. Coupons. A traveler on a railroad train, traveling on a commutation coupon ticket, which provides that the coupons shall be void if detached by any other person than the conductor, and that the ticket shall be shown to the conductor each trip, who shall detach the coupons for the number of miles to be traveled, technically violates the contract by detaching the coupons himself. If, while detaching the coupons, his attention be called by the conductor to the fact that it is his duty to detach them, the passenger should at once desist, and hand the ticket and coupons to the conductor, in which event it would be the duty of the latter, if he saw the coupons detached, or could readily ascertain by inspection that they had not been detached from the ticket, to accept them. But the conductor would not be bound to receive the detached coupons without seeing the ticket. *Louisville, Nashville, etc., R. R. Co. v. Harris*, 9 Lea (Tenn.), 180. 1882.

15. Damages. A passenger bought a ticket from one point to another on the line of a railway and return. She went to the latter point, but when she started to return the conductor informed her, on entering the car, that she could not return on that ticket; that if she did he would have to pay the fare. She thereupon left the train, and remained until the next train, on which she returned home without extra charge. She sued the railway company. *Held*, that the suit was founded on a breach of contract, and actual damages only could be recovered; or if none, then nominal damages. Exemplary damages cannot be allowed for a breach of contract. *Goins v. Western R. R. Co. of Alabama*, 68 Ga., 190. 1881.

16. Damages for wrongful act of ticket agent. If, by means of improper information, given by a ticket agent, a passenger is misled in the purchase of his ticket, the company will be liable for the resulting damages. But such incorrect information will not entitle him to remain upon the train, without payment of fare, in violation of the rules of the company. *Lake Shore and Michigan Southern R'y Co. v. Pierce*, 47 Mich., 277, 1882; 3 Amer. & Eng. R. R. Cases, 340. The same principle recognized. *Yorton v. Milwaukee, Lake Shore and Western R'y*

Co., 54 Wis., 234, 1882; 6 Amer. & Eng. R. R. Cases, 322; *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Nuzum*, 60 Ind., 533, 1878.

17. — A railway passenger has a right to act upon the conduct and directions of the agents of the corporation in relation to tickets. *Lake Erie and Western R'y Co. v. Fax*, 88 Ind., 381, 1882; 11 Amer. & Eng. R. R. Cases, 109.

18. Discrimination. Railway companies have no right to discriminate between persons, and sell tickets to some and refuse others. *Indianapolis, Peru and Chicago R'y Co. v. Rinard*, 46 Ind., 293, 1874; 6 Amer. R'y Rep., 328.

19. Drover's pass. Where a passenger had the right, under a "stock pass," to return on defendant's cars from St. Louis to Knob Noster, and was actually on the return trip, *held*, that, under the pass, he had the right to stop at Eureka, an intermediate station, and was not liable to pay fare to the latter place. *Graham v. Pacific R. R. Co.*, 66 Mo., 536. 1877.

20. Effect of purchase of ticket. The purchase of a ticket by a person on a company's railway, between two stations, creates the relation of carrier and passenger between them, with all the duties the law imposes on each. *Wabash, St. Louis and Pacific R'y Co. v. Rector*, 104 Ill., 296, 1882; 9 Amer. & Eng. R. R. Cases, 264.

21. — The ticket given to a passenger, upon payment of his fare, is a receipt merely, and not a contract. *Logan v. Hannibal and St. Joseph R'y Co.*, 12 Amer. & Eng. R. R. Cases (Mo.), 141. 1883.

22. Failure to show ticket. A by-law of the respondents' company provided "that a passenger should show and deliver up his ticket to any duly authorized servant of the company whenever required to do so for any purpose, and that any person traveling without a ticket, or failing or refusing to show or deliver up his ticket as aforesaid, should be required to pay the fare from the station whence the train originally started to the end of his journey." The appellant had a ticket entitling him to travel on the lines of the respondents and the L. and S. W. R'y Co. from Charing Cross or Cannon street to Windsor and back. Having come to Waterloo Junction station on the respond-

Failure to Stop at Station — Fraud.

ents' line, where he had to change trains, he had for this purpose to go from the respondents' station to that of the L. and S. W. R'y Co. On passing out of the respondents' station he was asked to show his ticket, but refused to do so. There was no intention to defraud on the appellant's part. The respondents summoned him under the above by-law, and he was convicted in the amount of the fare from the station whence the respondents' train by which he traveled had started. *Held*, that the conviction must be quashed. *Saunders v. South Eastern R'y Co.*, Law Reports, 5 Queen's Bench Division, 456, 1880; 29 Eng. (Moak), 384.

23. Failure to stop at station. In an action against a railway company for failing to stop a train and allow a passenger to alight at a station for which he had purchased a ticket, where the evidence tended to show that the defendant ran two daily trains that stopped at the station for which the passenger held the ticket, and also ran a through train which, by the company's rules, was not allowed to stop at that station, and that when the ticket was taken up by the conductor he informed the plaintiff that he must get off at a station before reaching the one for which he held the ticket or go to the next station beyond, and that the plaintiff voluntarily went on to the station beyond, it was error to instruct the jury that if the plaintiff purchased his ticket for the station at which he wished to stop he had a right to enter the first train due after he purchased the ticket, unless he was informed, before he entered the train, that it would not stop at the station for which the ticket was purchased. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Nuzum*, 50 Ind., 141, 1875; 9 Amer. R'y Rep., 893.

24. — If a person purchase a ticket for a certain station, and expressly for a particular train, and at the time of the purchase he is informed by the agent that the train will stop at that station, he will have a right to take passage on such train, and it will be the duty of the company to allow him to leave the train at that station. *Ib.*

25. — A passenger must take notice of the published rules of a railway company. He is not entitled to damages if he takes a train which, by such rules, does not stop at

the station to which he desires to go. *Trottinger v. East Tenn., etc., R. R. Co.*, 11 Lea (Tenn.), 533. 1883.

26. — The words "good on passenger trains only," contained on a ticket issued and sold by a railway company to a passenger, do not amount to a contract that all of its passenger trains will stop at the stations designated on the ticket. In an action by the passenger, against the company, to recover damages for carrying him beyond his destination named on the ticket, the complaint should aver that the train on which he was so carried was one which, under the regulations of the company, should have stopped at that station. *Ohio and Mississippi R'y Co. v. Swarthout*, 67 Ind., 567. 1879.

27. Family ticket. A son or daughter residing with the father does not cease to be a member of his family when he or she arrives at the age of twenty-one or eighteen, respectively, by reason of that fact alone. The right to use a family commutation ticket is not confined to parents and their minor children. *Chicago and Northwestern R'y Co. v. Chisholm*, 79 Ill., 584. 1875.

28. Form of. Where a railway company had employed a band to attend an excursion on its road, at a fixed sum of money and a ticket for a lady to each member, and the prepared tickets for the ladies contained the following words only: "Maine Central R. R., July 30, 1877. Dexter,"— which was different from common tickets,— in a suit by a brother of a member of the band for refusing to carry him on such a ticket, *held*, that an instruction that the ticket did not, on its face, entitle him to a passage, is not erroneous. *Crosby v. Maine Central R. R. Co.*, 69 Me., 418. 1879.

29. Fraud; traveling without ticket. A by-law of a railway company provided that "any passenger traveling without a ticket, or failing or refusing to show or deliver up his ticket" to any duly authorized servant of the company when required to do so, "shall be required to pay the fare from the station whence the train originally started to the end of his journey. *Held*, that, as against a passenger who had, in good faith, traveled a short distance upon the line without having procured a ticket, this by-law was unreason-

Free Pass for Life — Limitation as to Time.

able and void, inasmuch as it was in substance an attempt to inflict a penalty for doing without fraud that which, by the joint operation of ss. 103 and 109 of 8 Vict., c. 20, can be punished only if done fraudulently. *London and Brighton R'y Co. v. Watson*, Law Reports, 3 Common Pleas Division, 429, 1878; 30 Eng. (Moak), 277.

30. Free pass for life. The free pass given by the lessor, the N. C. R. R. Co., was only a license, without any consideration in law, which that company could revoke at pleasure, and did revoke by leasing the road to the defendant. *Turner v. Richmond and Danville R. R. Co.*, 70 N. C., 1. 1874.

31. Freight trains. A railway company allowed passengers to ride on way-freight trains, under a rule that "passengers will not be carried on any way-trains unless they are provided with tickets. Way-freights will not stop at stations where tickets are not sold to receive nor to let off passengers." *Held*, that the rule was a reasonable one. *Lake Shore and Michigan Southern R'y Co. v. Greenwood*, 79 Pa. St., 373, 1875; *Indianapolis and St. Louis R. R. Co. v. Kennedy*, 77 Ind., 507, 1881; 3 Amer. & Eng. R. R. Cases, 467; *Falkner v. Ohio and Mississippi R'y Co.*, 55 Ind., 369, 1876; 16 Amer. R'y Rep., 262; *St. Louis and Southeastern R'y Co. v. Myrtle*, 51 Ind., 566, 1875.

32. — Where a certain freight train was in the habit of carrying passengers to a certain station, and, before the company had made any different rule or regulation in this respect, the plaintiff purchased a ticket for such station, but was informed by the conductor that he would not stop there, and advised to take passage upon another extra train, to which he applied and was refused passage, and the plaintiff entered the first train, informing the conductor of the facts, and was by it carried to the next station beyond the one named in his ticket, *held*, that the company was liable to the plaintiff in compensatory damages. *Chicago, Rock Island and Pacific R. R. Co. v. Fisher*, 66 Ill., 152, 1872; *St. Louis and Southeastern R'y Co. v. Myrtle*, 51 Ind., 566, 1875.

33. — A railroad company, as a common carrier, may make reasonable rules for the regulation of its business and the performance of its public duties; but in the adoption

of these rules regard must be had to the convenience and interest of the traveling public. It may forbid the transportation of freight and passengers on the same trains, or may require passengers traveling on freight trains to procure tickets before entering the cars; but, in such cases, reasonable facilities for procuring tickets, at or about the time of the arrival or departure of the trains, must be afforded, according to the established usage of all railroads; and it is not reasonable, while allowing passengers to travel on freight trains, to afford them no opportunity to procure tickets, except at such hours as would make it more expeditious to travel by the passenger trains. *Evans v. Memphis and Charleston R. R. Co.*, 56 Ala., 246, 1876; 18 Amer. R'y Rep., 350.

34. Larceny. A passenger railway ticket, in a ticket office of the company, is not the subject of larceny at common law, nor under the Delaware statutes. *State v. Hill*, 1 Houston's Criminal Reports (Del.), 420. 1874.

35. Limitation as to time. A ticket, good for a certain number of fares, sold at a reduced rate, and limited as to time, is of no validity after the expiration of such time. *Powell v. Pittsburgh, Cincinnati and St. Louis R. R. Co.*, 25 Ohio St., 70, 1874; 13 Amer. R'y Rep., 477; *Hill v. Syracuse, Birmingham and New York R. R. Co.*, 63 N. Y., 101, 1875; *Grand Trunk R'y Co. v. Cunningham*, 11 Lower Canada Jurist, 107, 1865.

36. — The holder of a railway ticket, by the terms of which he agrees to "use the same on or before the expiration" of a day named, complies with the terms of that limitation where he enters upon the transit before midnight of the day named. *Evans v. St. Louis, Iron Mountain and Southern R'y Co.*, 11 Mo. App., 463. 1882. See, also, *Auerbach v. New York Central and Hudson River R. R. Co.*, 89 N. Y., 281, 1882; reversing *Same v. Same*, 60 Howard's Practice (N. Y.), 332, 1881.

37. — An indorsement upon a limited ticket by a conductor, showing it had been used to an intermediate station before the expiration of the time specified, or an allowed use of it for a portion of the distance thereafter, with an indorsement showing it, is not such a waiver of the condition as allows a further use of the ticket. *Hill v.*

Loss — Mileage Ticket.

Syracuse, Binghamton and New York R. R. Co., 63 N. Y., 101, 1875.

38. — A railway ticket issued during the day of December 6th, and limited to be used within two days from the date sold, did not expire until twelve o'clock on the night of December 8th. *Georgia Southern R. R. Co. v. Bigelow*, 68 Ga., 219, 1881.

39. — The Statute of 1871, ch. 223, which declares that the holder of a ticket shall have the right to stop over at any of the stations along the line of the railroad, and that such ticket shall be good for a passage for six years from the time it is first used, applies only to transportation within the territorial limits of Maine; the statute has no extraterritorial force, and consequently does not apply to a ticket from Portland to Montreal, while the ticket is being used beyond the limits of the state of Maine. *Carpenter v. Grand Trunk R'y Co.*, 72 Me., 388, 1881; 3 Amer. & Eng. R. R. Cases, 432.

40. — While such a ticket is being used in New Hampshire, Vermont or Canada, the rights of the passenger will be governed and controlled by the laws of those places and not by the laws of Maine; but in the absence of proof to the contrary, the law of those places will be presumed to be the same as the common law of Maine, and not the same as the statute above cited. *Id.*

41. Loss. A passenger has no right to travel upon a ticket which he has lost. *Duke v. Great Western R'y Co.*, 14 Upper Canada (Queen's Bench), 369, 377. 1857.

42. — A passenger having presented his ticket to the conductor, it was punched and returned to him. The passenger mislaid the ticket, and for a time was unable to find it. The conductor afterwards again called for the ticket, and, as the passenger was unable to find it, he was ejected from the car, without any demand of payment of fare. *Held*, that his expulsion was wrongful. *Robson v. New York Central and Hudson River R. R. Co.*, 21 Hun (N. Y.), 387. 1880.

43. Mileage ticket. A mileage ticket stipulated that it should be good only for a certain period, and that, if presented after the expiration of that time, the conductor should take up the ticket and collect the fare. *Held*, that its use a number of times in violation of the condition would not

estop the company to take it up and eject the passenger from its train upon refusal to pay fare. *Sherman v. Chicago and Northwestern R'y Co.*, 40 Ia., 45, 1874; 8 Amer. R'y Rep., 410.

44. — Where the holder of a thousand miles ticket, expressed to be "good for six months only," after the period had elapsed, having first obtained legal advice that the ticket was good till the thousand miles were traveled, and before the ticket was exhausted, took his seat in the baggage car of a train, refused payment of fare otherwise than by offering his ticket, and was forcibly ejected from the train; *held*, that the ticket was void; that the holder was not a passenger, but became a trespasser on entering the baggage car, and, upon his refusal to get off, might be ejected, with the use of any force necessary to that end, and at a point contiguous neither to a station nor dwelling-house; that the statute (Wagn. Stat., 307, § 28) had no application to such case. *Lillis v. St. Louis, Kansas City and Northern R'y Co.*, 64 Mo., 464. 1877.

45. — A railway company, being the owner of one line and the lessee of another, the two forming a continuous railway between Indianapolis and St. Louis, sold a "thousand mile" ticket, authorizing the purchaser to travel three hundred miles upon one of said roads and seven hundred miles upon the other, having black figures representing the one road and red figures the other, with directions to conductors to punch out the black figures, representing the number of miles traveled on the western division of the road, and the red figures for the miles traveled on the eastern end. On the back of the ticket were printed conditions, signed by the purchaser, among which was a stipulation that the miles traveled each trip should be indicated by the conductor punching out corresponding figures on the opposite side. After all the red figures had been punched out, the purchaser offered the ticket for passage on a train on the eastern division of the through line, which the conductor refused to accept, though there were black figures not punched out, amounting to the number of miles for which it was offered; and the holder of the ticket, refusing to pay his fare or to leave

Mistake — Refusal to Carry.

the car unless forcibly ejected, was put off by the train men. *Held*, that the terms expressed on the ticket constituted a contract between the seller and purchaser of the ticket, and that his refusal to pay fare and to leave the car, on request, justified his expulsion. *Terre Haute and Indianapolis R. R. Co. v. Fitzgerald*, 47 Ind., 79, 1874; 8 Amer. R'y Rep., 287.

46. Mistake. As between a conductor and passenger, the ticket is conclusive evidence of the passenger's right to travel, and he must produce it when called on. The conductor is not required to correct mistakes made by ticket agents. *Frederick v. Marquette, Houghton and Ontonagon R. R. Co.*, 37 Mich., 342. 1877.

47. No right to travel upon, except in direction named. A ticket with the words "Portland to Boston" imprinted on it, purchased in Portland under no contract other than what is inferable from the ticket itself, does not entitle the holder to a passage in a direction the reverse of that indicated on the ticket. A ticket with the words "Portland to Boston" on it does not entitle the holder to a ride from Boston to Portland, although the holder has been permitted to take such rides on similar tickets over the same railway before, and a conductor on another train at another time on the same road gave his opinion to the holder that the ticket would be good for a passage either way. *Keeley v. Boston and Maine R. R. Co.*, 67 Me., 163, 1878; 16 Amer. R'y Rep., 339.

48. Parol evidence. A ticket is not such a written contract as will exclude the introduction of parol representations made at the time of its sale. A parol representation made to the purchaser of a ticket, that it gave the right to stop off at any point on the line, is admissible in evidence. *Robinson v. Louisville and Nashville R. R. Co.*, 2 Lea (Tenn.), 594. 1879.

49. Penalty. Questions of penalty under the English statutes determined. *Dearden v. Townsend*, Law Reports, 1 Queen's Bench Cases, 10, 1865; *Woodard v. Eastern Counties R'y Co.*, 101 E. C. L., 977; 4 Law Times (N. S.), 336, 1861; *Regina v. Freere*, 29 Eng. Law & Equity, 143, 1855; *Dyson v. London and North Western R'y Co.*, Law Reports, 7 Queen's Bench Division, 32; 2 Amer. & Eng.

R. R. Cases, 629, 1881; *Queen v. Freere*, 4 Ellis & Blackburn, 598; 82 E. C. L., 598, 1855.

50. Rates of fare; excess charged on train. A regulation of a railway company, that a passenger who shall purchase a ticket before entering its cars shall be entitled to a discount from the advertised rates of fare, but if such ticket is not purchased, the full rate of fare shall be charged, is a reasonable regulation, and does not violate a rule prescribed by statute, that the rates of fare shall be the same for all persons between the same points. *Swan v. Manchester and Lawrence R. R. Co.*, 132 Mass., 116, 1882; 6 Amer. & Eng. R. R. Cases, 327; *Hoffbauer v. Davenport and Northwestern R'y Co.*, 52 Ia., 342, 1879; *Bordeaux v. Erie R'y Co.*, 8 Hun (N. Y.), 579, 1876.

51. — The company is not bound to keep its ticket offices open at or for any particular time, and the fact that a passenger is unable to procure a ticket in consequence of the office being shut, will not entitle him to be carried to his place of destination upon payment of the amount for which he could have procured a ticket at the office had it been open. *Bordeaux v. Erie R'y Co.*, 8 Hun (N. Y.), 579. 1876.

52. Refusal to carry; master in one train holding tickets for servants in another. A by-law of the defendant, a railway company, was as follows: "No passenger will be allowed to enter any carriage without having first paid his fare and obtained a ticket. Each passenger, on payment of his fare, will be furnished with a ticket, which such passenger is to show when required, and to deliver up before leaving the company's premises, upon demand." The plaintiff took tickets for himself, his servants and horses, by a particular train on the defendant's railway. The train was afterwards divided into two. The plaintiff traveled in the first train, taking all the tickets with him. When the second train, with the servants and horses, was about to start, the plaintiff's servants were required to produce their tickets, and on their being unable to do so, the defendant refused to carry them. *Held*, in an action by the plaintiff for not carrying his servants, that, as the defendant contracted with the plaintiff, and delivered the tickets to him and not

Right to Compel Purchase of Ticket — Stop-Over Tickets.

to the servants, the defendant could not, under the by-law, justify its refusal to carry. *Jennings v. Great Northern R'y Co.*, Law Reports, 1 Queen's Bench Cases, 7. 1865.

53. Right to compel purchase of ticket.

A railway company may establish and enforce a rule requiring a person desiring passage on its trains to procure, and to exhibit to its employees, a ticket entitling him to such passage, before entering the cars. *Pittsburgh, Cincinnati and St. Louis R'y Co. v. Vandyne*, 57 Ind., 576, 1877; 18 Amer. R'y Rep., 454.

54. Rules. Carriers of passengers may lawfully require those seeking to be carried to purchase tickets when convenient facilities to that end are afforded, to exhibit them to the person designated by the carrier for that purpose, and surrender them after securing their seats, when required by the person in charge. Such requirements are reasonable ones to protect the carrier against imposition and the fraud of its employees. *Pullman Palace Car Co. v. Reed*, 75 Ill., 125. 1874.

55. Sale; delivery to purchaser. It is the duty of a ticket agent to use reasonable care in delivering a ticket to the purchaser. Where the purchaser, after paying for the ticket, is called away, it is no delivery to put the ticket on the counter in his absence. *Quigley v. Central Pacific R. R. Co.*, 5 Sawyer (U. S. C. C.), 107. 1878.

56. Season tickets. A passenger has no right to travel on a lost season ticket. A condition requiring him to exhibit his ticket is a reasonable one. *Cresson v. Philadelphia and Reading R. R. Co.*, 11 Philadelphia, 597. 1875. See, also, *Cooper v. London, Brighton and South Coast R'y Co.*, Law Reports, 4 Exchequer Division, 88; 31 Eng. (Moak), 384, 1879.

57. Stop-over tickets. A regulation by a railway company, by which a passenger who has paid his fare between two points on the line, but desires to stop over at an intermediate point, is required to procure a stop-over ticket from the conductor, and present it to the conductor of the train on which he seeks to complete his journey, as evidence of his right to do so without further payment, is a reasonable regulation. *Yorton v.*

Milwaukee, Lake Shore and Western R'y Co., 54 Wis., 234; 6 Amer. & Eng. R. R. Cases, 322, 1882. The same principle recognized. *Lake Shore and Michigan Southern R'y Co. v. Pierce*, 47 Mich., 277. 1882.

58. — A lay-over ticket limited to five days from its date, held valid and the condition enforced. The condition is not waived by checking the passenger's baggage. *Wentz v. Erie R'y Co.*, 5 Thompson & Cook (N. Y. Supreme Ct.), 556, 1874; *Churchill v. Chicago and Alton R. R. Co.*, 67 Ill., 390, 1873; *Wentz v. Erie R'y Co.*, 3 Hun (N. Y.), 241, 1874.

59. — If a passenger who has purchased a ticket from a railroad company which is silent on the subject of his stopping over, stops over before he reaches the point to which the ticket entitled him to ride, he cannot resume his journey on that ticket. If a passenger on the railroad leaves the train before he has arrived at the point to which his ticket entitled him to ride, he voluntarily terminates his contract with the company to carry him to such point. *Drew v. Central Pacific R. R. Co.*, 51 Cal., 425, 1876; 13 Amer. R'y Rep., 222.

60. — The defendant's ticket agent represented to the plaintiff that it was necessary to purchase but one ticket to enable him to pass over the road, stopping over one night at an intermediate station, and that the conductor would give a stop-over check for that purpose. At the time these representations were made, and in consequence of them, the plaintiff having informed the agent of his desire to stop over, purchased the ticket, paying the fare demanded for the whole distance. On the second day his ticket was refused by the conductor, upon the ground that it was indorsed "good for this day only," and, the plaintiff refusing to pay the fare demanded, was expelled from the cars. *Held*, in an action against the company, that such representations of the ticket agent were admissible in evidence, and that the conductor, having been informed thereof, was not authorized to expel the plaintiff without first offering to return the excess of fare paid, or to deduct it from the fare demanded, although the rules of the company prohibited passengers from stopping over upon such tickets. *Burnham v. Grand Trunk R'y Co.*, 63 Me., 298. 1873.

Miscellaneous.

61. Stoppage of trains at station. A passenger, having a ticket to a certain destination, cannot demand to be taken there in order to alight, if the train, by the rules of the company, does not go to or stop at such station. It is the duty of the passenger to ascertain what train will stop at his destination. *Logan v. Hannibal and St. Joseph R'y Co.*, 12 Amer. & Eng. R. R. Cases (Mo.), 141, 1882; *Beauchamp v. International and Great Northern R'y Co.*, 56 Tex., 239, 1832; 9 Amer. & Eng. R. R. Cases, 307; *Ohio and Mississippi R'y Co. v. Applewhite*, 52 Ind., 540, 1876.

62. Tourist ticket; non-transferable. The respondent, who was traveling on the G. W. Railway in a train going to N., produced the "forward half" of a tourist return ticket from L. to N. and back. This ticket had been originally issued to another person and was stated on the back thereof to be not transferable. The original taker had used the ticket as far as H. on the way from L. to N., but then proceeded on a different route, and, consequently, not having given up the forward half of the ticket, sold it to the respondent, who was traveling with it between H. and N. *Held*, that the respondent was liable to be convicted under 8 and 9 Vict., c. 20, s. 103, for traveling without having previously paid his fare, with intent to avoid payment thereof. *Langdon v. Howells*, Law Reports, 4 Queen's Bench Division, 337. 1879.

63. Transfer. Where a non-transferable ticket contained a condition that "I, failing to comply with this agreement, either of the companies may refuse to accept this ticket," *held*, that this did not give the conductor the right to take it up, but merely to refuse to receive it. *Post v. Chicago and Northwestern R'y Co.*, 14 Neb., 110, 1883; 9 Amer. & Eng. R. R. Cases, 345.

64. — A regulation of a railway company providing for the sale of tickets at a reduced rate upon condition that they be used only by the persons purchasing the same is reasonable and proper, and a third party cannot, by purchasing such ticket, acquire the right to travel on the same. A party holding such ticket, who refused to pay his fare and was expelled from the cars, cannot recover damages therefor. *Ib.*

65. — The measure of damages in such case would not exceed the value of a ticket of the same class between the points named. *Ib.*

66. Verbal contract. A verbal contract cannot be shown to vary the terms of a railway ticket. *Melville v. Baltimore and Potomac R. R. Co.*, 2 Mackey (Dist. Col.), 63. 1882.

TIME-TABLES.

See CARRIAGE OF PASSENGERS.

TOLLS.

1. Levy by market town on property carried by railway. The Brecon Markets Act, 1862 (25 and 26 Vict., c. clxxxvii), vested in the market company certain tolls which had been immemorially received by the corporation of Brecon for cattle, goods and carriages passing to, through or from the borough. A railway company, under the sanction of an act of parliament passed in the same session, acquired land (not being a highway) on which it constructed a railway and station within the borough of Brecon, whence passengers, goods and cattle were conveyed by other lines of railway to other places beyond the limits of the borough. The rights of the corporation and of the market company were expressly reserved by the railway act, but there was no provision either in that or in the railway act enabling them to levy tolls on the railway. *Held*, that the Brecon Market Company was not entitled to toll in respect of cattle, goods or carriages passing along the railway. *Brecon Markets Co. v. Neath and Brecon R'y Co.*, Law Reports, 7 Common Pleas Cases, 555. 1872.

2. Sale of cars for tolls. By the 8 and 9 Vict., c. 20, s. 97, it is provided that if, on demand, any person fail to pay the tolls due in respect of any carriage, etc., it shall be lawful for the company to detain and sell the carriage, etc., of the party liable to such tolls, and out of the moneys arising from sale to retain the tolls. *Held*, that a demand of the sum actually due for tolls is a condition precedent to the right to sell under this

Miscellaneous.

section. *Field v. Newport, Abergavenny and Hereford R'y Co.*, 3 Hurlstone & Norman (Exchequer), 409. 1858.

TRAMWAYS.

See STREET RAILWAYS.

1. Interference with by railways. By s. 53 of the Railways Clauses Consolidation Act, 1845 (8 and 9 Vict., c. 20), "if, in the exercise of the powers by the special act granted, it be found necessary to cross, cut through, raise, sink or use any part of any road, the company shall cause a sufficient road to be made instead of the road interfered with." A railway company, under the powers of its special act, and in execution of the works relating to a line of railway which it was empowered to make, adapted to the purposes of such line so much of a tram-road as was applicable thereto. In an action by the owners of collieries who were entitled to use the tram-road, for special damage, under s. 55 of Stat. 8 and 9 Vict., c. 20, *held*, that s. 53 referred to crossings and interferences with roads for temporary purposes, and not to acts done in the conversion of a road into the railway, and therefore the action was not maintainable. *Tanner v. South Wales R'y Co.*, 33 Eng. Law & Equity, 140. 1856.

TREASURER.

1. Action against; account. An account will be ordered as of course where defendant admits he is an accounting party. But if the liability to account is denied (as here by former settlement), no order of reference or other issue can be had until the alleged bar is passed upon. Therefore, in an action on the bond of a railway treasurer, where the defendant's accounting character is admitted in the answer, but a settlement with the company pleaded in bar of an account, the court did not err in submitting an issue to the jury in relation to the settlement as a preliminary matter. *Atlantic, Tennessee and Ohio R. R. Co. v. Morrison*, 82 N. C., 141. 1880.

TRESPASS.

See CONTRACTORS; EMINENT DOMAIN; EJECTMENT; FENCES; FORCIBLE ENTRY AND DETAINER; HIGHWAYS; INJURIES TO DOMESTIC ANIMALS; WEARVES.

1. Action for rent. A land owner cannot sue a railway company for rent when he has never consented to the use of his land, and has warned the company not to use the land. *Marquette, Houghton and Ontonagon R. R. Co. v. Harlow*, 37 Mich., 554. 1877.

2. Collision of train with trespassing animal; liability of owner. A railway company is entitled to the unobstructed use of its railway; and where its cars and engine are thrown off the track and damaged in consequence of a collision with an ox, which was upon the track through the negligence of its owner, the injury is the direct result of the owner's negligence, and he is liable therefor. *Annapolis and Elkridge R. R. Co. v. Baldwin*, 60 Md., 88, 1882; 11 Amer. & Eng. R. R. Cases, 486.

3. Contractor and railway company. A railroad company, by whose direction a contractor for the construction of its road enters and builds the road upon land which it has acquired, subject to an existing lease, is liable, as a joint tort-feasor, with the contractor and his servants, for damages done by them in the prosecution of the work to the crops of the lessee. *Ullman v. Hannibal and St. Joseph R. R. Co.*, 67 Mo., 118. 1877.

4. Corporation. A corporation cannot be made responsible for a trespass committed by individuals before it had an existence. *Berry v. San Francisco and North Pacific R. R. Co.*, 50 Cal., 435. 1875.

5. — Railroad corporations may commit trespass. *Mobile and Montgomery R. R. Co. v. McKellar*, 59 Ala., 458, 1877; *Maund v. Monmouthshire Canal Co.*, 3 Eng. R. R. & Canal Cases, 159, 1842.

6. Costs. In an action of trespass upon lands the complaint alleged title and possession in plaintiff, both of which allegations were specifically put in issue by the answer. Plaintiff claimed damages for injuries to the freehold by the deposit of earth and rubbish thereon, as well as for the entry. Plaintiff recovered less than \$50. *Held*, that, as to entitle plaintiff to recover for the injury to the freehold, it was necessary to

Damages — Evidence.

allege and prove his title, the question of title arose upon the pleadings; and that, consequently, a certificate that it arose on trial was unnecessary to entitle plaintiff to costs. *Kelly v. New York and Manhattan Beach R. R. Co.*, 81 N. Y., 233. 1880.

7. **Damages.** In an action to recover damages for a trespass alleged to have been committed by destroying the plaintiff's fences, and by trampling and destroying the grain and herbage growing on his land, the plaintiff cannot recover for injury done to the grain by the cattle of a third person, for any period of time after the original entry and trespass. *Berry v. San Francisco and North Pacific R. R. Co.*, 50 Cal., 435. 1875.

8. — Where a railway corporation constructs its road over the land of another, without condemnation or right, the measure of damages will be the amount of the injury directly resulting from the act complained of, where no malice or oppression is shown, or, in other words, the difference between the value of the land when the injury began, and such value as affected by it. *Chicago and Iowa R. R. Co. v. Baker*, 73 Ill., 316. 1874.

9. — For unlawful excavation, and removal of his soil, a party is entitled, to recover not the cost of refilling, but the amount of the diminution of the value of the property injured by such excavation and removal. *Karst v. St. Paul, Stillwater and Taylor's Falls R. R. Co.*, 22 Minn., 118. 1875.

10. — Where defendant, as employe of a railway company, pulled down the house of plaintiff, *held*, that the proper measure of damage was the amount by which the land was lessened in value by the defendant's wrongful act. *Hosking v. Phillips*, 3 Welsby, Hurlstone & Gordon (Exchequer), 168. 1848.

11. **Ditches.** A party who enters another's land and commits a trespass by digging a ditch does not thereby acquire a right to re-enter and fill up the ditch. He would be liable as a trespasser if he did so re-enter. *Kansas Pacific R'y Co. v. Muhlman*, 17 Kans., 224, 1876; 9 Amer. R'y Rep., 428.

12. **Erection of fence; damages.** The appellee took down a stone wall and erected a fence in front of the appellant's houses;

which fence was a part of a line of fence which the appellee had erected around its tracks for the protection of the same from intrusion, to facilitate the management of its business and the safety of the trains moving upon its road. There was nothing to show that the appellee did not do this in good faith, and with an endeavor to keep the fence within its own lines and on its own land. In an action of trespass *quare clausum fregit* against said corporation, it was held that the appellee was not guilty of a wanton and malicious trespass on the appellant's close, and there was no evidence to justify vindictive damages. *Sapp v. Northern Central R'y Co.*, 51 Md., 115. 1878.

13. **Estoppel.** When land is appropriated by a railway company in the construction of its road-bed, without recourse to the method pointed out for the condemnation of the same, the right of the owner to compensation is not waived by his standing by and permitting the company to construct its road over his land. Neither is his right to recover the land lost if the company refuses to make compensation. *Galveston, Harrisburg and San Antonio R. R. Co. v. Pfeuffer*, 56 Tex., 66, 1881; 11 Amer. & Eng. R. R. Cases, 373. See, also, *Rusch v. Milwaukee, Lake Shore and Western R'y Co.*, 54 Wis., 136, 1882; 6 Amer. & Eng. R. R. Cases, 609.

14. **Evidence.** In an action of trespass against a railway company for entering upon land and building its railway, evidence that the land owner had sold cross-ties, cut from the same land, to the railway company is inadmissible. *Northeastern R. R. Co. v. Hawkins*, 62 Ga., 164. 1878.

15. — In an action of wilful trespass against defendant for constructing and operating its railroad across a village lot of plaintiff, whereon was a house, in which she resided, testimony tending to show the effect upon the use of the house, and the discomfort and annoyance to the plaintiff by reason thereof, is competent, no question being raised as to the sufficiency of the averments in the complaint. *Spencer v. St. Paul and Sioux City R. R. Co.*, 19 Amer. R'y Rep., 416; 22 Minn., 29, 1875; *Wampach v. St. Paul and Pacific R. R. Co.*, 22 Minn., 34, 1875.

Highway — Principal and Agent.

16. Highway. Where the *locus in quo* was a national road, the fee being in the state, the town having only the care and superintendence of it and the duty of keeping it in repair, there is no such possession as will enable the town to maintain this action. No such possessory right in a road exists in a corporation. *St. Louis, Vandalia and Terre Haute R. R. Co. v. Town of Summit*, 3 Bradwell (Ill.), 155. 1878.

17. Injunction; lease. When a railway company is in possession under a claim of right or title as against the plaintiff, and in no way connected with him in estate, a court of equity will not enjoin the company from making a lease or conveyance on the ground that it would be a cloud upon the plaintiff's title. *Spofford v. Bangor and Bucksport R. R. Co.*, 66 Me., 51. 176.

18. Injury to child. A lad about ten years of age was forcibly put on board of a freight train by its brakeman, and against his will was carried for a distance of five miles. He returned home on foot, running most of the way, and was taken sick and became permanently crippled in both legs. *Held*, that the action of the brakeman was a trespass, and if the conductor of the train was present, and directed or consented to the acts of the brakeman, they were joint trespassers, and if the sickness resulted directly from their acts, they were liable in an action of trespass. *Drake v. Kiely*, 4 Amer. & Eng. R. R. Cases (Pa.), 592. 1879.

19. Injury to mill site; homestead. Where a railway company, having no right of way, so constructs its road-bed across an unperfected homestead as to obstruct a mill race and destroy the use of the mill on it, the measure of damages is the difference between the value of the mill site and machinery before the obstruction and after it. *Hot Springs R. R. Co. v. Tyler*, 36 Ark., 205, 1880; 10 Amer. & Eng. R. R. Cases, 145.

20. License. Where a railroad is located on land other than that granted, but with the knowledge of the owner, who makes no objection, but declares his intention to claim damages, the company cannot be held as trespasser or wrong-doer. *Hosher v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 60 Mo., 329, 1875; 9 Amer. R'y Rep., 230.

21. — Where the owner of land has allowed the construction of a railway over it, he is chargeable with knowledge that the track is of such a permanent nature that it cannot well be removed or abandoned. *Harlow v. Marquette, Houghton and Ontonagon R. R. Co.*, 41 Mich., 336. 1879.

22. — Where a land owner has allowed a railway company to construct and operate its road over the land with the understanding that the rights of parties as to damages should be adjusted thereafter, and the company takes statutory proceedings to ascertain the damages, the owner should present all his claims for settlement in these proceedings, and cannot split his demand and reserve part of it for future litigation. But if such proceedings are not resorted to, he would have a suitable remedy for the enforcement of his rights in some other way. *Id.*

23. Mining coal; damages. In an action of trespass for taking coal from the plaintiff's mine, he may recover the value of the coal at the mouth of the pit, less the cost of carrying it there from the place where it was dug, allowing the defendant nothing for digging. *Illinois and St. Louis R. R. and Coal Co. v. Ogle*, 82 Ill., 627. 1876.

24. Municipal corporation. A city is liable for the unlawful acts of its authorities in tearing down a railway depot. *Pontchartrain R. R. Co. v. New Orleans*, 27 La. An., 163. 1875.

25. Ouster; re-entry. If a party in possession of real estate is wrongfully ousted by another, the latter cannot by such wrongful act acquire a possession which it will be a trespass in the former to disturb, provided the re-entry of the person so wrongfully ousted involves no breach of the peace. *Illinois and St. Louis R. R. and Coal Co. v. Cobb*, 94 Ill., 55. 1879.

26. Pleading. The pleadings in case of a trespass committed by a railway company in the construction of its track considered. *Boeckler v. Mo. Pacific R'y Co.*, 10 Mo. App., 448, 1881; *Isaacson v. Minneapolis and St. Louis R'y Co.*, 27 Minn., 463, 1881.

27. Principal and agent; res adjudicata. Although, in actions of trespass, a judgment against one defendant is no bar to an action against another, yet judgment and payment

Remedy.

thereof would be, and the record would be admissible to prove the judgment. For similar reasons the record of acquittal of one defendant is admissible in an action against another, in connection with proof that the latter is sought to be charged for the same acts only by virtue of his relation, as principal, to the former. Where the real actor, none the less liable personally because acting for another, is not guilty, it necessarily follows that the party for whom he acted cannot be. The principal can be no more guilty by reason of the act of his agent than if he had committed the act in person. *Lake Shore and Michigan Southern R'y Co. v. Goldberg*, 2 Bradwell (Ill.), 228. 1878.

28. Remedy. Ejectment will lie against a railway corporation by the owner, for land taken, where the land has not been condemned under proceedings instituted for that purpose, in the mode prescribed by the constitution and laws. *Smith v. Chicago and Alton R. R. Co.*, 67 Ill., 191. 1873.

29. — Where a railway company enters upon land under color of a proceeding in the probate court to appropriate the same, without first making or securing compensation in money, and constructs thereon a railroad and commences to operate the same, after which the owner obtains a reversal of the proceeding and commences an action to recover possession of the land, the mere fact of delay, without proof of knowledge of or acquiescence in the acts of the company, will not estop the owner from maintaining such action. *Bothe v. Dayton and Michigan R. R. Co.*, 37 Ohio St., 147. 1881.

30. — A railroad company which enters upon land and appropriates a right of way without proceedings to condemn, or contract with the owner, or rendering him compensation therefor, is a mere trespasser and acquires no right to hold the land. *Hibbs v. Chicago and Southwestern R'y Co.*, 39 Ia., 340. 1874.

31. — That the owner of land permitted a railway company to enter upon it and construct its road does not give the company title to the right of way, to estop him to maintain an action of ejectment against it. *Conger v. Burlington and South Western R'y Co.*, 41 Ia., 419. 1875.

32. — In subsequent condemnation pro-

ceedings by the railroad company to acquire the right of constructing the road over such land, it is not regularly proper for the commissioners or the jury, in case of appeal, to include in their assessment the damages which the land owners suffered prior to the filing of the commissioners' award. For all such damages the land owner has his remedy as for trespass. *Leber v. Minneapolis and Northwestern R'y Co.*, 29 Minn., 256, 1882; *Hartz v. St. Paul and Sioux City R. R. Co.*, 21 Minn., 358, 1875; 18 Amer. R'y Rep., 430; *Chicago and Iowa R. R. Co. v. Davis*, 86 Ill., 20, 1877.

33. — Where one of two tenants in common deeded the right of way through their premises to a railroad company upon certain conditions, and the company entered but failed to comply with the conditions, the tenant granting the deed can maintain an action to recover damages for the breach of contract, and the other, the entry being without her consent, for the trespass. *Rush v. Burlington, Cedar Rapids and Northern R'y Co.*, 57 Ia., 201, 1881; 11 Amer. & Eng. R. R. Cases, 298.

34. — Where a railway company in building its road-bed, without taking the steps prescribed by law to condemn its right of way, unlawfully takes possession of land, and suit is brought by the land owner to recover damages for such trespass, the damages should include compensation for the injury inflicted and such punitive damages as are authorized by law, but not the value of the land so used or appropriated; and the jury trying such cause should be so instructed. *Anderson, etc., R. R. Co. v. Kernodle*, 54 Ind., 314. 1876.

35. — In such a suit no judgment that the court trying such cause is authorized to render will give such company a title to the land so appropriated. *Ib.*

36. — The commencement of the construction of its road by a railroad company upon the land of a private person without his consent, or without first having paid or secured to him compensation, is a trespass for which a right of action immediately accrues. *Leber v. Minneapolis and Northwestern R'y Co.*, 29 Minn., 256, 1882; *Rusch v. Milwaukee, Lake Shore and Western R'y Co.*, 54 Wis., 136. 1882.

Removal of Improvements.

37. — The owner of land which has been unlawfully taken and occupied by a corporation authorized by law to appropriate land cannot maintain an action for the value of the land so taken and also damages accruing by reason of such appropriation, if the circumstances are such that he may recover the land itself. In such case the owner may recover compensation and damages, by special proceedings, under § 21 (69 Ohio L., 88, 95; Rev. Stat., §§ 6448-6450), or the land itself, as in other cases of unlawful entry. *Atlantic and Great Western R. R. Co. v. Robbins*, 35 Ohio St., 531. 1880.

38. — An action was brought in trespass to try title against a railway company, and for damages for destruction of fences and orchards, for fencing in twenty acres, and other items of damage, with a prayer in the alternative; for restoration of the premises, for damages and injunction; or that, if the railway company was entitled to have a right of way condemned, that it be set aside by metes and bounds. The plaintiff, it was shown, had conveyed by deed a right of way over the land to the company. *Held*, that the admission of evidence showing the depreciation of the value of the entire property by reason of the location and construction of the railway, connected with the fact that the greater part of the charge related to the condemnation of the right of way and measure of damages in such cases, all of which resulted in an inconsistent verdict, was such error as to require a reversal of the judgment. *Houston and East Texas Ry Co. v. Adams*, 58 Tex., 476. 1883.

39. — Where a railway company entered upon the land of C. and built its railway, and C. brought an action of trespass *quare clausum fregit* against the company, and recovered judgment, which was paid, and C. afterwards peaceably retook possession of the premises, after which the railway again entered and rebuilt its track, *held*, that C. might recover damages in a second suit. *Illinois and St. Louis R. R. and Coal Co. v. Cobb*, 82 Ill., 183. 1876.

40. — When damage is done to lands held by a corporation, the party by whose negligence such injury was caused cannot escape liability by showing that the corporation was not permitted by its charter to acquire

title to the property, or that it acquired it for purposes unauthorized by law. *Farmers' Loan and Trust Co. v. Green Bay and Minnesota R. R. Co.*, 11 Bissell (U. S. C. C.), 334. 1882.

41. Removal of improvements. If a building be erected upon land without the assent and agreement of the owner of the land, it becomes at once a part of the realty, and is the property of the owner of the freehold. Hence, where a railroad company, having obtained a decree for the condemnation of a tract of land, without the knowledge of the owner, erected upon it a building of a permanent character for a depot, and afterward the decree was adjudged to be void, *held*, that the building had become a part of the realty, and could not be removed by the company; and it made no difference that it was set upon posts and could be taken away without injury to the ground. *Hunt v. Missouri Pacific Ry Co.*, 76 Mo., 115. 1882.

42. — A railway company which has constructed its track upon a person's land, without filing a written location or presenting a plan thereof, or paying or tendering any damages for the land so taken, cannot enter upon the land for the purpose of removing the track laid upon the road-bed and structures placed upon the land; such property becomes a part of the realty; and the fact that the original entry and construction were made without objection by a mortgagor in possession cannot avail against the title acquired by the mortgagee by the subsequent foreclosure of his mortgage. *Meriam v. Brown*, 128 Mass., 391. 1880.

43. — The trespass consisted in constructing a railroad across a farm without the right to do so having been acquired by ascertaining and paying compensation to the owner. *Held*, that if the ties and rails increased the value of the farm, that should be considered in determining the amount of damages; but if the farm was in no way benefited or enhanced in value by the ties and rails being laid across it, no deduction from the damage done to the farm should be made on account of the value of the ties and rails. In other words, conceding that the ties and rails became the property of the land owner, their value could not be set off

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against the damages occasioned by the trespass. *Schroeder v. De Graff*, 28 Minn., 299, 1881; 5 Amer. & Eng. R. R. Cases, 298.

[See EMINENT DOMAIN, subtitle Trespass.]

44. Streets; abutting property. In an action against a railroad company for trespass in constructing and operating its railroad for six years upon a public street in front of plaintiff's lots, where the complaint does not allege the existence of any buildings on the lots, or injury to the use of the lots, or any special damage whatever, plaintiff cannot recover for loss of the use of the lots, loss of rent of shops, or loss of custom in business. *Wampach v. St. Paul and Sioux City R. R. Co.*, 21 Minn., 364. 1875.

45. — It seems that in a complaint against a railroad company for trespass in laying its track in a public street, between the center thereof and plaintiff's lots, it is sufficient for plaintiff to allege his ownership of the lots, and the commission of the trespass thereon; and that the plaintiff's ownership of the fee of the street — the *locus in quo* — will be implied from the averment of his ownership of the adjacent lots. *Spencer v. St. Paul and Sioux City R. R. Co.*, 21 Minn., 362, 1875; *Wampach v. Same*, ib., 364, 1875.

46. Tenant. A landlord cannot, ordinarily, maintain an action of trespass *quare clausum fregit* for an unlawful entry upon the premises demised during the continuance of the term. *Wentworth v. Portsmouth and Dover R. R. Co.*, 55 N. H., 540. 1875.

47. — Although possession of land for the construction of a railway may have been obtained from a tenant by fraud, yet an injunction will not be granted, at the suit of the land owner, restraining the owners of the railway from using it when completed, or from interrupting the plaintiff's workmen in removing the railway. *Deere v. Guest*, 1 Mylne & Craig (Eng. Ch.), 516. 1886.

48. Title to land. Where a person claims to be the owner of a certain piece of land as against all the world, and is in possession thereof by a tenant to whom he has leased the same, such person may maintain an action against a mere wrong-doer for injuries done to the land, although such person has never had actual and personal pos-

session of the land, and although his title to the land may be ever so defective. Such possession and such claim of ownership is *prima facie* evidence of ownership as against any person, and is conclusive evidence of ownership as against a mere wrong-doer. A mere wrong-doer cannot dispute the title of the person so in possession, and so claiming ownership. So held, where a railway company trespassed and dug ditches, causing an overflow of lands. *Pacific R. R. Co. v. Walker*, 12 Kans., 601. 1874.

49. — In making proof of title in an action of trespass to the realty, when the title is put in issue, if the plaintiff puts in evidence the deed only of his immediate grantor, and the grantor is not the United States, he should show further that he is in possession under the deed. *McCormick v. Chicago, Rock Island and Pacific R. R. Co.*, 47 Ia., 345. 1877.

50. Timber. In an action for the conversion of timber against an innocent purchaser from a person who had previously converted the property to his own use and had afterward added to its value by his own labor, the measure of the damages is the value of the timber when first taken from the owner, whether the first taker was a wilful or an involuntary trespasser. *Lake Shore and Michigan Southern R. R. Co. v. Hutchins*, 4 Amer. & Eng. R. R. Cases (Ohio), 219. 1881.

51. — Timber was cut from lands of B. by trespassers, who converted it into cord-wood and railroad ties, thus increasing its value three-fold. It was then sold to an innocent purchaser, who was sued by B. for the value of the wood and ties. Whatever might be the rule of damages against the trespassers, as against innocent purchasers B. cannot recover the value of the timber as enhanced by the labor of the wrong-doers, after it was severed from the realty. *Railway Co. v. Hutchins*, 32 Ohio St., 571. 1877.

52. — The owner of timber trees cut from his land by a trespasser cannot be divested of his title thereto, although the trespasser has converted them into railroad ties and sold them to a *bona fide* purchaser. *Strubbee v. Cincinnati R'y Co.*, 78 Ky., 481. 1880.

53. — A railway company is not responsible for the acts of its employes in going beyond its right of way to cut telegraph poles,

Children — Expulsion from Train.

where such trespass is against the company's orders. *Fairchild v. New Orleans and Northeastern R. R. Co.*, 60 Miss., 931, 1883.

54. — Pleadings in an action for trespass in cutting timber examined. *Atlantic and Pacific R. R. Co. v. Freeman*, 61 Mo., 80, 1875.

55. — In a suit by the owner of land for damages for timber cut thereon by the license of the vendor, and for the vendor's use, the unrevoked parol license given by the vendor prior to the purchase by complainant is no defense. *Paine v. Northern Pacific R. R. Co.*, 14 Federal Reporter, 407, 1882; 4 McCrary, 586.

56. Wilful trespass. Where a trespass has been wilfully committed, and persisted in after earnest remonstrance, with circumstances of aggravation, it is not error to instruct the jury that they are at liberty to give exemplary damages. *Newman v. St. Louis and Iron Mountain R. R. Co.*, 2 Mo. App., 402, 1876.

57. — One who enters upon the land of another under a *bona fide* claim of right is guilty of no criminal offense; therefore, where an employe of a railroad company was ordered to fell trees upon land adjacent to its track, which had been conveyed by the owner for right of way, etc., *held*, not to be indictable for wilful trespass. *State v. Crosset*, 81 N. C., 579, 1879.

58. — Upon complaint made against T., before justices, under Stat. 3 and 4 Vict., c. 97, s. 16, for wilfully trespassing on the premises of a railway company, and refusing to quit them on request made, it appeared that T. had gone on to the premises for the purpose of repairing, under a contract to do so, a carriage which was there, by the permission of the company, and which belonged to a third party; that he had previously been prohibited by the company from entering; and that upon being requested by the company to quit, he refused to do so, insisting on his right to remain for the purpose of completing the repair, without which repair the carriage could not quit the yard. The magistrate having refused to convict, *held*, on appeal under Stat. 20 and 21 Vict., c. 43, that the justices were not bound to convict, inasmuch as it was competent to them, if

they thought fit, to decide that T. was not a wilful trespasser. *Jones v. Taylor*, 1 Ellis & Ellis, 20; 102 E. C. L., 20, 1853.

TRESPASSERS.

1. Children. Where a boy, aged about seven years, was injured while attempting to climb up the ladder of a freight car while in motion along a public street in a city, and it appeared that the train was not being run at an unlawful rate of speed, it moving not faster than four miles an hour, that the train was properly manned, with every employe at his station, and that the train was under perfect control, and being run with the greatest care and caution, it was held that the company was not liable. *Chicago, Burlington and Quincy R. R. Co. v. Stumps*, 69 Ill., 409, 1873.

2. Evidence. When the evidence is not only undisputed, but the facts are clear and convincing, and admit of but one conclusion, it is the duty of the court to decide, as a matter of law, whether the ultimate fact involved therein, namely, the existence of negligence or contributory negligence, has or has not been sufficiently proven. So held, where a boy climbed upon a freight train and was injured through his own fault. *Buckley v. New York and Harlem R. R. Co.*, 43 N. Y. Superior Ct., 187, 1878. See, also, *Finney v. Northern Pacific R. R. Co.*, 12 Amer. & Eng. R. R. Cases (Dak.), 17, 1883.

3. Expulsion from train. Where a brakeman kicked a trespassing boy from the platform of the car, when the train was running about ten miles an hour, *held*, that the case was properly for the jury; the putting the boy off the car was in the scope of the brakeman's duty; the illegality of the manner of doing the act did not exonerate the company. *Hoffman v. N. Y. Central and Hudson River R. R. Co.*, 87 N. Y., 25, 1881; 46 N. Y. Superior Ct., 526, 1880; 44 N. Y. Superior Ct., 1, 1878. See, also, *Rounds v. Delaware, Lackawanna, etc., R. R. Co.*, 5 Thompson & Cook (N. Y. Supreme Ct.), 475, 1874; 3 Hun (N. Y.), 329, 1874; affirmed, 64 N. Y., 129, 1876; *Hoffman v. New York Central and Hudson River R. R. Co.*, 4 Amer. & Eng. R. R. Cases (N. Y.), 537, 1881; *Pennsylvania Co.*

Practice — Assignment — Railway Ties.

v. Toomey, 91 Pa. St., 256, 1879; 1 Amer. & Eng. R. R. Cases, 461.

4. — The company is liable for the wilful acts of an employe engaged in the expulsion of a trespasser. *Carter v. Louisville, New Albany and Chicago R'y Co.*, 8 Amer. & Eng. R. R. Cases (Ind.), 347. 1882.

5. **Riding upon train; personal injury.** A boy was permitted by a conductor to ride on the train to sell newspapers, in violation of the regulations of the company, and was killed by an accident. *Held*, that the boy was a mere trespasser, and the company was not liable. *Duff v. Allegheny Valley R. R. Co.*, 91 Pa. St., 458, 1879; 2 Amer. & Eng. R. R. Cases, 1.

TRIAL.

1. **Practice.** Matters in relation to trial of causes determined. *Union Pacific R. R. Co. v. Wilson*, 1 Wyoming, 307, 1875; *Mayor of New York v. Broadway and Seventh Avenue R. R. Co.*, 54 Howard's Practice (N. Y.), 323, 1878.

TROVER.

See BAILMENTS; CARRIAGE OF MERCHANDISE; LAT-
ERAL RAILWAYS; MORTGAGE.

1. **Assignment.** An action of trover is not assignable. R. S., § 3462. *Wallen v. St. Louis, Iron Mountain and Southern R'y Co.*, 74 Mo., 521. 1881.

2. **Conversion of money found on cars.** Defendant H. found a sum of money in one of plaintiff's cars which he delivered to the conductor to be restored to the owner, if called for. The conductor delivered it to plaintiff's treasurer. Subsequently H. demanded the money, and which being refused he brought action therefor and recovered a verdict. After the verdict defendant M., the owner of the money, demanded it of plaintiff, whereupon an action was commenced to restrain proceedings upon the verdict. *Held*, that the refusal to deliver to H. was evidence tending to show a conversion, but was not an actual conversion, nor did it affect the title or claim of M.; that upon his appearance and demand of the money, all right of H. thereto was ended, and that plaintiff not having had an oppor-

tunity to interpose this defense, was entitled to the aid of equity to restrain the enforcement of the verdict; but that the question as to whether plaintiff or H. had the right to the custody of the money for the owner could not be raised in this action, as it was disposed of in the original action; and as it must be assumed that H. was right in bringing his action and proceeding to verdict, he was entitled to be allowed his taxable costs therein. *New York and Harlem R. R. Co. v. Haws*, 56 N. Y., 175, 1874; 6 Amer. R'y Rep., 173.

3. **Cord wood.** Proper measure of damages for the taking of cord wood held to be the value of the wood, with six per cent. interest from time of taking. *Charles v. St. Louis and Iron Mountain R. R. Co.*, 58 Mo., 458. 1874.

4. **Delivery by mistake.** The plaintiff, a railway company, delivered to the defendant, through mistake, three cars of oil, which the defendant converted to his own use. *Held*, that the defendant might show that he received the oil unwittingly, and that he had received from the plaintiff no more oil than he was entitled to receive, and that, if there was a mistake, it was the plaintiff's. *Waring v. Pennsylvania R. R. Co.*, 76 Pa. St., 491. 1874.

5. **Evidence.** Defendant offered evidence that the staves were cut from land owned by the president of the corporation, in connection with evidence that the president had directed the taking of them. There was no evidence that he had not granted permission to plaintiffs to cut the staves, and no other evidence that they belonged to him. *Held*, that the offer was properly rejected. *Allen v. St. Louis, Iron Mountain and Southern R'y Co.*, 72 Mo., 386. 1880. See, also, *Dunn v. St. Louis, Iron Mountain and Southern R'y Co.*, 70 Mo., 663. 1879.

6. **Pleading.** Pleadings in actions of trover examined. *Gregory Point Marine R'y Co. v. Selleck*, 43 Conn., 320, 1876; *Macon and Western R. R. Co. v. Meador*, 67 Ga., 672, 1881.

7. **Railway ties.** Where ties were taken and used by a railway subcontractor, and the road was in use before it was delivered to the company, the owner of the ties, after waiting until they had become realty, can-

Adverse Possession — Expense of Execution of Trust.

not bring trover against the corporation as for their conversion. *Detroit and Bay City R. R. Co. v. Busch*, 43 Mich., 571, 1880; 21 Amer. R'y Rep., 171; 9 Amer. & Eng. R. R. Cases (Mich.), 151, 1880.

TRUST.

See MORTGAGE.

1. Adverse possession. A trustee cannot claim adversely to those for whom he acquired and holds the property. *Railroad Co. v. Durant*, 95 U. S., 576. 1877.

2. Attachment. When a railway company deposits its funds with a trustee for the purpose of paying its coupons, such fund is not thereafter subject to attachment. *Rogers Locomotive Works v. Kelly*, 21 Hun (N. Y.), 399, 1879; 88 N. Y., 234, 1882.

3. Death of trustee. A trust to sell or improve lands; to invest and reinvest the proceeds; to collect rents and income; to pay taxes, assessments, commissions and other annual expenses and charges; to pay over the net income, and to divide the estate, vests a fee simple title in the designated trustees, not limited to the life-time of the donor's children, which trust descends to the heir at common law, the eldest son of the survivor of the trustees, and his contract to sell lands of the estate may be specifically enforced. *Zabriskie v. Morris and Essex R. R. Co.*, 33 N. J. Eq., 22, 1880; *Morris and Essex R. R. Co. v. Zabriskie*, 34 ib., 282, 1881.

4. Deed. A conveyance in trust construed. *Allegheny R. R. Co. v. Casey*, 79 Pa. St., 84, 1875.

5. Corporation stock. Where railway stock is deposited with a trustee for the benefit of a party named, and the *cestui que trust* desires to sell the stock, but the donor of the trust refuses to consent, a court has no power to compel such consent. *Vanderbilt, In re*, 20 Hun (N. Y.), 520. 1880.

6. Deposit of bonds. Bonds deposited in trust for the benefit of certain creditors will be applied in accordance with the terms of the trust, although such deposit was not made with the knowledge of the creditors to be benefited thereby. *Rogers Locomotive Works v. Kelley*, 88 N. Y., 235, 1882; revers-

ing *Same v. Same*, 19 Hun (N. Y.), 399, 1879.

7. Donations to officer for railway company. The acting president and active manager of a railroad company, by an oppressive exercise of his powers, procured donations of property to be made to him in trust for the railroad company. *Held*, that his action was illegal, and that it affected the company, and that the effect was that he held the property in trust for the donors, and not the company. *Union Pacific R. R. Co. v. Durant*, 3 Dillon (U. S. C. C.), 343. 1874.

8. Expense of execution of trust. Where a large body of land is conveyed to trustees to secure the payment of the principal and interest of a great number of railway bonds, which have a long time to run before maturity, and the grantor, the railway company, in the trust deed reserves the right to sell the lands and pay the proceeds of the sales thereof to the trustee, after deducting expenses incurred in executing the trust, it may retain the proper amount for expenses in making the sales, and may also pay the taxes out of the proceeds thereof. *Nickerson v. Atchison, Topeka and Santa Fe R. R. Co.*, 17 Federal Reporter, 408; 3 McCrary (U. S. C. C.), 455. 1881.

9. — One jointly interested with others in a common fund, and who, in good faith, maintains the necessary litigation to save it from waste and destruction, and secure its proper application, is entitled in equity to reimbursement of his costs as between solicitor and client, either out of the fund itself, or by proportional contribution from those who receive the benefit of the litigation. *Trustees Internal Improvement Fund of Florida v. Greenough*, 12 Amer. & Eng. R. R. Cases (U. S. S. C.), 345. 1882.

10. — Where a large number of bonds issued by a corporation are secured by a trust fund, which is being wasted and misapplied by the trustees, or which they refuse or neglect to apply to the payment of the bonds, a holder of a portion of such bonds who, in good faith, files a bill to secure the due application of the fund, and succeeds in bringing it under the control of the court for the common benefit of the bondholders, is entitled to have his costs, counsel fees and necessary expenses of the litigation, that is

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to say, his costs as between solicitor and client, paid out of the fund before its distribution. *Ib.*

11. — Such a complainant, however, is not entitled to an allowance for his private expenses, such as traveling fares and hotel bills, nor for his own time or personal services. *Ib.*

12. **Misapplication of funds; res adjudicata.** A creditor's bill which sought to follow, as trust money, funds of a bank invested by its officers in a railroad company, was dismissed, on the ground, among others, that the identity of the property purchased with the money of the bank could not be ascertained. *Held*, that such decree was a bar to a new bill brought for the same purpose, and substantially the same as the first, except that it contained an averment which was not in the first bill, to the effect that the complainant had reduced to judgment his claim against the officers of the bank for the misappropriated funds. *Case v. New Orleans and Carrollton R. R. Co.*, 2 Woods (U. S. C. C.), 236. 1876.

13. **Operation of railway by trustees; fences.** Where a railroad has been taken possession of under a mortgage, by trustees for bondholders, and is being operated by them, and where, by the mortgage, power is given to them to make repairs and additions to the road, they may be held for a performance of the duties imposed by the statute in relation to fences. *Jones v. Seligman*, 81 N. Y., 190, 1880; 3 Amer. & Eng. R. R. Cases, 236.

14. **Right to purchase obligations of cestui que trust.** There is no rule of law or equity that incapacitates a trustee from purchasing the obligations of his *cestui que trust* which have become largely vested in a third person. If they are valid obligations they may be sold and transferred to any one, and such transfer will pass a good title to them. *Clark v. Flint and Pere Marquette R'y Co.*, 5 Hun (N. Y.), 556. 1875.

TUNNELS.

See EMINENT DOMAIN.

1. **Diversion of water.** A railway company having constructed a tunnel on its own

land, thereby diverted the subterranean water from plaintiff's land contiguous to the tunnel. *Held*, that the company was not liable for the diversion of this underground water, the same being done in the exercise of the ownership of defendant's own land. *Galgay v. Great Southern and Western R'y Co.*, 4 Irish Common Law, 456. 1854.

2. **Excavation; child.** The railway tunnel connecting the Union depot in St. Louis with the Illinois and St. Louis bridge was, at a point where it was uncovered, and within the line of a public street, left unguarded, exposing a perpendicular wall fourteen feet in depth below the surface of the street. The petitioner, a boy four years of age, strayed away from his home, about two blocks distant, under circumstances not disclosed by the testimony, fell into this excavation, and sustained a fracture of the thigh bone. It appeared that his parents were poor and unable to employ a servant to look after him; that he sustained no other injury except physical pain and suffering; that the tunnel was in custody of receivers of this court. *Held*, that the unguarded excavation was a nuisance, the continuing of which rendered the receivers liable to pay out of the fund in their charge damages for any injury of which it was the proximate cause; that the petitioner was in law incapable of negligence, and that the burden of showing contributory negligence on the part of the parents, such as, imputed to the petitioner, would bar a recovery, rested with the respondents. *Morgan v. Illinois and St. Louis Bridge Co.*, 5 Dillon (U. S. C. C.), 96. 1878.

3. **Streets.** A railroad company constructing its road in a tunnel or archway under a public street does not impair its right to the exclusive use of the ground over the tunnel. *Junction R. R. Co. v. Boyd*, 8 Philadelphia, 224. 1870.

TURNPIKES.

See EMINENT DOMAIN; STREET RAILWAYS.

1. **Crossings.** Where a railway and turnpike are constructed at the same time, but the railway company's chartered rights are prior in time, it is the duty of the turnpike company to construct the necessary railings

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or banisters, and for an injury resulting from this neglect the turnpike company alone, not the railway company, is liable. *Zucarello v. Nashville and Chattanooga R. R. Co.*, 3 Baxter (Tenn.), 364, 1874; 21 Amer. R'y Rep., 188.

2. — In trespass for disturbing the bed of a turnpike road, by building a railroad thereon, the measure of damages is the damage actually sustained by reason of the acts of the defendant, not the entire value of the land composing the bed of the road. *Stockton, etc., Gravel Road Co. v. Stockton and Copperopolis R. R. Co.*, 53 Cal., 11, 1878.

3. Location of railway. The charter of a railway company provided that, if the line should intersect any highway, the company should restore it to its former usefulness; and that the railway should be so located within the town of H. that in its construction and use it should not interfere with a certain turnpike road so as to obstruct, impede or endanger public travel. The location of the road was to be approved by the railway commissioners, and a special committee appointed by the superior court was to determine whether the company had complied with this requirement of its charter. The road was located for two miles in the town of H., close beside the turnpike, the traveled path of which was in some places changed to make room for the road. The commissioners approved the location, and the committee reported that the company had complied with the requirements of its charter. Thirty years afterwards, when the turnpike had become a highway, the increase of travel upon the highway, and of the number and speed of the trains on the railway, had rendered the proximity of the track to the highway a much greater injury to the public than it was at first, and the attorney for the state applied for a *mandamus* to compel the company to change the location of its road and to restore the highway to its former usefulness. *Held*, that the provisions of the charter were not intended to impose upon the company the duty of removing all danger incident to the operation of the railway. That no further legal duty was imposed upon the company by reason of the increased danger from the

increase of travel on the highway and of the number and speed of the trains. *State v. New Haven and Northampton Co.*, 45 Conn., 331. 1877.

4. — right of owner of fee; laying railway on turnpike. When a turnpike company, having merely the right of way along the line of its road, laid down a railway track, it is liable for damages to the owner of the land. Even if the claimant has given a release of damages to the turnpike company, it would still be liable, on changing a road that could be used by the whole neighborhood into one merely beneficial to the company. The claimant should be allowed for the future damages to his property that would result from the ordinary use of the railroad. *Mumma v. Harrisburg R. R. Co.*, 1 Pearson (Pa.), 24. 1851.

TURN-TABLE.

1. Injury to children. Facts stated which were held sufficient to render a railway company liable in damages for injuries inflicted upon a child while it was playing on a railway turn-table. *Evansich v. G., C. and S. F. R'y Co.*, 57 Tex., 123, 1882; 6 Amer. & Eng. R. R. Cases, 182.

2. — To hold a railroad company liable for the consequences of its negligence in leaving a turn-table unfastened and unguarded, it is not necessary to show that the company was the owner of the turn-table. It is sufficient if it appears that it was in the charge or under the control of the company. *Nagel v. Missouri Pacific R'y Co.*, 75 Mo., 653, 1882; 10 Amer. & Eng. R. R. Cases, 702.

3. — The question of negligence in leaving a turn-table exposed to use of children is one for the jury. *A. and N. R. R. Co. v. Bailey*, 11 Neb., 332, 1881; 10 Amer. & Eng. R. R. Cases, 742; *Kansas Central R'y Co. v. Fitzsimmons*, 22 Kans., 686, 1879.

4. — Where a turn-table was situated in an exposed place near a populous city, where boys often play, and yet was left without locks or fastenings, and without being watched or guarded or even fenced in, and a boy hunting his father's cow went to the turn-table with other boys, and rode and played upon it, and was injured by means

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thereof, and the jury found that the railway company leaving the turn-table in that condition was guilty of negligence, and was liable for the injuries to the boy, *held*, that the verdict of the jury is conclusive. And where the jury also find in such case that the boy is not guilty of contributory negligence, which finding has been approved by the trial court, *held*, that under the circumstances of this case the verdict cannot be disturbed by the supreme court. *Kansas Central R'y Co. v. Fitzsimmons*, 22 Kans., 686. 1879. See, also, *Kansas Central R'y Co. v. Fitzsimmons*, 18 Kans., 34. 1877.

5. — Where a turn-table, not covered with plank or walled except where the rails of the switch intersected, was constructed, not near to any public street or place where the public were in the habit of passing, but in an isolated place, and a boy about nine years old, while he and others were turning and riding upon it, was seriously hurt, it also appearing it was latched, but not locked, it was held, in an action by the boy to recover for the injury, that, in view of the isolated position of the table, the railway company was not guilty of such negligence as to render it liable. *St. Louis, Vandalia and Terre Haute R. R. Co. v. Bell*, 81 Ill., 76. 1876.

6. — Persons operating a turn-table in a public street are bound to such vigilance as may be reasonably necessary to prevent collisions. *Schureman v. Mo. R'y Co.*, 7 Mo. App., 570. 1879.

7. — It is negligence on the part of a railroad company to omit to secure its turn-tables so that children cannot revolve them. If a child is injured in consequence of such an omission, the company will be liable, and the fact that the turn-table was being revolved by other children at the time will make no difference. *Nagel v. Missouri Pacific R'y Co.*, 75 Mo., 653, 1882; 10 Amer. & Eng. R. R. Cases, 702. See, also, *Keefe v. Milwaukee and St. Paul R'y Co.*, 21 Minn., 207, 1875; 19 Amer. R'y Rep., 231.

8. — The fact that the turn-table of a railway company, on which a child of tender years was injured, through the negligence of the company's agents, was located on the premises of the company, cannot affect the right of the child to recover for the damage inflicted. *Evansich v. G., C. and S. F. R'y*

Co., 57 Tex., 126, 1882; 6 Amer. & Eng. R. R. Cases, 182.

9. — An instruction to the jury to find for plaintiffs if they "believe from the evidence that plaintiffs negligently permitted their son to wander from his home and go upon the turn-table of defendant, and that the son was killed by said turn-table, and that he was so young and inexperienced as not to possess sufficient judgment to warn him of the danger of the place or character of the machinery, and that he was killed by negligence and carelessness of defendant in not properly guarding and protecting said turn-table and keeping children from playing on the same," was held to be clearly erroneous; but it was also held, that, because of said instruction, the court would not reverse the judgment where it appeared that there was no evidence whatever that plaintiffs ever assented to, or approved of, their child going on the turn-table; but on the contrary, they prohibited his so doing. *Koons v. St. Louis and Iron Mountain R. R. Co.*, 65 Mo., 592. 1877.

10. — The custom of other railroads, as to keeping their turn-tables locked, is immaterial upon the issue whether or not the defendant railroad was guilty of negligence in not doing so. *Id.*

11. — The opinions of witnesses who are not experts, as to whether or not a turn-table is a dangerous machine, and as to whether or not it was gross carelessness to leave it unfastened or uncovered, are not competent evidence. *Id.*

ULTRA VIRES.

See HIGHWAY.

1. Aid to state fair. Corporations possess the powers expressly conferred by law, and such implied powers as are necessary to enable them to exercise the powers expressly granted, and no others; yet, although there may be a defect of power in a corporation to make a contract, if a contract made by it is not in violation of the charter of the corporation, or of any statute prohibiting it, and the corporation has by its promise induced a party, relying upon such promise and in execution of the contract, to expend money

Bills of Exchange — Docks.

and perform his part of the contract, the corporation is liable on the contract. A railway company may be held liable upon a subscription made to secure the location of a state fair. *State Board of Agriculture v. Citizens' Street R'y Co.*, 47 Ind., 407. 1874.

2. Bills of exchange; acceptance. It is not competent for a company incorporated in the usual way for the formation and working of a railway, to draw, accept or indorse bills of exchange; and the question is properly raised by a plea denying the acceptance, though the acceptance was given by order of the directors and under the common seal of the company. *Bateman v. Mid-Wales R'y Co.*, Law Reports, 1 Common Pleas Cases, 499. 1866.

3. Contract to borrow money. Where a corporation is created for certain purposes, with power to sue and be sued, and to borrow money for the completion of those purposes, and to secure the repayment of such money by an instrument which on its face imports a covenant for repayment, if money be so borrowed and so secured, and not duly repaid, an action may be maintained against the corporation on breach of the covenant, although there are no specific statutory provisions enabling it to bind itself by such a covenant. *Eastern Union R'y Co. v. Hart*, 14 Eng. Law & Equity, 535; 17 Jurist, 89; 22 Law Jour. (N. S., Exch.), 20; 8 Exch., 116; 8 Welsby, Hurlstone & Gordan, 116. 1852.

4. Canal company; contract. It is not *ultra vires* for a canal company, having the right to draw water from a public river for its chartered purposes, to agree to discharge its waste water at a certain point. *Armstrong v. Pennsylvania R. R. Co.*, 38 N. J. Law, 1, 1875; 13 Amer. R'y Rep., 1.

5. Cartage. A railway company has the right, incidental to its business, to engage in the cartage of merchandise to and from its depots. *Attorney-General v. Grand Trunk R'y Co.*, 16 Decisions des Tribunaux (Lower Canada), 91. 1865.

6. Contract. Where a corporation has entered into a contract which has been fully performed on one part, and nothing remains but for it to pay the consideration money, it will not be allowed to set up that the contract was *ultra vires*. *Oil Creek and Alle-*

gheny River R. R. Co. v. Pennsylvania Transportation Co., 83 Pa. St., 160, 1876; 18 Amer. R'y Rep., 322. See, also, *Atlantic and Pacific Telegraph Co. v. Union Pacific R'y Co.*, 1 Federal Reporter, 745; 1 McCrary (U. S. C. C.), 541. 1880.

7. — The managing body of a railway company has no power to enter into a contract fixing and regulating the future traffic which may be carried upon a line of railway which the company may thereafter be empowered to construct, so as to give to another railway company an interest in such traffic and profits. The court will not by implication import conditions, not expressed, into an agreement, unless there is something in the agreement which shows that the parties must have intended such conditions. *Midland R'y Co. v. London and North-western R'y Co.*, Law Reports, 2 Equity Cases, 524. 1866.

8. — A contract made with a town for right of way through its streets, conditioned that the railway company should extend its road a certain distance beyond the town, was held not to be *ultra vires*. *Indianola v. Gulf, Western Texas and Pacific R'y Co.*, 56 Tex., 594. 1882.

9. — A contract of a New York corporation, giving the control of its road to a foreign connecting company, is authorized by the statute and is not void as against public policy. *Ogdensburg and Champlain R. R. Co. v. Vt. and Canada R. R. Co.*, 16 Abbott's Practice, N. S. (N. Y.), 249. 1874.

10. Diversion of corporate funds. A railway company incorporated by act of parliament cannot, even with the assent of all its shareholders, legally enter into a contract involving the application of any portion of its funds to purposes foreign from those for which it was incorporated. *East Anglian R'y Co. v. Eastern Counties R'y Co.*, 11 Common Bench, 775; 73 E. C. L., 775. 1851.

11. Docks. If the directors of a railway company become, for the purposes of the company, lessees of land, with a privilege to use docks, and agree to pay rent and royalties to the owner of the docks, and enter into other conditions which, by a state of circumstances subsequently created, appear to be unreasonable and impolitic, such stipulations and conditions cannot, on that ac-

Estoppel—Lands.

count, be treated as *ultra vires* of the directors. *Taff Vale R'y Co. v. Macnabb*, Law Reports, 6 English & Irish Appeal Cases, 169; 6 Eng. (Moak), 1. 1873.

12. Estoppel. Although negotiable securities issued by a corporation without authority of law, or in violation of a statute, are inoperative and void even in the hands of innocent holders, yet if the company in such case knowingly permits the other contracting party, without objection, to go on and perform the contract on his part, and thereby obtains and appropriates to its own use money, property or labor in furtherance of some legitimate corporate purpose, it will be estopped from denying its liability on such contract. *Peoria and Springfield R. R. Co. v. Thompson*, 103 Ill., 187, 1882; 7 Amer. & Eng. R. R. Cases, 101.

13. Furnishing means to aid another company. An agreement by a railway company to contribute towards the parliamentary deposit required for bills promoted by another company is *ultra vires*. So also is an agreement to take shares in future extensions of another company. So also an agreement to make traffic regulations applicable to future extension. *Maunsell v. Midland Great Western R'y Co.*, 1 Hemming & Miller (Eng. Ch.), 130. 1863.

14. Guaranty of bonds. A railway company has power, upon a sufficient consideration, to guaranty the payment of the bonds of another railroad corporation. *Low v. Central Pacific R. R. Co.*, 52 Cal., 53, 1877; 9 Amer. R'y Rep., 366.

15. Harbors. A railway company held not bound by a contract for improving a harbor. *Caledonian, etc., R'y Co. v. Helensburgh Harbor Trustees*, 39 Eng. Law & Equity, 28. 1856.

16. Illegal contracts. The promoters of a railway company contracted with a land owner, being a peer of parliament, to pay him £20,000 personally, for his countenance and support in obtaining its act, such sum to be independent of the ordinary payment for land, severance, and other usual compensation. After the passing of the act the directors of the company, when formed, ratified the contract, but having doubts whether, under the Lands Clauses Act, the land owner was entitled to the money personally, they

covenanted by deed to pay interest upon the amount, which was to be retained by the company or paid into court. A separate agreement stipulated for the quantity of land to be taken for the railway, and the amount to be paid by the company. *Held*, that the original contract, and the contract by the directors after the formation of the company to pay a sum of money for countenance and support previously given in procuring the act, were *ultra vires* of the company, and could not be enforced against the company as payment of expenses of obtaining the act, under the sixty-fifth section of the Companies Clauses Act, or otherwise. *Earl of Shrewsbury v. North Staffordshire R'y Co.*, Law Reports, 1 Equity Cases, 593. 1865.

17. Irredeemable bonds. Under an authority to borrow money a railroad company has no right to raise money by the issue of irredeemable bonds, entitling the holder merely to a share of the earnings after the payment of certain dividends to stockholders. *Taylor v. Philadelphia and Reading R. R. Co.*, 7 Federal Reporter, 386. 1881.

18. Lands. Where land is donated to a railway company, and the title is fraudulently taken by the officers of the company to themselves, the company cannot maintain a suit to acquire the title, if, by its own charter, it is forbidden to take and hold the lands. *Farmers' Loan and Trust Co. v. Green Bay and Minnesota R. R. Co.*, 11 Bissell (U. S. C. C.), 334. 1882.

19. — Where an act creating a railway company, or giving new powers to an existing company, authorizes the purchase of lands for extraordinary purposes, a person who agrees to sell his land to the company is not bound to see that it is strictly required for such purposes; if he does not know of any intention to misapply the funds of the company, but acts *bona fide* in the matter, he may enforce performance of the contract. *Eastern Counties R'y Co. v. Hawkes*, 35 Eng. Law & Equity 8. 1855.

20. — An agreement by a railway board of directors to take land and pay for it in three months from the passage of the incorporation act is valid, and its stipulations enforceable after the passage of the act. *Taylor v. Chichester and Midhurst R'y Co.*, Law Re-

Lease—Rights of Stockholders.

ports, 4 English & Irish Appeal Cases, 628. 1870.

21. — Corporations acquiring title to lands along the line of a railroad may recover damages for injuries to such lands arising from the negligence of the receiver of such road and his agents engaged in operating the line, notwithstanding they acquired such title for purposes foreign to the object of their creation. Such fact is no defense to an action for damages for injury to their lands. *Farmers' Loan and Trust Co. v. Green Bay and Minnesota R. R. Co.*, 12 Federal Reporter, 773. 1882.

22. Lease. The acceptance of rent by a corporation under a lease which it had no power to make would not validate the lease. *Ogdensburg and Lake Champlain R. R. Co. v. Vt. and Canada R. R. Co.*, 6 Thompson & Cook (N. Y. Supreme Ct.), 488; 4 Hun (N. Y.), 712, 1875; 63 N. Y., 176, 1875.

23. Loaning money. A railway company has power to loan money to aid in a work auxiliary to its main business; so held where money was loaned to aid in building an elevated railway. *Cheever v. Gilbert Elevated R'y Co.*, 43 N. Y. Superior Ct., 478. 1878.

24. Musical festival; guaranty of expenses. It is beyond the powers of a railway company chartered by the legislature, or of a corporation organized under the St. of 1870, ch. 224, for the manufacture and sale of musical instruments, to guaranty the payment of expenses of a musical festival; and no action can be maintained against such corporations upon such a guaranty, although it was made with the reasonable belief that the holding of the festival would be of great pecuniary benefit to the guarantors by increasing their proper business, and the festival has been held and expenses incurred in reliance upon the guaranty. *Davis v. Old Colony R. R. Co.*, 131 Mass., 258, 1881; 3 Amer. & Eng. R. R. Cases, 543.

25. Issuance of debentures. Certain debentures held to have been issued without authority. *Fountaine v. Carmarthen R'y Co.*, Law Reports, 5 Equity Cases, 316. 1868.

26. Notice of legal powers. A company is presumed to know the extent of the legal powers of another company with whom it is dealing, and the company is a proper party

defendant to a suit in respect of such dealings, although the bill seeks to make the directors personally liable. *Salomons v. Laing*, 6 Eng. R. R. & Canal Cases, 303. 1850.

27. Pipe lines. The Oil Creek and Allegheny River R. R. Co. agreed to pay the Pennsylvania Transportation Co., an oil-pipe line, a certain sum per barrel on all oil transported by it, in consideration that the pipeline would deliver all the oil under its control to the railway company for transportation; the pipe-line performed its part of the agreement and brought suit to recover the price agreed on. *Held*, that the railway company could not set up as a defense that the contract was *ultra vires*. *Oil Creek and Allegheny River R. R. Co. v. Pennsylvania Transportation Co.*, 83 Pa. St., 160, 1876; 16 Amer. R'y Rep., 322.

28. Pledge of corporate bonds. Where the bonds of a corporation were issued on the understanding that they were to be sold for cash, but were in fact pledged to a creditor as collateral security for corporate notes held by him, the objection that this disposition of them is unlawful is one that is open only to the corporation or its stockholders, unless it also affected some existing right; it cannot be raised by one who holds the property of the company under a voluntary conveyance or by a purchaser, at judicial sale, of the equity of redemption. *Beecher v. Marquette and Pacific Rolling Mill Co.*, 45 Mich., 103. 1881.

29. Purchase of stock in another corporation. The funds of a company cannot legally be devoted to the purchase of stock in another railway company (Stat. 8 Vict., c. 17). *Balfour v. Edinburgh and Northern R'y Co.*, 10 Scotch Session Cases (2d series), 1240, 1848; *Elkins v. Camden and Atlantic R. R. Co.*, 36 N. J. Eq., 5, 1832; 9 Amer. & Eng. R. R. Cases, 590; *Milbank v. N. Y., Lake Erie and Western R. R. Co.*, 64 Howard's Practice (N. Y.), 20, 1882.

30. Rights of stockholders. A stockholder of a corporation will not be allowed, after a reasonable time, to disturb and rescind a contract made by his corporation, after the same has been fully executed, on the ground that it is *ultra vires*, and in excess of the corporate powers granted by the charter of the corporation. *Taylor v. South*

Rolling Stock — Wharves.

and *North Alabama R. R. Co.*, 13 Federal Reporter, 152. 1882.

31. Rolling stock. A contract by one corporation to supply rolling stock for the use of another, *held*, not *ultra vires*. *Attorney-General v. Great Eastern R'y Co.*, Law Reports, 5 Appeal Cases, 473, 1880; 33 Eng. (Moak), 768. See *Same v. Same*, Law Reports, 11 Chancery Division, 449; 27 Eng. (Moak), 672. 1879.

32. Running arrangements. An agreement whereby one railway company grants running powers over its line to another company in consideration of the guaranty of dividends upon certain preferred stock is not *ultra vires*. *South Yorkshire R'y Co. v. Great Northern R'y Co.*, 9 Welsby, Hurlstone & Gordon (Exchequer), 55, 1853; *Great Northern R'y Co. v. South Yorkshire R'y Co.*, 9 Welsby, Hurlstone & Gordon (Exchequer), 642, 1854; 25 Eng. Law & Equity, 482.

33. Sale of railway. A railway company having the right of constructing a particular line of road, with general power to purchase all kinds of property of whatever nature or kind, may purchase from another company a road constructed upon that line, if the latter company had power to sell and dispose of the same. As a general rule, a corporation cannot transfer its franchises, nor a railroad company its road, without legislative authority. *Branch v. Jesup*, 106 U. S., 468, 1882; 9 Amer. & Eng. R. R. Cases, 558.

34. Steamboats and ships. The charter of the Green Bay and Minnesota R. R. Co. construed to empower it to contract with a steamboat line to run in connection with its railway, and to guaranty certain gross earnings to the steamboats. *Green Bay and Minnesota R. R. Co. v. Union Steamboat Co.*, 107 U. S., 98. 1882.

35. — A company established for one purpose cannot, against the will of any dissentient minority (however small), undertake a business foreign to its original object. Thus a railway company cannot become a steamboat company. *Lyde v. Eastern Bengal R'y Co.*, 36 Beavan (Eng. Ch.), 10. 1866. See, also, *Colman v. Eastern Counties R'y Co.*, 10 ib., 1. 1846.

36. — A railway company had authority to keep steam vessels for the purpose of a

ferry. *Held*, that such vessels, when otherwise unemployed, might be used by the company for excursion trips to the sea; though a company incorporated for the purpose of making a railroad cannot, with the dissent of one of the shareholders, carry on a trade distinct from the purposes for which it was incorporated. *Forrest v. Manchester, etc., R'y Co.*, 30 Beavan (Eng. Ch.), 40. 1861.

37. — In an action against a corporation to recover damages occasioned by the negligence of its employes, it is no defense to show that the act from which the injury resulted was not authorized by the charter, if the corporation in any clear and explicit manner recognized the act as done in its business, as by employing agents to superintend it, or receiving the profits arising from it. So held where a railway company operated a line of steamers upon which a passenger was injured. *Hutchinson v. Western and Atlantic R. R. Co.*, 6 Heiskell (Tenn.), 634, 1871; 12 Amer. R'y Rep., 16.

38. Street railways. A contract by which a street railway company transfers the entire control of the road, with all its franchises, receiving in return only a fixed rent, paid in the form of a dividend to its stockholders, is *ultra vires* and void. *Middlesex R. R. Co. v. Boston and Chelsea R. R. Co.*, 115 Mass., 347, 1874; 7 Amer. R'y Rep., 469.

39. Superfluous land. Where a railway station is erected upon arches, the land under the arches is not "superfluous land" within the meaning of the Lands Clauses Act of 1845. Therefore such land cannot be sold as superfluous. *Mulliner v. Midland R'y Co.*, Law Reports, 11 Chancery Division, 611, 1879; 27 Eng. (Moak), 818.

40. Who may object to illegal act. A bondholder of one railway company is not the proper person to object to the right of another company to own shares of the stock of the former. If it exceeded its corporate power in purchasing, they belong to the vendor; the state incorporating is the party offended if a violation of the charter is committed. *Matthews v. Murchison*, 15 Federal Reporter, 691. 1883.

41. Wharves. A railway communicated with a river, upon the banks of which the company was empowered to erect wharves,

Miscellaneous.

etc., and take tolls. The navigation of the river having become deteriorated, the company was about to support a bill for improving it. An injunction was granted to restrain the application of the funds of the company toward that object. Companies having funds for objects which are distinctly defined by act of parliament cannot be allowed to apply them to any other purpose whatever, however advantageous or profitable that purpose may appear to be to the company, or to the individual members of the company. *Munt v. Shrewsbury and Chester R'y Co.*, 13 Beavan (Eng. Ch.), 1. 1850.

UNDERGROUND RAILROAD.

1. **Statute.** To authorize a general term of the supreme court, acting under ch. 582 of the Laws of 1880, to appoint commissioners to determine whether and in what manner an underground railroad shall be constructed, it must be shown affirmatively, by a statement of the facts, that application for the consent of the owners of the property bounded on the line of the proposed railroad has been made and refused, and that the persons to whom the same was made were in fact the owners of at least one-half in value of such property. *Broadway Underground R'y Co., In re*, 23 Hun (N. Y.), 693. 1881.

UNION DEPOTS.

1. **Controversy between companies.** The court may interfere between two railway companies entitled to the joint use of a station by prescribing regulations for its management; but such interference ought not to take place without grave occasion. The court may also direct a partition of the station, and appoint a receiver, if necessary. But where provisions exist for the settlement of disputes on the above subjects by arbitration, the court will withhold its intervention until the remedy thus provided has been resorted to. *Shrewsbury and Birmingham R'y Co. v. Stour Valley R'y Co.*, 21 Eng. Law & Equity, 628; 2 De Gex, Macnaghten & Gordon, 866. 1853.

2. **Change of line.** Under the statute of 1871, ch. 343, providing for the establishment

of a union passenger station in the city of Worcester for five railway companies whose roads lead into the city, and for making corresponding changes in their several tracks and locations, and for regulating the use thereof and the compensation therefor in the transportation both of passengers and of freight, and providing in § 10 that the Boston, Barre and Gardner R. R. Co., one of the said corporations, "may extend its railroad to said union passenger station, and for that purpose may locate, construct and maintain its railroad within the location of any other railroad corporation in said city, at such places and upon such terms as the parties agree, or, in case of disagreement, as the board of railroad commissioners determines," the commissioners have no power to authorize the Boston, Barre and Gardner R. R. Co. to take as well as to use lands within the location of another railway in the city, and it is their duty, upon a petition to them by the company whose lands they authorize the above named corporation to use, to fix the compensation to be paid by the latter corporation to the former. *Worcester and Nashua R. R. Co. v. R. R. Commissioners*, 118 Mass., 561. 1875.

3. **Ladies' waiting room.** Where several railway companies have provided in their depot building, in a large city, separate waiting rooms for ladies and gentlemen, a regulation that no gentleman without a lady shall be allowed to enter and remain in the ladies' room is not only reasonable, but absolutely necessary to enable the companies to discharge a duty they owe the public, of protecting females, while at the depot, from violence and insult. *Toledo, Wabash and Western R'y Co. v. Williams*, 77 Ill., 354. 1875.

4. **St. Louis.** The statute in relation to the St. Louis Union Depot construed. *Union Depot Co. v. City of St. Louis*, 76 Mo., 393, 1882; *State ex rel. v. St. Louis, Kansas City and Northern R'y Co.*, 3 Mo. App., 180, 1876.

UNITED STATES PROPERTY.

1. **Construction of railway.** Under acts of congress of March 3, 1819, and April 28, 1828, the secretary of war had authority to

Railway Bonds — Evidence — Sale of Rails.

grant the right to build a railway over the property of the United States at Harper's Ferry. *United States v. Baltimore and Ohio R. R. Co.*, 1 Hughes (U. S. C. C.), 138. 1875.

USURY.

1. Railway bonds. Neither a natural person nor a corporation can legally sell its bonds, bearing the highest legal rate of interest, at a discount, for the purpose of borrowing money. Such a sale is in effect a loan and is usurious. *Comm'rs of Craven County v. Atlantic and North Carolina R. R. Co.*, 77 N. C., 289. 1877.

2. Statute. The usury law of Georgia construed. *Caswell v. Central R. R. and Banking Co.*, 50 Ga., 70. 1873.

VENDOR'S LIEN.

1. Evidence. The evidence held insufficient to sustain a vendor's lien upon a railway. *Cross v. Burlington and South Western R. R. Co.*, 51 Ia., 683. 1879.

2. Injunction. The court will not, for the purpose of enforcing the lien of an unpaid vendor against a railway company for his purchase and compensation money, interest and costs, restrain the company from running trains or engines over the land until the sale (directed by the order) of the land agreed to be taken. *Lycett v. Stafford and Uttoxeter R'y Co.*, Law Reports, 13 Equity Cases, 261. 1872.

3. Purchase of railway. Certain parties purchased a railroad and received a deed therefor, but left a part of the purchase price unpaid, and then procured an act of the legislature, by which they, as purchasers and owners, were incorporated. *Held*, that the company so formed took the railroad subject to the vendor's lien for the unpaid purchase money. *North Carolina R. R. Co. v. Drew*, 3 Woods (U. S. S. C.), 691. 1879.

4. Railroad ties. A written contract for the sale of land stipulated that the vendee should cut the timber growing upon it into railway ties, upon which the vendor should have a lien to the extent of the purchase price of the land. The vendee sold to a rail-

road company, whose agent received and paid for them with full notice of plaintiff's lien. *Held*, that the company was bound by its agent, and bought the ties subject to the rights of the notice to lien-holder. *Slater v. Burlington and Mo. River R. R. Co.*, 38 Ia., 261. 1874.

5. Right of way. A vendor of land to a railway company which has entered and used it for the purpose of its railway is entitled to the same lien on the land for the unpaid purchase money, and the same remedies for enforcing it, as an ordinary vendor. *Wing v. Tottenham and Hampstead Junction R'y Co.*, Law Reports, 3 Chancery Appeal Cases, 740, 1868; *Galt v. Erie and Niagara R'y Co.*, 15 Grant Ch. (Upper Canada), 637. 1869. See, also, *Slater v. Canada Central R'y Co.*, 25 ib., 363. 1878.

6. — Where a decree had been obtained by a vendor against a railway company for specific performance of a contract for sale, in which inquiries were directed to ascertain the amount due for damages and costs, and the amount, when found due, together with the purchase money, was ordered to be paid, but was not declared to be a charge on the land, *held*, that the vendor was not entitled, under the liberty to apply, to enforce by petition a lien on the land for the sums due, especially as there were incumbrancers, not parties to the suit, whose rights would be affected by such lien. *Attorney-General v. Sittingbourne and Sheerness R'y Co.*, Law Reports, 1 Equity Cases, 636. 1866.

7. Sale of rails. A contractor agreed with a railway company to construct its line, taking stock in payment, and bargained with an importer that the importer should furnish him the rails upon credit upon a deposit, *pro rata* as they were delivered, of the stock as collateral security, it being agreed by all parties that the rails were to be delivered directly to the company, which would forward the contractor's stock directly to the importer. The importer bonded a cargo of rails, taking the warehouse receipt in his own name, and forwarding to the contractor a bill of parcels, which the contractor assigned to the company. The corporation and the contractor having become insolvent, the collateral security was not furnished, and, the rails not being paid for,

Damages — Delivery to Carrier.

the importer refused to transfer the warehouse receipt. Upon a bill in equity by the company against the importer, to compel the delivery of the rails, *held*, that the corporation had an interest in the agreement between the contractor and the importer, which equity would enforce; but that the importer had a lien upon the rails for the unpaid purchase money, whether the title in them had or had not passed to the contractor; and that the company was entitled to the rails upon payment of what was due the importer. *Ware River R. R. Co. v. Vibbard*, 114 Mass., 447. 1874.

8. Specific performance. Bill by unpaid vendors against two railway companies — the purchasers and the lessees — in possession of the land for specific performance of the contract, for payment of the purchase money, for an injunction against both companies, for a declaration of lien, and that it might be enforced by a sale, and that a receiver might be appointed of the rents and profits of the purchaser's estate. The court held that the lessees were properly made parties, declared a lien as against both companies and gave leave, in case the money should not be paid, to apply for an injunction and for the appointment of a receiver to enforce the lien. *Bishop of Winchester v. Midhants R'y Co.*, Law Reports, 5 Equity Cases, 17. 1867.

9. Subrogation. A person who pays a debt of a railroad company, incurred under contracts of purchase for rolling stock, which, if not paid, would entail serious loss and embarrassment to the company, under agreement with the company for security for repayment by subrogation to the rights of the vendors under the contract, is entitled to be subrogated to the rights of the vendors to the amount of his advances. *Coe v. New Jersey Midland R'y Co.*, 27 N. J. Eq., 110. 1876.

VENDOR AND VENDEE.

See CARRIAGE OF MERCHANDISE.

1. Damages; penalty. Where a railway company, having constructed its road-bed through a city lot, entered into a written contract with the owner, thereby to acquire a right of way over the lot, in consideration

of a given amount in money, and of an agreement on its part that it would do certain work on specified streets leading to or around the lot, where they were intersected by the railroad, within a time prescribed by the contract,—a stipulation in such contract, that for any failure on the part of the company, after the time within which it agreed to do the work, it would pay the owner \$1 per day for each day it was in default, will be construed to have been intended by the parties as a penalty, and not as liquidated damages; and on a breach of the stipulation the owner would be entitled to recover the actual loss or injury sustained by him therefrom, which is the diminution of the value of the lot resulting from the obstruction or interruption by the railroad of the streets on which the work was to be done. *Hooper v. Savannah and Memphis R. R. Co.*, 69 Ala., 529. 1881.

2. Death of vendor; costs of obtaining deed from infant heirs. A land owner contracted with a railway company to sell it a certain portion of his land; he died; and the legal estate in the lands in question descended to infants. *Held*, that inasmuch as the vendor, knowing that the purchasers would take that portion of his lands, had suffered the legal estate therein to descend to infants, he had thereby occasioned the necessity for a suit, in order to procure a conveyance of the legal estate, and that the costs of the suit must be defrayed out of the purchase money. *Midland Counties R'y Co. v. Wescomb*, 2 Eng. R. R. & Canal Cases, 211. 1840.

3. Delivery to carrier. The rule that delivery to the usual carrier, with proper instructions, is to be considered delivery to a consignee who has ordered goods from a distance without giving special directions as to shipment, is applicable to a case where the goods shipped are not all of the particular grade ordered, if they have been received by the consignee with knowledge of the fact and without objection. In such case, in the absence of any warranty by the consignee he is not liable for damage to the goods occurring while they are in the hands of the carrier. *Graff v. Foster*, 67 Mo., 512. 1878. See, also, *Wigton v. Bowley*, 130 Mass., 252, 1881; 3 Amer. & Eng. R. R. Cases, 328.

Intoxicating Liquor — Right of Re-entry.

4. — If a man places his wheat in a railroad car under a contract to sell it, by the terms of which contract it is not to be removed until paid for, he does not thereby part with his right of possession, and he has the right to remove the same from the car if not paid for. *Toledo, Wabash and Western R'y Co. v. Gilvin*, 81 Ill., 511. 1876.

5. — Where corn is shipped by railroad for a purchaser, a bill of lading forwarded to him, and a draft drawn on him for the price, which is paid, the title to the grain will, *ipso facto*, be transferred to and vested in such purchaser, but the acceptance and payment of drafts drawn on general account, without reference to any particular lot forwarded, will not pass the title. *Cobb v. Illinois Central R. R. Co.*, 88 Ill., 394, 1878; 21 Amer. R'y Rep., 317.

6. **Intoxicating liquor.** Where an agent takes in Michigan a verbal order for liquors and transmits it to his principals in Ohio for approval, and the latter there approve it and ship the goods to a common carrier in Ohio, and the vendee accepts the goods in Michigan, paying the freight charges, the contract is an Ohio contract, and not a Michigan one; and the transaction is not within the Michigan prohibitory liquor law. *Kling v. Fries*, 33 Mich., 275. 1876.

7. **Loss of goods in depot; when title passes.** Cider was sold by G. to P., upon an agreement that P. would pay for the cider upon production of the shipping receipt. The cider was placed in the defendant's depot to be loaded, and the shipping receipt not yet made out. The cider was lost by the neglect of the carrier. *Held*, that the title to the cider had not yet passed from G., and that he could recover for the loss. *Gilbert v. N. Y. Central R. R. Co.*, 6 Thompson & Cook (N. Y. Supreme Ct.), 662. 1875.

8. **Payment of purchase money into court.** The plaintiff agreed to sell lands to a railway company at a sum to be paid on completion, with interest at four per cent. from the date of the agreement. The company was to be at liberty to take possession on making a certain deposit. If from any cause, other than default of the vendor, the purchase was not completed in six months, the interest was, from the expiration of the six months, to be at the rate of five per cent.

The deposit was made, and possession taken. The company, when pressed to complete, more than three years after the date of the agreement, alleged inability from want of funds. *Held* (affirming the decision of Stuart, V. C.), that the plaintiff was not entitled to an order, on motion, for payment of the balance of the purchase money into court. *Pryse v. Cambrian R'y Co.*, Law Reports, 2 Chancery Appeal Cases, 444. 1867.

9. **Purchase money deposited in bank; failure of bank.** Plaintiff contracted with the B., W. and S. R'y Co. to sell lands at 4,069*l*. Pending the investigation, the company requested permission to enter and carry on its works, offering to pay the purchase money into a bank in joint names. Plaintiff consented, if the payment or deposit were to be made into his own bankers, and interest at 5*l*. per cent. paid up to the time of completion. The money was so paid in, and the company entered and worked. The bank failed. *Held*, that the plaintiff, and not the company, was liable for the loss. *St. Paul v. Birmingham R'y Co.*, 23 Eng. Law & Equity, 37; 17 Jurist, 1176. 1853.

10. **Purchase of railway; liability of vendee for prior acts of vendor.** By the Statute of 1874, ch. 55, the Old Colony R. R. Co. was authorized to purchase the rights, franchise and property of the Middleborough and Taunton R. R. Co., and the latter was empowered to convey to the former its franchise and property, rights, easements, privileges and powers, and thereupon the former company was to "be subject to all the duties, liabilities, obligations and restrictions to which said last named corporation may be subject." *Held*, that the Old Colony R. R. Co., upon the completion of the purchase and conveyance, became directly liable in an action of tort for damage occasioned by the prior neglect of the Middleborough and Taunton R. R. Co. *New Bedford R. R. Co. v. Old Colony R. R. Co.*, 120 Mass., 397. 1876.

11. **Right of re-entry; ejectment.** Where a contract for the sale of land contains a provision that upon default of the vendee, in payment of the principal or interest, or in any other stipulation of the contract, the vendor may re-enter, and the vendee makes default, and, on demand, refuses to deliver possession,

Change of — Evidence — Misconduct.

the vendor may maintain ejectment. *Central Pacific R. R. Co. v. Mudd*, 59 Cal., 585. 1881.

12. Sale of wood. Where anything remains undone necessary to convey the title to personal property which is sought to be delivered to the vendee by the vendor under a contract for the sale and delivery of the same, an action on the contract for the value of the property cannot be maintained by the vendor. But where such thing remains undone through the vendee's fault, he may be liable for a breach of such contract. *Indianapolis, Peru and Chicago R'y Co. v. McGuire*, 62 Ind., 140. 1878.

13. Statute of frauds. The making of substantial improvements, pursuant to an oral agreement to convey the real estate improved, by a vendee in possession prior to and at the time of the agreement, is such a part performance as takes the agreement out of the statute of frauds. *Pfiffner v. Stillwater and St. Paul R. R. Co.*, 23 Minn., 348. 1877.

14. — A delivery to a common carrier specified in a verbal contract of sale does not take it out of the operation of the statute of frauds; there must be an acceptance by the vendee or an authorized agent, and an authority to receive for transportation carries with it no implied authority to accept. *Allard v. Greasert*, 61 N. Y., 1. 1874.

15. Stoppage in transitu. Goods were shipped by the vendor on board of a general ship, belonging to a firm of which the purchaser was a member, and registered in the purchaser's name. Three parts of the bill of lading (by which the goods were deliverable at Goole to the purchaser or assigns) were handed to the vendor, and the fourth part retained by the master. *Held*, that the delivery on board was not delivery to the purchaser, so as to preclude stoppage *in transitu* before the delivery of the goods at Goole. *Schotsmans v. Lancashire and Yorkshire R'y Co.*, Law Reports, 1 Equity Cases, 349. 1865.

16. Usage. A. sold grain to B. for cash; B. did not pay for it, but sold and delivered it to C., who was ignorant that it was not paid for. A. replevied the grain. At the trial there was proof of a custom in the grain trade on cash sales to deliver the grain to the buyer before payment, and to allow

him time for payment not exceeding ten days, and also of a usage for the buyer in such cases to sell the grain at any time after delivery to him. *Held*, that title to the grain passed to C. *Goodwin v. Boston and Lowell R. R. Co.*, 111 Mass., 487. 1873.

VENUE.

1. Change of. The provisions of the Code relating to the granting of a change of venue in civil actions are applicable to proceedings on appeal from an award of damages for right of way by a sheriff's jury. *Whitney v. Atlantic Southern R'y Co.*, 53 Ia., 651, 1830; 21 Amer. R'y Rep., 175.

2. — An application of a railroad company for a change of venue, based on the affidavit of an agent whose duty it is to investigate the facts connected with all claims against the company, and who is conversant therewith, is sufficient. *Jones v. Chicago and Northwestern R. R. Co.*, 36 Ia., 68. 1872. See, also, *Hedge v. Gibson*, 7 Amer. & Eng. R. R. Cases (Ia.), 69. 1882.

3. — Various questions of practice on changes of venue determined. *Bannigan v. Central Iowa R'y Co.*, 58 Ia., 671, 1882; 7 Amer. & Eng. R. R. Cases, 491; *Edwards v. Southern Pacific R. R. Co.*, 48 Cal., 480, 1874; *Hall v. Central Pacific R. R. Co.*, 49 Cal., 454, 1875; *Houston and Texas Central R'y Co. v. Ryan*, 44 Tex., 426, 1876; *Taylor v. Atlantic and Pacific R. R. Co.*, 68 Mo., 397, 1878; *Pa. Canal Co. v. Philadelphia and Reading R. R. Co.*, 2 Pearson (Pa.), 298, 1877.

VERDICT.

1. Evidence. The verdict will be sustained in the case of a conflict of evidence, unless it appears that it was not the result of an honest and intelligent exercise of judgment. *Moody v. St. P. and S. C. R'y Co.*, 41 Ia., 284. 1875.

2. Misconduct. Discussion by a juror, outside of the jury room, of a case pending and undecided before him, is the clearest evidence that he is not an unbiased and impartial juror, notwithstanding his disclaimer of the influence of such discussion

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upon his own mind. *Pool v. Chicago, etc., R. R. Co., 2 McCrary (U. S. C. C.), 251. 1881.*

3. — To render invalid a verdict arrived at by aggregating the several amounts which the different jurors are in favor of, and dividing the result by twelve, there must have been an agreement on their part in advance to be bound by the verdict thus obtained. *Hamilton v. Des Moines Valley R. R. Co., 36 Ia., 31. 1872.*

4. **Motion to direct verdict; waiver.** Where, in an action to recover for personal injuries, a motion asking the court to direct a verdict for defendant on the ground of plaintiff's contributory negligence was overruled, and a verdict for the plaintiff was subsequently set aside upon motion of the defendant upon the same ground, it was held that the defendant, by filing the latter motion, waived the error, if any, committed by the court in overruling the former. *Laverenz v. Chicago, Rock Island and Pacific R. R. Co., 53 Ia., 321. 1880.*

5. **Practice.** Various matters of practice determined. *Fallon v. Brooklyn City, etc., R. R. Co., 56 N. Y., 652, 1874; Dougherty v. St. Louis, Kansas City and Northern R'y Co., 62 Mo., 554, 1876; Kelley v. Chicago, Milwaukee and St. Paul R'y Co., 53 Wis., 74, 1881; 5 Amer. & Eng. R. R. Cases, 469; Steele v. Charlotte, Columbia and Augusta R. R. Co., 11 So. Car., 589, 1878; Wilson v. Southern Pacific R. R. Co., 62 Cal., 164, 1882; Ebersole v. Northern Central R. R. Co., 23 Hun (N. Y.), 114, 1880; Thompson v. Cincinnati, Lafayette and Chicago R. R. Co., 54 Ind., 197, 1876; Pitzer v. Indianapolis, Peru and Chicago R'y Co., 80 Ind., 569, 1881.*

6. **Successive verdicts set aside.** To permit, even after three trials, a verdict to stand without evidence, is to plunder a citizen under the form of law. *Lodge v. Railroad Co., 10 Philadelphia, 158. 1874.*

7. — There had been three verdicts for the same party, the last sustained by the circuit court. Although the supreme court may be of the opinion that the weight of evidence is against it, yet the verdict and judgment will not be disturbed. *Louisville and Nashville R. R. Co. v. Graves, 78 Ky., 74. 1879.*

VESSELS.

1. **Collision.** The anchoring of a vessel in an unsafe place is a negligent act, and if she is run into and injured by another vessel, or if persons in charge of her are injured, and the improper anchorage was a proximate cause of the injury, no action lies against the owner of the colliding vessel. *Lambert v. Staten Island R. R. Co., 70 N. Y., 104, 1877; Thompson v. Same, ib., 598, 1877.*

WAREHOUSEMEN.

See CARRIAGE OF MERCHANDISE; FIRES; FORMER ADJUDICATION.

1. **Carrier's charges.** A warehouseman, with whom freight, on which the charge for transportation is unpaid, is stored by a common carrier, and who, without the knowledge or consent of the common carrier, delivers the property to the consignee, is liable to the common carrier for the amount of his charges. *Compton v. Shaw, 1 Hun (N. Y.), 441. 1874.*

2. **Conversion; damages.** The defendant, as a warehouseman, held for the plaintiffs corn belonging to them. G., an agent of the plaintiffs, obtained sixty quarters from the defendant, promising to forward it a delivery order from the plaintiffs. T. subsequently contracted to purchase sixty quarters of corn from the plaintiffs, and, having obtained from the plaintiffs a delivery order to himself, indorsed it to G., who forwarded it to the defendant as the delivery order which he had promised to send to it. T. was unable to pay for the corn, and G. never accounted to the plaintiffs for the price of the sixty quarters of corn which G. had obtained. *Held* (overruling the exchequer decision), by Bramwell and Thesiger, L. JJ., that, although there had been a conversion of the sixty quarters of corn by the defendant, the plaintiffs were only entitled to nominal damages. *Hior v. London and Northwestern R'y Co., Law Reports (4 Exchequer Division), 188, 1879; 31 Eng. (Moak.), 441.*

3. **Degree of care required.** As to goods in their possession merely as warehousemen common carriers are bound to no more than ordinary care or such as a man of ordinary

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prudence would use in respect to his own property placed in like circumstances. *Pike v. Chicago, Milwaukee and St. Paul R'y Co.*, 40 Wis., 583, 1876; 13 Amer. R'y Rep., 447; *White v. Colorado Central R. R. Co.*, 3 McCrary (U. S. C. C.), 559, 1878.

4. — After the responsibility of a railroad as a common carrier has ceased, it may charge for storage of goods as warehousemen, in which case it will be liable for ordinary care in relation to the goods. But where they are acting in good faith as mere depositaries, without pay, they are only responsible for slight care, and would not be liable for an act of ordinary negligence on the part of their servant in taking care of the goods. So held where flour had been received by the consignee and placed in a separate part of the depot at his request, and there stored gratuitously, where it was injured by leakage of coal oil. *Brown v. Grand Trunk R'y Co.*, 54 N. H., 535, 1874; 11 Amer. R'y Rep., 195.

5. **Fire.** A *prima facie* case of negligence is made out against a warehouseman who refuses to deliver property stored with him, upon proof of demand and refusal. Such evidence alone is sufficient to show a conversion by him. But if it appear that the property, when demanded, had been burned, the burden of proof is then on the bailor to show that the fire was the result of the negligence of the warehouseman. *Wilson v. Southern Pacific R. R. Co.*, 62 Cal., 164. 1882.

6. — In an action to recover of a railroad company for the loss of goods delivered to it for transportation, where it was admitted by the pleadings that the goods were destroyed by fire while in defendant's warehouse, and alleged that such fire occurred through defendant's negligence, *held*, that the burden of proof was upon the plaintiff to establish such negligence before he could recover. *Denton v. Chicago, Rock Island and Pacific R. R. Co.*, 52 Ia., 161. 1879.

7. — The evidence examined in an action for damages for negligence in management of a lamp by a warehouseman. *Wilson v. Southern Pacific R. R. Co.*, 7 Amer. & Eng. R. R. Cases, 400; again reported, 9 ib., 161 (Cal.), 1882; *Kronshage v. Chicago, Milwaukee and St. Paul R'y Co.*, 45 Wis., 500, 1878.

8. — Putting a large quantity of powder (one hundred and sixty kegs) in the same warehouse with plaintiff's goods was negligent conduct, for which defendant is liable in damages to the extent of the loss resulting to plaintiff from the presence of such powder in the warehouse. A fire occurring in defendant's warehouse, where plaintiff's goods were stored, there being a large quantity of powder in the same house, if the firemen who resorted to the place for the purpose of extinguishing the fire were, by the presence of powder in the house, hindered and prevented from saving plaintiff's goods, the powder may be regarded as the proximate cause of the loss. *White v. Colorado Central R. R. Co.*, 5 Dillon (U. S. C. C.), 428. 1879.

9. **Measure of damages; loss of samples.** Where a commercial traveler deposited a case of patterns in a waiting-room of the defendant and it was lost, *held*, that the plaintiff, in an action against it as a warehouseman for negligence, could not recover damages beyond the actual value of the article lost. There is no undertaking on the part of warehousemen to be answerable beyond the actual value of the article, except by special contract. *Anderson v. North Eastern R'y Co.*, 6 Hurlstone & Norman (Exchequer), American Reprint, 914; 4 Law Times (N. S.), 216. 1861.

10. **Place of delivery.** If the place of consignment can be reached by any track of which the railroad company is the owner or lessee, or in the lawful use, or which can be lawfully and rightfully used by it, the company is bound to deliver at that place. But this is the extent of the duty imposed by the constitution. The contrary interpretation would involve the fundamental law in the absurdity of commanding the performance of an unlawful act. A carrier cannot be compelled to deliver over the track of another company. *Chicago, Burlington and Quincy R. R. Co. v. Hoyt*, 1 Bradwell (Ill.), 374. 1878.

11. **Refusal to deliver grain at warehouse.** To make a railway company liable under § 82, ch. 114, R. S. of 1874, for not delivering grain to the consignee, or place of consignment, the freight must be in bulk, and must be consigned to the warehouse or

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place in question at the time of shipment. A demand at the place of destination is not, of itself, sufficient. *Chicago and Northwestern R'y Co. v. Stanbro*, 87 Ill., 195, 1877; 18 Amer. R'y Rep., 180.

12. — In a simple action on the case, without reference to the statute, against a railway company, for not delivering grain shipped in bulk to a particular warehouse, the true measure of damages is the necessary cost of moving the cars to the place required. If the suit is under the statute, the depreciation in the price of the grain may be considered. *Ib.*

13. **Watchman.** Where the daily average of goods stored in a railway warehouse does not exceed \$500, ordinary care does not require the company to keep a night watch about such warehouse, or to have some one to sleep therein. *Pike v. Chicago, Milwaukee and St. Paul R'y Co.*, 40 Wis., 583, 1876; 13 Amer. R'y Rep., 447; *Kronshage v. Same*, 40 Wis., 587, 1876.

14. — Plaintiff's goods (of the alleged value of less than \$300) having been destroyed by fire in defendant's depot, it was error to submit to the jury the questions, whether the goods might have been saved if a night watch had been provided, or if some one had slept in the depot. *Ib.*

15. **Warehouse on railway.** A warehouse on a railway right of way is not a fixture. *Evans v. McLucas*, 11 Amer. & Eng. R. R. Cases (So. Car.), 310. 1881.

16. **When carrier's liability ends.** Where goods are carried to their place of destination and there deposited in a warehouse, are kept safely for the consignee until he has had reasonable time to remove them, and are afterwards destroyed by fire, the company is not liable for them as a common carrier. *Lemke v. Chicago, Milwaukee and St. Paul R'y Co.*, 39 Wis., 449, 1876; 13 Amer. R'y Rep., 406; *Leavenworth, Lawrence and Galveston R. R. Co. v. Maris*, 16 Kans., 333, 1876; *Illinois Central R. R. Co. v. Friend*, 64 Ill., 303, 1872.

WAREHOUSE RECEIPTS.

1. **Construction.** Warehouse receipts for grain in store should be construed by their

terms and by commercial usage. In commerce they would be understood to represent the title to the quantity of grain specified, and changes in bulk caused by delivery and shipments would not affect the title of the holder of receipts, and he could call for his proper quantity so long as that much remained in store. Nor would the consumption of the grain by the warehouseman make any difference so long as the quantity is kept good. But if the grain is all consumed by the owner's express or implied consent, it may fairly be assumed that the owner and the receptor have agreed upon a sale to the latter, especially if the receipts imply that the bailment may be converted into a sale at the option of the parties. *Ledyard v. Hibbard*, 48 Mich., 421. 1882.

WARRANTY.

See CONVEYANCE.

1. **Sale of railway bonds.** A statement in an advertisement of railway bonds for sale, that "the road is in successful operation and earning net more than the interest on all its bonds;" held to be a representation, not that the road was earning that amount at the exact date of the advertisement or during the time it might appear in the newspaper; but that the road was then on a paying basis and was steadily earning net more than the interest on all its bonds. *Blake v. Watson*, 45 Conn., 323. 1877.

WAR OF 1861.

See CARRIAGE OF MERCHANDISE; CONFISCATION; INJURIES TO EMPLOYEES.

1. **Capture of property.** The carrier is liable if he negligently expose property to capture by a public enemy, in consequence of which it is captured and destroyed. *Caldwell v. Southern Express Co.*, 1 Flippin (U. S. C. C.), 85. 1866.

2. **Carriage of Confederate soldiers.** When, during the late war, a company of men, organized as soldiers, though unarmed, were on their way from Columbus to Atlanta, with the open intent to offer themselves to Governor Brown for service as sol-

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diers in the Confederate army, and a railroad company received them on its car as soldiers, with their baggage, the transportation to be paid for by the state or Confederate authorities, it was held that both the company of men and the railroad company were engaged in an illegal transaction, and the rule *in pari delicto* applies to a suit against the railroad company for negligence in its duty as a common carrier. *Redd v. Muscogee R. R. Co.*, 48 Ga., 102, 1873; 11 Amer. R'y Rep., 390.

3. — But when it appeared by the proof that one of the soldiers having with him a negro slave, and the railroad company refused to carry the slave as a soldier, or as a part of or adjunct to the company, but demanded and received from the soldier fare for said slave as an ordinary passenger, the rule *in pari delicto* does not apply, and if the owner of the slave is injured by the negligence of the road he can recover for the injury. *Ib.*

4. **Circulating notes of railway company.** The circulating notes of a railway company, payable in either gold, silver or Confederate money on demand, were issued in 1862. After the war had closed, a demand, so as to compel the company to elect whether to pay in Confederate notes or other currency, became unnecessary, as the payment of Confederate money was then illegal. *Miss. and Tenn. R. R. Co. v. Green*, 9 Heiskell (Tenn.), 588, 1872.

5. **Confederate money.** A payment of a school fund loan in Confederate money during the war by a railway company held void. *New Orleans, St. Louis and Chicago R. R. Co. v. State*, 52 Miss., 877, 1875.

6. — Deposits of Confederate money are payable in accordance with the value of such money at the time of the deposit. *Georgia R. R. and Banking Co. v. Dabney*, 52 Ga., 515, 1874.

7. — Contracts made during the war in one of the Confederate States, payable in Confederate currency, but not designed in their origin to aid the insurrectionary government, are not, because thus payable, invalid between the parties. *Wilmington and Weldon R. R. Co. v. King*, 91 U. S., 3, 1875.

8. — Allowing stockholders, during the war, to pay up their entire stock subscribed

in the then depreciated Confederate currency, before regular calls were made, is illegal on the part of the directors, but the act of the directors, being *ultra vires*, will not discharge other stockholders from paying for their stock in proper calls made, because such act is a mere nullity and will not prevent the company from still collecting from those who paid in such currency the real amount due by them. *Macon and Augusta R. R. Co. v. Vason*, 57 Ga., 314, 1876.

9. **Confiscation; railway stock.** The decree of the Confederate courts confiscating the stock of the Petersburg R. R. Co. is wholly void. The company was held liable to the stockholders for the dividends accruing, computing the same according to the market value of Confederate money at the time the dividends were declared. *Keppel v. Petersburg R. R. Co.*, Chase's Decisions, 167, 1868.

10. **Impressment.** A mere notice of seizure of property for war purposes, unaccompanied by any act of possession, does not constitute an impressment of the property. *Central R. R. and Banking Co. v. Atlantic and Gulf R. R. Co.*, 50 Ga., 444, 1873.

11. **Limitations.** The statute of limitations was suspended by the war of the rebellion. *Ellis v. Atlantic and Gulf R. R. Co.*, 61 Ga., 362, 1878.

12. **Military control of railway.** Where a railroad company was under the military control of the government, and operated by its officers in the transportation of troops, munitions of war and supplies, so that it was not in the free and unrestrained exercise of its franchise, held, that the company was not liable as a common carrier for refusing to receive freights for transportation, it not being safe to undertake their carriage. *Phelps v. Illinois Central R. R. Co.*, 94 Ill., 548, 1880; *Illinois Central R. R. Co. v. Phelps*, 4 Bradwell (Ill.) 258, 1879. See, also, *Cobb v. Ill. Central R. R. Co.*, 38 Ia., 601, 1874.

13. — A common carrier is not liable for property received within the Confederate lines for transportation, which was seized and destroyed by Confederate soldiers in obedience to military orders, and of which no notice was given to the consignor. *Nashville and Chattanooga R. R. Co. v. Estes*, 10 Lea

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(Tenn.), 749, 1832; 3 Amer. & Eng. R. R. Cases, 492.

14. — If a citizen and a railroad company were ordered by the military authorities to transport the cotton of defendant in error from Chattanooga to Atlanta during the war, and they obeyed, and a part of the cotton was lost or destroyed, but not through the negligence or fault of the railroad company, it would not be responsible for such loss. It was the duty of defendant in error, having notice of such orders and the transportation of his cotton, to look after it himself. If loss ensued from his failure to do so, he must bear it. *Railroad Co. v. Hurst*, 11 Heiskell (Tenn.), 625. 1872.

15. **Mortgage bonds; Confederate money.** Notes issued by the Confederate government having become the currency in which contracts were made and business conducted in the insurrectionary states, during the recent civil war, and such notes having been designated by general custom as notes for so many "dollars," parol evidence is admissible, where suit is brought . . . to enforce a contract payable in "dollars," and made during the war, to prove — the above condition of things being first shown — that the term "dollars," as used in the contract, meant, in fact, Confederate notes. In the absence of such evidence the presumption of law would be that by the term "dollars" the lawful currency of the United States was intended. *Confederate Note Case*, 19 Wallace, 548. 1873.

16. — The interest payable on a railway mortgage bond, issued as above mentioned, follows the character of the principal, and is payable in like currency. *Ib.*

17. **Public enemy.** The destruction of property by the Confederate army cannot be set up by a common carrier in Tennessee as the act of the "public enemy." *Nashville and Chattanooga R. R. Co. v. Estis*, 7 Heiskell (Tenn.), 622. 1872.

18. — A railroad company ceased to be a common carrier while its road was in the hands of the Confederate authorities, appropriated to military uses. *Ib.*

19. — Whether spirits delivered to a railroad company for transportation were destroyed by the order of the Confederate authorities, as a military measure to prevent

their falling into the hands of the approaching federal army, or as a matter of public necessity for the safety of the people in the neighborhood, in either case such destruction would be a good defense for the company whose road was at the time in the hands of said authorities. *Ib.*

20. **Slave accompanying troops killed on trains.** Where the question at issue was whether a slave, for the killing of which the action was brought, was on the cars of the defendant as a passenger or as an attachment to a military organization then being transported to Atlanta for the purpose of entering the service of the Confederate States in the war against the United States, evidence showing who paid the fare of such slave is material. *Muscogee R. R. Co. v. Redd*, 54 Ga., 33. 1875.

21. — The conversation between the soldier in whose employ said slave was and the conductor, as to the payment of his fare, showing a demand therefor by the latter, was admissible. *Ib.*

WASTE WATER.

1. **Water tanks.** Where a railway company turns its waste water from a tank upon the premises of another, where it spreads and freezes, doing damage to the property of the owner, the company cannot claim exemption from liability on the ground that the freezing of the water was an act of nature, as such a result, from its wrongful act, might have been foreseen. To excuse from liability for an act of nature in combination with the defendant's own act, it must be such as could not have been foreseen and prevented by the exercise of ordinary care and prudence. *Chicago and Northwestern R'y Co. v. Hoag*, 90 Ill., 339. 1878.

WATERCOURSES.

See BRIDGES; EMINENT DOMAIN.

1. **Action for damages.** It is not error in the court below to dismiss an action against a railroad company on the ground that the court had no jurisdiction thereof, because the charter of the defendant's company pro-

Bridges.

vides the manner in which a party injured by the construction of its road shall proceed to recover damages, where the complaint does not allege that the cause of action arose from the construction of said road. *Cole v. Carolina Central Ry Co.*, 74 N. C., 587. 1876.

2. — In an action for damages it was claimed that the railway company had negligently caused a pond of water by which malaria was produced. By way of amendment plaintiff sought to set up the allegation that the embankment had exposed to sun and air earth that had been previously covered by water, thus causing malaria. *Held*, that the amendment contained a new cause of action. *Central R. R. and Banking Co. v. Wood*, 51 Ga., 515, 1874; 8 Amer. R'y Rep., 9.

3. — Where a declaration alleges the construction of a dam by a railway company on its land adjoining that of the plaintiff, and thereby overflowing the land of the latter, and the proof shows the closing of a culvert under its road by the defendant, through which the water was accustomed to flow, this will sustain the allegation in the pleading, and there will be no variance. *Illinois and St. Louis R. R. and Coal Co. v. Fehring*, 83 Ill., 129. 1876.

4. **Bridges.** Congress has authority to regulate or prohibit the construction of bridges across the Mississippi river. It can also delegate that authority to one of the chiefs of a department. The United States has the right to prevent their construction otherwise than as prescribed by congress, and the federal courts have jurisdiction for that purpose. Under these acts the secretary of war had the right to determine whether the construction of a bridge at a given point would seriously affect the navigation of the river and to declare that a bridge should not be there built. *United States v. Milwaukee and St. Paul R. R. Co.*, 5 Bissell (U. S. C. C.), 410, 1873; *Same v. Same*, ib., 420.

5. — The legislature of the state of Kansas has the power to pass an act authorizing the organization of a corporation to build a bridge across the Missouri river at a place where said river forms the boundary line between the state of Kansas and the state of

Missouri. *Hunt v. Kans. and Mo. Bridge Co.*, 11 Kans., 412. 1873.

6. — When the charter of a railroad company gives it the right to construct its road across a watercourse only on condition that the same should be restored to its former state or in such manner as not to impair its usefulness, a bridge erected over such watercourse which does not fulfil this condition of the charter is both a public and private nuisance, as much so as if it had been erected without legislative authority. *Healy v. Joliet and Chicago R. R. Co.*, 2 Bradwell (Ill.), 435. 1878.

7. — The defendant was authorized by its act of parliament to construct a railway bridge across a navigable river. The act provided that it should not be lawful to detain any vessel navigating the river for a longer time than sufficient to enable any carriages, animals or passengers, ready to traverse, to cross the bridge, and for opening it to admit such vessel. The defendant employed a contractor to construct the bridge in conformity with the provisions of the act of parliament, but, before the works were completed, the bridge, from some defect in its construction, could not be opened, and the plaintiff's vessel was prevented from navigating the river. *Held*, that the defendant was liable for the damage thereby caused to the plaintiff. *Hole v. Sittingbourne R'y Co.*, 6 Hurlstone & Norman (Exchequer), 498. 1861.

8. — Plaintiffs owned several lots fronting on a navigable river, and were accustomed to use their water front in fastening logs, putting in rafts and shipping lumber. Defendant, by permission of the legislature, built a bridge over the river, and an embankment. *Held*, that plaintiffs are entitled to recover for any injury to their riparian rights caused by such bridge and embankment. *Chapman v. Oshkosh and Mississippi River R. R. Co.*, 33 Wis., 620. 1873.

9. — Where the erection of a railroad bridge across a river in a city causes a permanent injury or depreciation in the value of a lot in the immediate vicinity which is used for dock purposes, such injury is a proper element of damages, and it is proper to allow the lot owner to show such damage by proving the value of his property before

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the erection of the bridge and its value after, or, in other words, to prove how much less the property would sell for in consequence of the building of the bridge. *Chicago and Pacific R. R. Co. v. Stein*, 75 Ill., 41. 1874.

10. — A cause of action for damages caused by overflow, resulting from the insufficient width of a bridge, accrues when the overflow occurs, and not upon the construction of the bridge. *Moison v. Great Western R'y Co.*, 14 Upper Canada (Queen's Bench), 109, 1856; *Vanhorn v. Grand Trunk R'y Co.*, 18 ib., 356, 1859. But see *Carron v. Great Western R'y Co.*, 14 ib., 192. 1856.

11. — A railroad corporation held liable in damages for building a bridge across a river with a pier, turned obliquely to the course of the river, in such a manner as to turn the water of the stream, in time of freshets, upon the plaintiff's grass land, thereby throwing sand and earth upon it, and gully-ing and washing away the same, it appearing that the bridge could, at an additional expense, have been erected with safety to the railroad, in such a manner as not to injure said land. Held, that the plaintiff was not estopped from maintaining his action for the damage so caused to his land by reason of having previously, by deed, conveyed to the said railroad corporation a portion thereof, for the purposes of a railroad, and, in consideration of the purchase money, released all claims for damages which might be awarded by commissioners, inasmuch as the commissioners could have appraised and awarded only such damages as would have resulted from the construction and use of the road in a legal and proper manner. *Spencer v. Hartford, Providence and Fishkill R. R. Co.*, 10 R. I., 14, 1871; 6 Amer. R'y Rep., 150.

12. Change of channel. A person owning land abutting on a river, through which a creek flows and empties into the river, may, as against proprietors on the opposite side of the river, change the channel and mouth of the creek upon his own land and for his own protection or convenience, if, in so doing, both in the inception and execution of the work, he exercises reasonable care and caution not to injure the rights of others. *Cincinnati, etc., R. R. Co. v. Carr*, 11 Amer. & Eng. R. R. Cases, 533; *Railroad Co. v. Carr*, 33 Ohio St., 448. 1882.

13. — In a suit against a railway company for the construction of its road-bed in such a manner as unnecessarily to turn the current of a stream against the plaintiff's land and wash away his soil, the plaintiff may recover for prospective as well as past injury; and a recovery of prospective damages will bar an action for subsequent damage, though caused by an unusual freshet. *Fowle v. New Haven and Northampton Co.*, 112 Mass., 334. 1873.

14. Contract. Contract for the diversion of a watercourse construed. *Oursler v. Baltimore and Ohio R. R. Co.*, 60 Md., 358. 1883.

15. Crossing of railway. Where a railroad company is authorized by its charter to cross any stream in the line of its road, coupled with the duty to restore the stream so crossed to its former state, or to such state as not to impair its usefulness, it was held to apply to streams not navigable as well as to those that were navigable, as legislative authority was as necessary to cross the one as the other. *Chicago, Rock Island and Pacific R. R. Co. v. Moffitt*, 75 Ill., 524. 1874.

16. Culverts. A railway company, in constructing its line and works, is bound to bring to their execution the engineering knowledge and skill ordinarily known and practiced in such works. There is no liability on a company for not constructing a culvert so as to pass extraordinary floods. *Baltimore and Ohio R. R. Co. v. Sulphur Spring School District*, 96 Pa. St., 65, 1880; 2 Amer. & Eng. R. R. Cases, 166.

17. — It is the duty of railroad companies to provide by culverts or other means for the safe passage of accumulated water, and they are liable in damages for injuries to adjacent lands by overflow or back-water, caused by their failure or neglect to perform this duty. *Carriger v. East Tenn., Va. and Ga. R. R. Co.*, 7 Lea (Tenn.), 388. 1881.

18. — A railway company constructed a culvert to carry off water from land adjacent to the railway. No complaint was made by the owner of the land of the insufficiency of the culvert, and no application was made to justices for additional accommodation works within the five years limited by the Railways Clauses Consolidation Act, 1845, s. 73. An

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injury having subsequently arisen to the land from the insufficiency of the culvert to carry off all the water, an action in respect of such injury was brought by the occupier against the railway company in which it was alleged that the culvert was insufficient. *Held*, on demurrer, that the action would not lie. *Colley v. London and North Western R'y Co.*, Law Reports, 5 Exchequer Division, 277, 1880; 31 Eng. (Moak), 691.

19. Delaware river. Bridge over the Delaware river held lawful. *Attorney-General v. Delaware and Bound Brook R. R. Co.*, 27 N. J. Eq., 1. 1876.

20. Ditches. A railway company is responsible for damages occasioned by cutting line ditches whereby surplus waters are made to flow upon adjoining lands. *Grand Trunk R'y Co. v. Miville*, 14 Decisions des Tribunaux (Lower Canada), 469. 1864.

21. — A railroad company, for the purpose of draining a lake into an adjacent river, connected the two by a ditch dug for the most part on its right of way, but where it emptied into the river on land of another. When the water in the river was high it ran through the ditch into the lake and flooded the adjoining country. If no part of the ditch had been dug, except so much as was outside the right of way, the same thing would have happened. If no part had been dug except what was on the right of way, it would not have contributed to the overflow. The company which dug the ditch sold its right of way and other property to another company, and after the sale the lands of an adjoining proprietor were damaged by an overflow from the river. In an action against the latter company to recover the damage, *held*, that it was not liable. *Wayland v. St. Louis, Kansas City and Northern R'y Co.*, 75 Mo., 548, 1882; 11 Amer. & Eng. R. R. Cases, 543.

22. Diversion. Where it is practicable in the building of a railroad to construct a culvert which will allow the passage of the water of a stream in its natural channel, it is negligence not to do so, and a land owner injured by such failure may recover damages. *Van Orsdol v. Burlington, Cedar Rapids and Northern R'y Co.*, 56 Ia., 470, 1881; 5 Amer. & Eng. R. R. Cases, 53.

23. — In an action to recover damages

sustained by reason of the negligent construction of a railroad over the plaintiff's farm, the fact that the road is built as railroads usually are in such locations is no defense. *Ib.*

24. — A right of action to recover for permanent injuries to land resulting from the negligent construction of a railroad thereon accrues at the time the first injury is sustained, and not necessarily from the date of the construction of the road. *Ib.*

25. — In procuring right of way railway companies do not thereby acquire the right to divert a stream of water from its natural channel, to the injury of the land owner. *Stodghill v. Chicago, Burlington and Quincy R. R. Co.*, 43 Ia., 26, 1876; 14 Amer. R'y Rep., 398.

26. — Where the erection of an embankment for the track of a railway closed the natural channel of a stream and diverted the water from a tract of land, it was *held* that the injury caused to such land thereby was a permanent one, for which damages might be at once fully recovered. *Stodghill v. Chicago, Burlington and Quincy R. R. Co.*, 53 Ia., 341. 1880.

27. — A judgment recovered in an action for such injury would be a bar to future actions to recover for a continuation of the embankment, or for its abatement. The fact that in such action the jury were erroneously instructed not to take into account any future injury by reason of the maintenance of the embankment would not alter the effect of the judgment as an adjudication of all questions which were, or ought to have been, tried in the action. *Ib.*

28. — The payment of damages for the diversion of a stream is no bar to recovery for damages for subsequent failure to keep the channel open. *McLeod v. European and North American R'y Co.*, 1 Hannay (New Brunswick), 574. 1869.

29. — A grant was made to use certain water and lay down pipes to carry the same, but the size of the pipes and amount of water to be taken were not defined. Pipes were laid, and the water they could supply used for a number of years. *Held*, that this limited and construed the extent of the grant, and the grantee was liable for damages occasioned by the diversion of a greater

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quantity of water than originally used, caused by taking up such pipes and replacing them by larger ones. *Onthank v. Lake Shore and Michigan Southern R. R. Co.*, 8 Hun (N. Y.), 131, 1876; *Onthank v. Lake Shore and Michigan Southern R. R. Co.*, 71 N. Y., 194, 1877.

30. — If the water is that of a stream or natural watercourse, and it was diverted from its natural channel, the company is liable; provided, however, that plaintiff could not recover for damages which he might have averted at comparatively small cost. The company is bound to make sufficient ditches and passages to conduct the water away and prevent it from injuring plaintiff; but if it fails to do so, it is the duty of plaintiff to use all reasonable means to avert and avoid injury by the construction of ditches and levees himself within a reasonable time, if the same can be done at a reasonable amount of labor and expense. *Munkers v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 72 Mo., 514, 1880; 5 Amer. & Eng. R. R. Cases, 79.

31. — Before 1800, a canal company, under powers of an act of parliament, diverted for the purposes of the canal a considerable part of the water from a brook, which flowed through the plaintiff's land, at a point above the plaintiff's land, the rest of the water continuing to flow in its natural channel. In 1847 an act was passed authorizing the defendant to purchase the canal, to discontinue the use of it, and to fill it up and sell such parts as were not used for the railway. Under these powers the use of the canal was discontinued in 1853, and in 1864 the defendant made a cut by which it restored to the brook, at a point above the plaintiff's land, the water which had been diverted from it. In 1865 the defendant conveyed the part of the canal on which it had made the cut to a purchaser in fee. The bed of the stream, owing to the diminished scour of the water, from 1800 to 1853, had been silted up, so as to be insufficient to carry off the water coming down in extraordinary floods. In 1866 such a flood occurred; the water overflowed the plaintiff's land and damaged his crops; upon which he brought an action against the defendant. *Held*, that, there being no obligation imposed upon the

canal company to continue the diversion, the plaintiff had no right of action. *Mason v. Shrewsbury and Hereford R'y Co.*, Law Reports, 6 Queen's Bench Cases, 578. 1871.

32. — Where the plaintiff stood by and saw the defendant at great expense divert the course of a small stream, which previously had touched the corner of her premises, without objection, until the work of such diversion had been completed, she will not be entitled to a mandatory injunction restoring the stream to its original channel. *Slocumb v. Chicago, Burlington and Quincy R. R. Co.*, 57 Ia., 675. 1832.

33. — A railway company was restrained from taking a large quantity of water for the use of its station from a river under the control of conservators, credit being given to the evidence on their part that taking such water would impede the navigation, against the evidence on the part of the company that taking such water would produce no appreciable effect. Decree of the master of the rolls affirmed. *Attorney-General v. Great Eastern R'y Co.*, Law Reports, 6 Chancery Appeal Cases, 572. 1871.

34. — But where the taking of the water only interfered with the working of a mill for a few minutes each day, the court refused to interfere. *Earl of Sandwich v. Great Northern R'y Co.*, Law Reports, 10 Chancery Division, 707; 27 Eng. (Moak), 218. 1878.

35. — The land owner is not to be prevented from the reasonable and prudent use of his land by reason of the improper construction of the railroad, but if, using his land in a reasonable and prudent manner, he suffers damage from such improper construction, he may recover his damages, notwithstanding such use of his land was subsequent to the construction of the railroad. *Perley v. B., C. and M. R. R. Co.*, 57 N. H., 212. 1876.

36. Dog river. Dog river bridge in Alabama held lawful. *Peters v. New Orleans, Mobile and Chattanooga R. R. Co.*, 56 Ala., 528. 1876.

37. Equity. A court of equity may compel the removal of obstructions to the flow of water in a watercourse. *Lamar v. Railroad Co.*, 10 So. Car., 476. 1878.

38. Evidence. Evidence held sufficient to sustain a verdict for damages for overflow

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caused by an embankment. *Fogerty v. Minneapolis and St. Louis R'y Co.*, 30 Minn., 185. 1883.

39. — A farmer may testify as to the value of the grass destroyed by flood. *Byrne v. Minneapolis and St. Louis R'y Co.*, 29 Minn., 200. 1882.

40. **Floods.** A proprietor of lands situated nearly a mile from a railway has at common law a right to sue for damages for injury done to his property in consequence of the operations of the railway company. That railway companies are bound so to construct their works as to protect proprietors of lands on a lower level, not only from the effects of usual and ordinary floods, but also of unusual and extraordinary falls of rain, unless these occurrences are such as could not be reasonably anticipated. Circumstances considered in which damages were awarded for injury caused by the insufficiency of railway works. *Potter v. Hamilton and Strathaven R'y Co.*, 3 Scotch Session Cases (3d series), 83. 1864.

41. — Where a corporation has exercised ordinary care in the construction or repair of bridges and culverts over watercourses on private land, and is not otherwise guilty of negligence, it cannot be made liable for damages occasioned an adjacent proprietor by extraordinary floods choking or washing out the channel of the stream. *Illinois Central R. R. Co. v. Bethel*, 11 Bradwell (Ill.), 17. 1892.

42. **Injunction.** A court of equity may enjoin proceedings at law involving an estoppel. This principle applied to an estoppel in relation to use of water in the present case. *Society for Establishing Useful Manufactures v. Lehigh Valley R. R. Co.*, 32 N. J. Eq., 329. 1880.

43. — Defendant made excavations on its own land for the purpose of changing in part the flow of a stream. Although the company was working on its own land, the plaintiffs were held to have had notice of the intended works of the company, and having acquiesced for eighteen months, during which the company had expended a large sum of money on the works, they were precluded from asking for the interposition of this court by injunction. *Illingworth v. Manchester and Leeds R'y*

Co., 2 Eng. R. R. & Canal Cases, 187. 1840.

44. **Land made by filling along shore.** Soil acquired and redeemed from the water by filling in is in no sense alluvion or accretion which would become the property of the shore-owner, but is the property of the state or its grantees, in whom the title to the land between high and low-water mark is; and no right exists in the shore-owner, who has dedicated to the public streets to the limit of his ownership, to charge such newly-made land with the burden of an easement over it. *Hoboken v. Pennsylvania R. R. Co.*, 16 Federal Reporter, 816. 1883.

45. **Levee.** Damages for overflowing land by the construction of a railroad levee cannot be diminished by the enhanced value given to the land, in common with other lands in the vicinity, by the presence of the road. *St. Louis, Iron Mt. and Southern R'y Co. v. Morris*, 35 Ark., 622, 1880; 5 Amer. & Eng. R. R. Cases, 48.

46. — The act of April 30, 1839, "authorizing the building and repairing of levees to protect lands from overflow," is in contravention of the bill of rights, inasmuch as, under its provisions, private property may be taken without reference to the public welfare; and, also, inasmuch as no provision is made therein for the assessment of compensation by a jury. The body of men provided for in the act is not a jury within the meaning of the constitution. They are not authorized to hear testimony, nor are they subject to judicial direction in the hearing of the case. *Smith v. Atlantic and Great Western R. R. Co.*, 25 Ohio St., 91, 1874; 13 Amer. R'y Rep., 478.

47. **License to change.** When a license to fill up a watercourse is obtained from a corporation in possession as owner in consideration of a promise to reopen and restore the watercourse when requested so to do, the licensee, when sued for a breach of his promise, is estopped from setting up that the ownership and maintenance of the watercourse by the corporation are *ultra vires*. *Hamilton and Rossville Hydraulic Co. v. Cincinnati, Hamilton and Dayton R. R. Co.*, 29 Ohio St., 341. 1876.

48. **Multiplicity of suits.** Where several plaintiffs bring different suits at law against

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one defendant, some for diminishing their supply of water and another for backing water on his mill-wheel, no ground for interference to prevent multiplicity of suits is shown, although the alleged injuries are done in the use by the defendant of one stream. *Lehigh Valley R. R. Co. v. McFarlan*, 30 N. J. Eq., 135. 1878. See, also, *Same v. Society for Establishment of Useful Manufactures*, ib., 145. 1878.

49. Navigable streams. It is not necessary that a stream, to be navigable, be so declared by any statute of the state or United States. Usefulness for purposes of navigation for rafts, boats or barges gives navigable character to a stream, reference being had to its natural state rather than to its average depth the year round; and this character may be proved by parol. *Little Rock, Mississippi River and Texas R. R. Co. v. Brooks*, 39 Ark., 403. 1882.

50. — A party who suffers injury from a public nuisance, *e. g.*, in having his raft, boat or barge stopped by the building of a railroad bridge across a navigable stream, may have his action against the nuisance for damages. *Ib.*

51. Obstruction. A private person cannot maintain an action for the abatement of a nuisance caused by interrupting the navigation of a navigable stream, unless he suffers damage peculiar to himself, and differing from that suffered by the public who have occasion to use the stream. *Jarvis v. Santa Clara Valley R. R. Co.*, 52 Cal., 438. 1877.

52. — Where a railroad company placed a protection to a draw-bridge in a river, whereby the approach of vessels to dock was obstructed, and the value of the lot upon which the dock was placed was permanently depreciated, and afterwards the owner of the lot and dock sold the same to his wife, and conveyed the legal title to her, it was held that she could not maintain any action against the company for placing the obstruction in front of the dock. *Chicago and Alton R. R. Co. v. Maher*, 91 Ill., 312. 1878.

53. — Where a railroad company constructed a bridge across a stream not navigable, but affording a large volume of water, by driving piles with spans of only seven-

teen feet, and leased its road to another company, which, while operating the same as lessee, built a new bridge at the same place, constructed in the same manner, except that the spans were enlarged to fifty feet, but left the piles of the old bridge standing, a portion of the tops being cut off, after which these two companies consolidated, forming a new one with a different name, and the new company continuing to operate the road and use the bridge in such condition, *held*, that the new company was liable in damages to a riparian owner above, whose land was overflowed and injured in consequence of an obstruction of the stream by drift, etc., caused by the manner in which the bridge was constructed and used, and that no notice to abate the nuisance was necessary to the action. *Chicago, Rock Island and Pacific R. R. Co. v. Moffitt*, 75 Ill., 524. 1874.

54. — The plaintiff was the owner of land, lying within the angle formed by the intersection of a highway with an embankment, constructed on the lands of the defendant, upon which its tracks are laid. Prior to the construction of the embankment, large quantities of water flowed during the winter season and in very rainy weather, along the highway, and passed the land of the plaintiff without collecting there. The embankment prevented this water flowing off the land of the plaintiff, and caused it to collect thereon. In an action brought to recover damages for the injuries occasioned thereby, *held*, that there could be no recovery. *Wagner v. Long Island R. R. Co.*, 2 Hun (N. Y.), 633. 1874.

55. — An action to recover damages for illegally obstructing a navigable river is an action in tort. *Doughty v. Atlantic and North Carolina R. R. Co.*, 78 N. C., 22. 1878.

56. — The court cannot pronounce a simple obstruction in a navigable river to be a nuisance. It is a fact to be found. *Delaware and Hudson Canal Co. v. Lawrence*, 2 Hun (N. Y.), 163. 1873.

57. Overflow. Where a railroad company, by filling up a trestle under its road, and by making ditches, cattle-guards and culverts too small to carry off the water, overflows adjoining lands, and the owner of such lands sustains damages by reason thereof, the railroad company is liable to the owner

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of the lands for the amount of the damages actually sustained. *Mississippi Central R. R. Co. v. Caruth*, 51 Miss., 77, 1875; *Mississippi Central R. R. Co. v. Mason*, 51 Miss., 234, 1875.

58. — A railroad company in constructing its road over a natural watercourse is required to leave such openings as are sufficient to afford an outlet for all water (from whatever source it may come, and in times of floods and freshets, as well as at other times) which may reasonably be expected to flow through such watercourse. *Union Trust Co. v. Cuppy*, 26 Kans., 754, 1882; 11 Amer. & Eng. R. R. Cases, 562.

59. — Railroad companies, acting within the limits of their franchises, and using due skill and care in the construction and operation of their roads, and having the right of way, are not liable as trespassers, nor for injuries to outside property, which are the natural and unavoidable effect of the road. *St. Louis, Iron Mt. and Southern R'y Co. v. Morris*, 35 Ark., 622, 1880; 5 Amer. & Eng. R. R. Cases, 48.

60. — The fact that a railway company owns a right of way over the plaintiff's land does not authorize it to make such a change thereon, by structures or otherwise, as to flow water back upon the land of the plaintiff or others and thereby inflict an injury. *Chicago, Rock Island and Pacific R. R. Co. v. Carey*, 90 Ill., 514. 1878.

61. — It is no defense to an action for damages for an overflow occasioned by an insufficient bridge, to show that the bridge stood upon a public street and was used by the public, where the bridge was constructed by a railway company as a part of its embankment. *Houston and Great Northern R. R. Co. v. Parker*, 50 Tex., 330. 1878.

62. — A railroad company building a levee across a branch which overflows, and thereby causes a greater overflow of adjoining lands, is not relieved from damages therefor by making ditches and trestles that carry off the water as fast as the branch would when not overflowed. *St. Louis, Iron Mt. and Southern R'y Co. v. Morris*, 35 Ark., 622, 1880; 5 Amer. & Eng. R. R. Cases, 48.

63. — A railway company is not liable for damages to any person from the overflow of the water of a stream caused by the neces-

sary and proper elevation of its road-bed, not in the channel of the stream, but upon its own land. *Moyer v. New York Central and Hudson River R. R. Co.*, 88 N. Y., 351, 1882; 8 Amer. & Eng. R. R. Cases, 531.

64. — A railway company is liable for ordinary care in the construction of its culverts, to provide against ordinary rains, but is not required to provide against extraordinary overflows, such as would not be reasonably anticipated. *Houston and Great Northern R. R. Co. v. Parker*, 50 Tex., 330, 1878; *Ellet v. St. Louis, Kansas City and Northern R'y Co.*, 76 Mo., 518, 1882.

65. — canal. The defendant, owner of a canal, being threatened by an overflow of flood water from a neighboring river, and fearing damage to its premises situated on the banks of the canal, placed across it, at a point above its premises, planks reaching from the bottom of the canal to the coping stone, which was some inches higher than the surface of the canal water. The flood water afterwards broke into the canal at a point above the barricade of the planks, and opposite to the plaintiff's premises, which were also situated on the banks of the canal above the premises of the defendant, and, being penned back by the planks, the water rose in the canal until it flooded the plaintiff's premises. In an action brought to recover damages for the injury so caused, held, that the defendant was not liable, on the ground that the water which did the mischief was not brought there by it, and that there is no duty on the owner of a canal, analogous to that on the owner of a natural watercourse, not to impede the flow of water down it. *Nield v. London and North Western R'y Co.*, Law Reports, 10 Exchequer Cases, 4. 1874.

66. — contract. An agreement of a railroad company, in consideration of the right of way through one's lands, to so build its road-bed as to protect the lands from overflow, imposes upon it, as an artificial person, a personal obligation, for a breach of which it, or a company afterwards consolidated with it, would be liable to an action at law for damages. *Sappington v. Little Rock, Mississippi River and Texas R. R. Co.*, 37 Ark. 23, 1881; 11 Amer. & Eng. R. R. Cases, 330.

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67. — damages. Where the usual outlet of water is obstructed so as to overflow the plaintiff's lands, he may recover for the loss of or injury to the crops of hay, etc., or the expense of securing them, in addition to the loss by the depreciation of the land. *Chicago, Rock Island and Pacific R. R. Co. v. Carey*, 90 Ill., 514. 1878.

68. — The rule for assessing damages for overflowing land by the construction of an embankment is, to take the actual value of the land at the completion of the work, supposing the consequences to be known, compare it with what the value would have been if the overflow had remained as before the construction of the embankment, and fix the damages at the difference. *St. Louis, Iron Mt. and Southern R'y Co. v. Morris*, 35 Ark., 622, 1880; 5 Amer. & Eng. R. R. Cases, 48; *Chicago, Rock Island and Pacific R. R. Co. v. Carey*, 90 Ill., 514, 1878.

69. — The rule is well settled that when an injury to land occasioned by the commission of a nuisance is of a permanent character, and goes to the entire value of the estate, recovery for the whole injury should be had in a single suit, and a second action cannot be maintained for its continuance. But this rule does not apply to a case where, by reason of the diversion of a stream of running water, the plaintiff's land is annually overflowed and his crops injured. Such injury does not go to the entire value of the estate, but, being of yearly recurrence, is susceptible of periodical apportionment, and may, therefore, be redressed by successive actions. *Van Hoozier v. Hannibal and St. Joseph R. R. Co.*, 70 Mo., 145. 1879.

70. — dams. In an action for damages for injuries caused by the overflow of plaintiff's premises, alleged to have been occasioned by the construction of dams by the defendant, it was held that plaintiff was not entitled to recover, because the evidence showed that plaintiff would have suffered like injury if the dams had been removed. *Langdon v. Chicago, Burlington and Quincy R. R. Co.*, 48 Ia., 437. 1878.

71. — drain. A company which, for its own profit, undertakes to maintain a delph or drain for carrying off water, is responsible for damage done to the occupier of adjoining land by the bursting of a bank of the

delph after an unusual rainfall, though the mischief would not have happened but for the neglect of the persons whose duty it was to keep the outlet of certain dimensions, whereby the water in the delph was penned back. *Harrison v. Great Northern R'y Co.*, 3 Hurlstone & Coltman (Exchequer), 231. 1864.

72. — embankment. A railroad company, in constructing its road across a basin-shaped piece of low land, raised an embankment with a culvert or water-way through which water, collected on one side of the road from the adjacent highlands and from the overflow of a neighboring creek, escaped to the other side and damaged the adjoining premises. *Held*, that the company was liable; and so far as the overflowed water from the creek contributed to the injury, the liability was the same, whether the overflow was caused by the act of the company in building a bridge over the creek too narrow for the volume of water or not. *McCormick v. Kansas City, St. Joseph and Council Bluffs R. R. Co.*, 70 Mo., 359. 1879.

73. — Where, by reason of the breaking of a culvert, water has accumulated against an embankment of a railway, *held*, that in letting off the accumulated water the company was only liable for damages resulting from negligence. *Cairo and Vincennes R. R. Co. v. Howry*, 5 Amer. & Eng. R. R. Cases, 62 (Ind.). 1881.

74. — The grant of a right of way across one's land to a railroad company is no license to it to overflow the grantor's lands by the unskillful construction of a levee on the right of way. *St. Louis, Iron Mt. and Southern R'y Co. v. Morris*, 35 Ark., 622, 1880; 5 Amer. & Eng. R. R. Cases, 48.

75. — The defendant's railway passed across lowlands adjoining a river, over which the flood waters used to spread themselves. Those lowlands were separated from the plaintiff's land by a bank, constructed under certain drainage acts, and which protected the plaintiff's land from the floods. By the construction of the defendant's railway without sufficient openings, the floods could not spread themselves as formerly, and were penned up and flowed over the bank on the plaintiff's land. *Held*, that, though the defendant had constructed its

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line according to the provisions of its act, it was liable for an unforeseen injury to the plaintiff, arising from the mode in which the railway was constructed. *Lawrence v. Great Northern Ry Co.*, 6 Eng. R. R. & Canal Cases, 656; 16 Adolphus & Ellis (N. S.), 643; 71 E. C. L., 643; 20 Law Journal (N. S., Q. B.), 293; 4 Eng. Law & Equity, 285. 1831.

76. — title. The surviving wife may maintain an action against a railway company for an injury occasioned by the overflow of the homestead, resulting from the negligent construction of the railway. *Houston and Texas Central R. R. Co. v. Knapp*, 51 Tex., 592. 1879.

77. Pipe lines. A foreign corporation, without any authority whatever, laid a pipe for transporting oil on the bottom of a navigable river, on lands belonging to the state, and underneath a draw-bridge of complainant. At that point the channel was so deep and wide as that the laying of the pipe there would not interfere with the bridge. An injunction to restrain such pipe laying was refused. The laying of the pipe line did not interfere with the draw-bridge. *United New Jersey R. R. and Canal Co. v. Standard Oil Co.*, 33 N. J. Eq., 123, 1880; 1 Amer. & Eng. R. R. Cases, 33.

78. Riparian rights. The grantor, owning the lands under water on the side of the pier, an easement therein to a reasonable distance will pass to the grantee. *Knickerbocker Ice Co. v. Forty-second St., etc., R. R. Co.*, 65 Howard's Practice (N. Y.), 210. 1883.

79. — The owners of land bordering upon a navigable stream own to high water mark. The act of congress subsequently declaring the stream non-navigable does not extend the rights of the land owners. *Wood v. Chicago, Rock Island and Pacific R. R. Co.*, 11 Amer. & Eng. R. R. Cases (Ia.), 499, 1883; *Houghton v. C. D. and M. R. R. Co.*, 47 Ia., 370, 1877.

80. — By force of the statute, a riparian owner, when he extends his shore front, must, if the high water line is substantially a straight line, so extend his side lines as to make them rectangular with such high water line. When the high water line is not straight, the extension of the shore front must be divided proportionately among the

riparian owners. *Delaware, Lackawanna and Western R. R. Co. ads. Hannon*, 37 N. J. Law, 278. 1875.

81. — By the common law, where land lies adjacent or contiguous to a navigable river in which there is an ebb and flow of the tide, any increase of soil formed by the gradual and imperceptible recession of the waters, or any gain by the gradual and imperceptible formation of alluvion, from the action of the water, belongs to the proprietor of the adjacent or contiguous land. And the right to accretion, thus formed, is considered as an interest appurtenant to the principal land, and belonging, in the nature of an incident, to the ownership of that, rather than as something acquired by prescription or possession in the ordinary sense of those terms. *Baltimore and Ohio R. R. Co. v. Chase*, 43 Md., 23. 1875.

82. — Where the owner of land not abutting upon a river took water from the stream with the license of the riparian owner and used it for cooling purposes, returning it to the stream unpolluted, held, that a lower riparian proprietor had no grounds for an injunction to restrain such use. *Kensit v. Great Eastern Ry Co.*, Law Reports, 23 Chancery Division, 566. 1883.

83. Springs. The owner of a farm conveyed to a railroad company a portion thereof, upon which was a spring from which he had been accustomed to conduct water by wooden pipes to supply his farm. The deed contained a provision "excepting and reserving from the above described premises the spring issuing from said land, with the privilege, as now held by the parties of the first part, in the use and occupation of said spring, with access to and from said spring to repair, relay with logs or otherwise, without any damage whatever to said spring in consequence of the construction of said railroad." Held, that the title passed subject to the easement, and that it was entitled to use and enjoy the land in all lawful ways not inconsistent with the right reserved to the grantor. That it was entitled to lay its tracks over the spring on protecting its waters from injury, so as not unnecessarily to interfere with the enjoyment of the easement reserved by the grantor. *Mat-*

Compensation — Elevators.

thews v. Delaware and Hudson Canal Co., 20 Hun (N. Y.), 427. 1880.

84. Statute of frauds. An agreement between the owner of an artificial watercourse and a railway company, whereby the former consents that the latter, in building its road, may fill the channel and divert the water into a new channel on its own land, in consideration that the railroad company will open the old channel and restore the water thereto whenever requested, is not a contract for an interest in land within the meaning of the statute of frauds. *Hamilton and Rossville Hydraulic Co. v. Cincinnati, Hamilton and Dayton R. R. Co.*, 29 Ohio St., 341. 1876.

85. Tunnel. The act of March 21, 1874, extending the time for the completion by the Hudson Tunnel R. R. Co. of its proposed tunnel, did not confer upon that company, organized under the general railroad law, the right to construct its tunnel in the land of the state under the waters of the Hudson, without first obtaining consent of the board of riparian commissioners. *Attorney-General v. Hudson Tunnel R. R. Co.*, 27 N. J. Eq., 176. 1876.

86. — The western terminus of the Hudson river tunnel is defined in the certificate to be on the "western shore of the Hudson river, and within or near Jersey City or Hoboken." The word "shore" is not used in its strictest sense, but in the more extended and popular sense; as that Jersey City is built on the western shore of the Hudson river. *State v. Hudson Tunnel R. R. Co.*, 38 N. J. Law, 548, 1876; 13 Amer. R'y Rep., 82.

WATER-POWER.

1. Compensation. The right to carry water over a railway, for water-power, is property which cannot be taken or destroyed without compensation. *Arnold v. Hudson River R. R. Co.*, 55 N. Y., 631. 1873.

2. — Plaintiffs declared for injury to their mills, water-power, etc., and appurtenances, by filling up a watercourse with dirt, so that the works had to be abandoned. *Held*, that the evidence of the value of the superintendent's house and other improvements on a single tract of land on which the works

were erected was relevant. *Little Schuylkill Navigation, etc., Co. v. French*, 81, 2 Pa. St., 386. 1876.

3. Diversion. The plaintiff, the owner of a mill operated by the waters of the Tonawanda creek, brought an action to restrain the defendant from diverting the water of the creek by pipes and conducting it to tanks and reservoirs to be used in supplying its engines, and to recover damages for such diversion. It appeared that the defendant's acts materially reduced and diminished the grinding power of the plaintiff's mill, and had damaged him to the extent of \$500. *Held*, that the plaintiff was entitled to a perpetual injunction restraining such diversion, and to the amount of the damages sustained. *Garwood v. New York Central and Hudson River R. R. Co.*, 17 Hun (N. Y.), 356, 1879; affirmed, *Garwood v. New York Central and Hudson River R. R. Co.*, 83 N. Y., 400, 1881; 2 Amer. & Eng. R. R. Cases, 490.

4. Mill pond. Where a railroad company would be entitled to protection in laying a track over lands condemned under its charter, from an overflow of water, its licensees to lay a track over the same lands are entitled to the same protection. An injunction to restrain a defendant from raising the water from his mill pond above a certain height is not mandatory; but if it were strictly mandatory, that would not constitute a valid objection to it. *Longwood Valley R. R. Co. v. Baker*, 27 N. J. Eq., 166. 1876.

WEIGHT AND MEASUREMENT.

See CARRIAGE OF MERCHANDISE.

1. Elevators. Subd. 29 of § 12, title 3, ch. 77 of 1870, authorized the common council of the city of Albany to make ordinances "in relation to the inspection and sealing of weights and measures, and enforcing the keeping and use of proper weights and measures by vendors." *Held*, that it only authorized the inspection and sealing of weights and measures used by vendors, and was not applicable to scales used by defendant at one of its grain elevators. *Hittenbach v. New York Central and Hudson River R. R. Co.*, 18 Hun (N. Y.), 129. 1879.

Authority to Maintain — Trespass.

WHARVES.

See EMINENT DOMAIN; INJUNCTION; INJURIES TO PASSENGERS.

1. **Authority to maintain.** The legislature may lawfully grant to a railway company the power to make and maintain a wharf. *City of New Orleans v. New Orleans, Mobile and Chattanooga R. R. Co.*, 27 La. An., 414. 1875.

2. **Municipal authority.** By its charter and the statutes of Louisiana the city of New Orleans was authorized to erect and maintain wharves within its limits, and to collect wharfage. *Held*, that no right of the city was infringed by a subsequent enactment of the general assembly of that state granting to a railway company the authority to inclose and occupy for its purposes and uses a specifically described portion of the levee and batture, and maintain the wharf it had erected on its property within those limits, and exempting it from the supervision and control which the municipal authorities exercise in the matter of public wharves. *Railroad Co. v. Ellerman*, 105 U. S., 163, 1881; 9 Amer. & Eng. R. R. Cases, 144.

3. **Negligence in construction.** Where it was alleged that the negligence consisted in the defendant not providing cap-logs for its pier, it was error to overrule and offer to show that placing cap-logs thereon would interfere with the loading of vessels in the course of the business of the company. *Philadelphia and Reading R. R. Co. v. Ervin*, 80 Pa. St., 71. 1879.

4. **Obstruction.** The plaintiff, in 1839, with the assent of the company, made a siding on his land connecting the railway with a wharf, part of which was in his own occupation and the other part in that of certain tenants; and down to the year 1857 the company carried coals and other goods for the plaintiff and his tenants, placing the trucks on the siding and so sending them down to the wharf. In the course of that year, however, the company (with a view, as the jury thought, of diverting the trade from the plaintiff's wharf to another wharf in which it was interested) gave the plaintiff notice, under another section of its act, that, after the 30th of September, it would no longer

provide him with locomotive power for the conveyance of his goods along its line; and on the 1st of October it placed carriages and other things across the junction for the purpose (as the jury found) of permanently obstructing and preventing the plaintiff and his tenants from having access to the wharf by means of their railway. Neither the plaintiff nor his tenants had availed themselves at this time of the authority given to them by the act of parliament to provide locomotive power of their own, and consequently they were not in a position to be *actually* obstructed. The tenants, however, finding their trade destroyed, removed from the plaintiff's wharf, and carried their business to the company's wharf. *Held*, that these wrongful acts of the company constituted such a permanent obstruction and injury to the plaintiff's right to the use of his siding as to entitle him as reversioneer to maintain an action. *Bell v. Midland R'y Co.*, 10 Common Bench (N. S.), 237; 100 E. C. L., 287. 1861.

5. **Personal injuries; custom officer.** The owners of a wharf where foreign laden vessels discharge are liable to customs officers who are required to visit the premises in the performance of their duties for personal injuries received, while in the exercise of due care, because of the unsafe or unstable condition of the wharf. *Low v. Grand Trunk R'y Co.*, 72 Me., 313. 1881.

6. **Trespass.** To a declaration charging the defendant with breaking and entering upon a certain dummy or landing-stage of the plaintiffs, the same being a barge of the plaintiffs moored to a wharf in the river Orwell, and embarking and disembarking from the same passengers and others on, to and from divers ships and vessels, and mooring ships and vessels against the same, the defendant pleaded that the Orwell was a navigable river and common highway; that he had a right to land and was desirous of landing passengers from his steam-vessel at the wharf; that the plaintiff's dummy or landing-stage at the time when, etc., was permanently moored and fixed alongside the wharf, so that his passengers could not embark or disembark there without his vessel being moored thereto and his passengers passing over the same, etc. *Held*,

Injunction — Acts Outside of Employment — Trespasser.

on demurrer, a sufficient answer to the declaration, the dummy appearing to be a permanent obstruction of the defendant's right to use the river as a highway, which he could only exercise by removing it or passing over it. *Eastern Counties Ry Co. v. Darling*, 5 Common Bench (N. S.), 821; 94 E. C. L., 821, 1859.

7. Wharfage dues. The joint resolution of the legislature of Louisiana of March 6, 1869, does not confer upon the railroad company or those claiming under it the right to collect wharfage dues from vessels, etc., landing at the levee front of its riparian property. *Ellerman v. New Orleans, Mobile and Texas R. R. Co.*, 2 Woods (U. S. C. C.), 120. 1875.

WHISTLE.

See INJURIES TO DOMESTIC ANIMALS; FRIGHTENED TEAMS; SIGNALS.

1. Injunction. Section 1 of the act of March 29, 1879 (Acts 1879, p. 173), provides, in substance, that it shall be the duty of all railway companies, operating in Indiana, to have attached to every engine a proper whistle, and that such whistle "shall, when such engine approaches the crossing of any turnpike or other public highway, and when such engine is not less than eighty nor more than one hundred rods from such crossing," be sounded "continuously, from the time of sounding such whistle until such engine shall have fully passed such crossing." It further provides that it shall not be so construed as to interfere with any city ordinance which has been or may be passed, regulating the management or running of such engine or railroad within the limits of such city. *Held*, that the statute is a police regulation, within the scope of legislative authority, and is constitutional and valid. *Pittsburgh, Cincinnati and St. Louis Ry Co. v. Brown*, 67 Ind., 45. 1879.

WILFUL ACTS.

See INJURIES TO PASSENGERS; INJURIES TO EMPLOYEES; INJURIES TO DOMESTIC ANIMALS; TRESPASS.

1. Acts outside of employment. Where a servant goes outside of his employment,

and, while not acting in pursuance of the authority given him, inflicts a wilful injury upon one not intrusted to his care by the employer or on one to whom the master owes no duty, the act will be that of the servant alone, and the master cannot be held responsible for it. *Chicago and Eastern R. R. Co. v. Flexman*, 103 Ill., 546, 1882; 8 Amer. & Eng. R. R. Cases, 354; *Hudson v. Missouri, Kansas and Texas R. R. Co.*, 16 Kans., 470. 1876.

2. Assault; abduction of child. "It is common knowledge" that if the conductor of a train stops his train, pursues a boy into the father's house, with a pistol in his hand, seizes the boy, and carries him off on the train, these wrongful acts are not within the scope of his employment; consequently, the railway company is not liable in damages for such wrongful acts, without allegation and proof that it commanded, authorized or ratified them. *Gilliam v. South and North Alabama R. R. Co.*, 70 Ala., 268. 1881.

3. Fire. The defendant objected that it did not appear but that the casting off of the burning brand was the wilful act of the person who did it, and not within the scope of his employment. *Held*, that, in the absence of proof to the contrary, it was to be presumed that the fireman or engineer did the act in question in the performance of his usual duties. *McCoun v. N. Y. Central and Hudson River R. R. Co.*, 66 Barbour (N. Y.), 333. 1873.

4. Trespasser; injury by employee. The plaintiff, a boy of thirteen years, and three other boys were trespassers upon a freight train of defendant, moving at a rapid rate from New York towards the Harlem river, and were ordered to get off the car by the defendant's brakeman. The plaintiff begged to stay, but finally jumped or fell from the train, influenced by the threats of the brakeman that unless he got off the train he would kick him off, and by his leaving or falling from the train under these threats he was injured. The brakeman was not engaged in the performance of his duty in attempting to remove the plaintiff from the cars while they were in motion. His threats and his acts were alike unjustifiable in that view. His act was wilful and the defendant

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was not liable. *Hughes v. New York and New Haven R. R. Co.*, 36 N. Y. Superior Ct., 222. 1873.

5. — But for wanton and wilful acts within the scope of his employment the employer is liable. *Murphy v. Central Park, etc.*, R. R. Co., 48 N. Y. Superior Ct., 96, 1882; *Northwestern R. R. Co. v. Hack*, 66 Ill., 238, 1872.

WILLS.

1. **Railway shares.** Bequest of railway stock construed. *Peters v. Lewes and East Grinstead Ry Co.*, 3 Amer. & Eng. R. R. Cases (Eng. Ch.), 624, 1881; *Same v. Same*, 1 ib., 533, 1830; *Blount v. Hiplkins*, 7 Simons (Eng. Ch.), 43, 1834.

WRIT OF ERROR.

See APPEAL; PLEADING.

1. **Practice in writ of error considered.** *Railroad Co. v. White*, 101 U. S., 98. 1879.

WINDING-UP ACT.

See INSOLVENCY.

1. **Agreement to repay deposit.** An allottee of shares paid his deposit and received an undertaking from the directors that the deposit should be returned in the event that a special act was not obtained. *Held*, that the allottee was not a proper contributory in the winding up, the scheme having failed. *Dover and Deal Ry Co., In re*, 15 Eng. Law & Equity, 330; 22 Law Jour. Rep. (N. S., Chanc.), 15; 16 Jurist, 1108; 1 Drewry, 226, 1852.

2. **Allotment to stockholders.** P. M., a member of the managing committee of a provisionally registered railway company, had allotted to him and accepted one hundred shares. At a meeting of the managing committee, at which P. M. was president, an instruction was given to the allotment committee to allot the shares according to a scheme, by which five hundred shares were reserved to each member of the managing committee. A report was made by the secretary at a subsequent meeting, that the allotment com-

mittee had allotted the shares according to the scheme. No entry appeared in the allotment book of the allotment of the five hundred shares to each managing committee-man. Under an order for winding up the company, the master placed the name of P. M. on the list of contributories for one hundred shares, and afterwards for five hundred more shares. On appeal from the decision as to the five hundred shares, it was held that his name should remain for one hundred of them, besides the original one hundred, in respect of which no appeal was made. *Oxford and Worcester Ry Co., In re*, 3 Eng. Law & Equity, 129; 15 Jurist, 346. 1851.

3. **Dissolution of corporation.** The act of 1869 provides that the superior court, as a court of equity, may, on the application of any stockholder, pass a decree dissolving and winding up any corporation where such corporation has abandoned its business and has neglected for an unreasonable time to wind up its affairs and distribute its effects among its stockholders. *Held*, in a case where a railway company had so abandoned its business and neglected to wind up its affairs, that it was not a sufficient ground for a refusal of the court to dissolve the corporation; that the company had received its franchise from other states as well as from Massachusetts, the dissolution affecting only the franchise conferred by that state. *Hart v. Boston, Hartford and Erie R. R. Co.*, 40 Conn., 524. 1873.

4. **Conditional subscription.** A. applied by letter for shares in a provisionally registered railway company, and received a letter of allotment of certain shares, on which he was required to pay the deposit; and the letter, with the banking receipt appended thereto, was to be exchanged for scrip upon A.'s executing the parliamentary contract and subscribers' agreement. A. paid the deposit, but did not execute any deed. The scheme having been abandoned, and an order made for winding up the company, the master, in settling the list of contributories, placed A.'s name upon the list, but the vice-chancellor, on appeal, ordered it to be removed. *Held*, by the house of lords, affirming the decision of the vice-chancellor, that A.'s name had been prop-

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erly removed from the list of contributories. That A. had not subjected himself to any other obligation or responsibility than to take certain shares in the proposed company in the event of its being in fact established, which it never was. That the Stat. 7 and 8 Vict., c. 110, did not alter the existing law so as to render an allottee of shares liable beyond what his own contract had done. *Hutton v. Thompson*, 6 Eng. R. R. & Canal Cases, 708. 1851.

5. Contributories. A. consented by letter to have his name placed on the list of the provisional committee, subject to his approval of the line, and "so that he should be held free from all liabilities;" he attended two meetings, but took no part in the proceedings, and left before any resolution was formally passed or recorded. A few days afterwards he desired that his name might be struck out of the provisional committee, and that was accordingly done. A. afterwards paid 65*l.*, under protest, towards the expenses of the concern. *Held*, that A. was not a contributory within the meaning of the statute. *Roberts, Ex parte*, 6 Eng. R. R. & Canal Cases, 310, 1850; *Norris v. Cottle*, ib., 317, 1850.

6. — A party consented to have his name placed on the list of provisional committeemen, and agreed to take shares. Shares were allotted to him, but he did not pay the deposits thereon until after the undertaking had been abandoned, and he never executed the subscribers' agreement or parliamentary contract, without which it was expressly stated he could take no interest in the company. The master struck his name off the list of contributories. *Held*, upon appeal from this decision, that he had brought himself within the rule in *Upfill's Case*, 2 House of Lords Cases, 674, and his name must be replaced on the list of contributories. *Direct Shrewsbury R'y Co., In re*, 7 Eng. Law & Equity, 28; 20 Law Jour. Rep. (N. S., Chanc.), 479; 1 Simons (N. S.), 281. 1851. See, also, *Manwaring's Case*, 10 Eng. Law & Equity, 109; 16 Jurist, 263. 1852. See *Same Case*,

10 Eng. Law & Equity, 222; 16 Jurist, 392. 1852.

7. Shares held as collateral. A. advanced money to B. on the security of railway shares. They were transferred into the name of C. to secure A., and subject thereto for B. C. died insolvent. *Held*, that A. was not liable, at the suit of the company, for the arrears of calls on the shares. B., not being the registered owner, is not liable. *Newry R'y Co. v. Moss*, 14 Beavan (Eng. Ch.), 64. 1851.

8. Injunction. A court of equity has no jurisdiction to restrain a creditor of a joint-stock company from suing one of the members, on the ground that an order has been made for winding up the affairs of the company. *In Matter of Dover and Deal R. R. Co.*, 17 Simons (Eng. Ch.), 18. 1850.

YARD OF RAILWAY.

1. Joint use. The Junction R. R. Co. was incorporated to construct a road from a point on the Philadelphia and Reading Railway to a point on the Philadelphia, Wilmington and Baltimore Railway. The line traversed ground of these roads and of the Pennsylvania Railway, that of the last company being the central part of the line and used as its "yard." The line was promoted by the three companies; they owned the stock, their presidents were officers in the Junction Co., which constructed all the line except the portion through the "yard;" this was constructed by the Pennsylvania Co., under the direction of Thompson, its president, who was also president of the Junction Co. No measures had been taken to condemn the land through the "yard," for the Junction Co. The Junction Co. by bill asked for a decree that it was entitled to the "exclusive ownership, possession and use" of that portion through the "yard." *Held*, that it was not entitled to such decree. *Pennsylvania R. R. Co.'s Appeal*, 80 Pa. St., 265. 1876.



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